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CALIFORNIA REPORTER

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PEOPLE v. MYERS. (Cr. 3182.)

Supreme Court of California. Feb. 14, 1929.

1. Indictment and information 🔑161(5)—Information charging burglary with intent to commit "larceny," changed by court at conclusion of evidence to charge "theft," intent, held not misleading (Pen. Code, § 490a, as added by St. 1927, p. 1047, § 7).

Where information charged that defendant feloniously and burglariously entered certain store building with intent to commit the crime of larceny therein, and court, at conclusion of evidence, ordered word "theft" substituted for "larceny" therein because of Pen. Code, § 490a, as added by St. 1927, p. 1047, § 7, *held* that defendant was not misled, since words "theft" and "larceny" are popularly used interchangeably.

2. Criminal law 🔑15—Statute substituting "theft" for "larceny, embezzlement, or stealing" in statutes held not to repeal statute defining larceny so as to destroy it as element of burglary (St. 1927, p. 1047, § 7, adding Pen. Code, § 490a; Pen. Code, § 459, and § 484, as amended by St. 1927, p. 1046, § 1).

Laws 1927, p. 1047, § 7, adding Pen. Code, § 490a, providing that any statute referring to larceny, embezzlement, or stealing shall be interpreted as if word "theft" were substituted therefor, did not repeal but merely amended section 484 defining larceny by amalgamating larceny, embezzlement, false pretenses, and kindred offenses under cognomen of theft, without any change of substance, and therefore did not take element of larceny from definition of burglary contained in section 459.

3. Statutes 🔑141(1)—Statute substituting "theft" for larceny, embezzlement, or stealing in statutes held not to require re-enactment of such statutes to be effectual (Laws 1927, p. 1047, § 7, adding Pen. Code, § 490a; Pen. Code, § 459; Const. art. 4, § 24).

Since Laws 1927, p. 1047, § 7, adding Pen. Code, § 490a, providing that any statute referring to larceny, embezzlement, or stealing shall be interpreted as if word "theft" were substituted therefor, merely changes nomenclature without disturbing substance of law, contention that such statute was ineffectual to interpret word "larceny" to mean "theft" in Pen. Code, § 459, defining burglary, because Const. art. 4, § 24, requires that an act revised or section amended shall be re-enacted and published at length as revised or amended, is without merit.

4. Burglary 🔑19—Information charging burglary held not demurrable for failure to charge specific nature of theft intended to be committed (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1).

Information charging burglary, in that defendant feloniously and burglariously entered a certain store building with intent to commit the crime of theft therein, *held* not demurrable as leaving defendant without sufficient information as to which particular brand of theft was intended under Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Frank A. Myers was convicted of burglary in the first degree, and he appeals. Affirmed. Superseding former opinion in 269 P. 963.

R. M. Wiley, of Silver City, N. M., for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

Earl Warren, Dist. Atty., and Nathan Harry Miller, Deputy Dist. Atty., both of Oakland, as amici curiæ in behalf of respondent.

Walter K. Tuller, of Los Angeles, and John U. Calkins, Jr., of San Francisco (Max Radin, of Berkeley, of counsel), amici curiæ.

PRESTON, J. Defendant appeals from a judgment of conviction of the crime of burglary based upon a verdict of guilty returned upon undisputed evidence that he did, on January 6, 1928, with burglarious intent, enter the store of one Wahlforth at 124 North Main street, Los Angeles, with the intent to steal, and did take and steal cutlery and other articles therefrom of the value of about $125.

[1] The appeal assails only the information. It is claimed that it does not state an offense. This claim seems entirely without merit. The charging part of the information is as follows: The said Frank A. Myers "* * * did willfully, unlawfully ~~and~~ feloniously and burglariously enter the store, room and building of one August Wahlforth, located at number 124 North Main street, in the city of Los Angeles, county and state aforesaid, with the intent then and there and therein to commit the crime of theft ~~larceny."~~ (Changes indicate amendment ordered by court.)

As originally filed, the word "larceny" appeared where the word "theft" is now found. The court, at the conclusion of the evidence, ordered this amendment made. This he deemed expedient because of the provisions of section 490a of the Penal Code, enacted in 1927 as part of a comprehensive plan to simplify procedure in criminal cases, which section reads as follows: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." Stats. 1927, p. 1047, § 7. Appellant, by general demurrer both before and after this amendment, and by objections frequently made and by motion for an advisory verdict of acquittal, urged that the information did not before or after amendment state a public offense. No special demurrer, however, was interposed at any time.

Section 459 of the Penal Code reads: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary." This information as originally drafted was undoubtedly sufficient. While it has always been necessary to specify the crime intended to be committed (People v. Nelson, 58 Cal. 104; People v. Bartley, 12 Cal. App. 773, 108 P. 868) when the burglarious entry is made, yet it has never been held that it was necessary to dò more than refer to the ultimate crime intended in anything but general terms. "The allegations of the ulterior felony intended need not, however, be set out as fully and specifically as would be required in an indictment for the actual commission of the felony. It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to steal, or commit the crime of larceny, rape or arson." 4 R. C. L. § 29, p. 436.

This rule has been specifically applied in this state. For example, in the case of People v. Burns, 63 Cal. 614, an information was sustained which merely recited a burglarious entry of the "house of one (naming a woman) * * * with intent then and there to commit a rape upon the said (woman named)." Again in People v. Goldsworthy, 130 Cal. 600, 62 P. 1074, the information upheld recited simply that the defendant feloniously entered "the basement room of a certain store, with intent to commit arson." Again, an information substantially identical with the one before us was sustained in People v. Bartley, supra, 12 Cal. App. at pages 775, 776, 108 P. 868. These holdings are in accord with the general weight of authority in other jurisdictions as disclosed by a reference to the decisions of foreign courts. 9 Cor. Jur. p. 1050, § 92.

At this point we could well stop the discussion by saying that in popular acceptation the words "theft" and "larceny" are so nearly convertible terms that defendant could in no sense have been misled by the use of the one term or the other. The same is true of the term steal.

In People v. Lopez, 90 Cal. 569, 572, 27 p. 427, the information held a sufficient charge of larceny which accused the defendant of felony "by 'stealing, taking, and driving away'" a horse, etc. See section 960, Pen. Code; People v. Campbell (Cal. App.) 265 P. 364. The provisions of section 490a of the Penal Code might, therefore, be disregarded, and still the information here would undeniably be sufficient. If the section were invalid, the word "larceny" would in such case remain and the information would still be concededly sufficient.

[2] Appellant, however, attacks the information from an altogether different angle, and his processes seem to be as follows: That section 484 of the Penal Code, defining larceny, has been repealed, and this fact, in connection with the alleged invalidity of section 490a of the Penal Code, destroys section 459 of the Penal Code, defining burglary, by taking therefrom the element of larceny. It should here be noted that this argument overlooks the fact that in defining burglary the felonious entry is satisfied if made with intent to commit "any felony." The reply to this, no doubt, would be that the information before us merely uses the word "larceny," which may be either grand or petit, and the latter is not a felony; hence, upon any theory, the information is either defective or void.

But meeting the issue face to face, there is no merit to be found in the claim. Section 484 had been amended but not repealed (St. 1927, p. 1046, § 1), for the effect of the section as now appearing is merely to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of theft. No elements of the former crimes have been changed by addition or subtraction. This is particularly true of the crime of larceny. All former elements of this offense are perpetuated and contained in section 484 as amended. This latter section as now written is a step in advance of the English Larceny Act of 1916 (section 44, 6 and 7 Geo. 5, c. 50), the operation of which has been explained as follows:

"(1) If on the trial of any indictment for robbery it is proved that the defendant committed an assault with intent to rob, the jury may acquit the defendant of robbery and find him guilty of assault with intent to rob, and thereupon he shall be liable to be punished accordingly. (2) If on the trial of any indictment for any offence against section 17 of this act (relating to embezzlement) it is proved that the defendant stole the property in question, the jury may find him guilty of stealing, and thereupon he shall be liable to be punished accordingly; and on the trial of any indictment for stealing the jury may in like manner find the defendant guilty of embezzlement or of fraudulent application or disposition, as the case may be, and thereupon he shall be liable to be punished accordingly. (3) If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretences with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretences, and thereupon he shall be liable to be punished accordingly. (4) If on the trial of any indictment for obtaining any chattel, money, or valuable security by false pretences it is proved that the defendant stole the property in question, he shall not by reason thereof be entitled to be acquitted of obtaining such property by false pretences."

Archbold's Criminal Pleading, Evidence and Practice (27th Ed.) by R. E. Ross, p. 515, § 44.

The amendment to section 484, in connection with other cognate legislation such as the amendments to sections 951 and 952 (St. 1927, p. 1043) of the Penal Code, is designed not only to simplify procedure but also to relieve the courts from difficult questions arising from the contention that the evidence shows the commission of some other of these crimes than the one alleged in the indictment or information, a contention upon which defendants may escape just conviction solely because of the border line distinction existing between these various crimes.

The conclusion we have announced has heretofore either been expressly or impliedly given forth in the following cases: People v. Plum (Cal. App.) 263 P. 862; People v Giron (Cal. App.) 270 P. 462. In the latter case the sole ground of appeal was that the information did not charge a public offense for the reason that under the amendments to the Penal Code adopted in 1927 there is no such thing as larceny. The information was not amended. After discussion, Mr. Justice Conrey disposes of the question as follows: "So far as the new definition of larceny is concerned, the change of name is one of form and not of substance. The amendments did not wipe out the common-law definition of larceny, nor did they destroy the universal meaning of the word wherever English is spoken, that larceny is a form of theft. To think otherwise would be to defy common sense." See, also, People v. Campbell, supra.

[3] With this conclusion before us, the essence of section 490a is simply to effect a change in nomenclature without disturbing the substance of any law. It is, therefore, unimportant to dwell upon the contention that this section is ineffectual to interpret the word larceny to mean theft in section 459 of the Penal Code because of article 4, § 24, of the Constitution, to the effect that the act revised or section amended shall be re-enacted and published at length as revised or amended. This would mean that a change of phraseology without changing the meaning can be accomplished only by a republication of every statute wherein the phrase appears. This, to our mind, is carrying the refinements of logic to the point of absurdity.

[4] The only other point is that it is contended that, inasmuch as section 484 now has these three crimes included within it, by charging the intent to be that of theft, the defendant is left without sufficient information as to which particular brand of theft he is supposed to have intended by the felonious entry of the building. This contention, too, seems hypercritical, for if the defendant is told that he is charged with the felonious entry of a certain building, at a certain time, with a certain intent, which particular subdivision of the crime he is guilty of does not seem to be a matter that would prejudice his status, and it has been so ruled in the case of People v. Burns, supra, and in the late case of People v. Manchell (Cal. App.) 267 P. 718. Moreover, appellant did not make this point at all in the court below, by special demurrer or otherwise.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.

206 Cal. 541

BUCKEY et al. v. McGRAW et al.
(L. A. 9910.)

Supreme Court of California. Feb. 25, 1929.

1. Vendor and purchaser 🔑299(3)—Evidence held insufficient to support finding that vendors waived prompt payment and strict performance of contract.

In action to quiet title, evidence *held* insufficient to support finding that plaintiffs, as vendors under contract wherein time was of the essence, had waived prompt payment of monthly sums required by contract and had waived strict performance of terms of contract, where there was no acceptance of delayed payments, and vendors' entire action was continued effort to collect installments, with no promise of forbearance.

2. Vendor and purchaser 🔑101—Purchasers held not entitled to notice of termination of contract under evidence showing no intention to make delinquent payments or to return to premises.

Purchasers *held* not entitled to notice of cancellation of contract and re-entry by vendors under evidence containing no showing that purchasers intended to make delinquent payments, nor that they intended to return to premises after they vacated them.

3. Vendor and purchaser 🔑98—Vendors, after termination of contract, held not required to return purchase money paid in view of expense to them in transaction.

Where vendors were required to pay agent's commission of $250 on account of sale, were deprived of rental value of property during time of purchasers' possession under contract, and were put to expense of clearing title after cancellation of contract, they should not be required to return to purchasers any of $950 payment on purchase price.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action to quiet title by Charles G. Buckey and another against Elizabeth McGraw and another, in which defendants filed a cross-complaint. From judgment for defendants on the cross-complaint, plaintiffs appeal. Modified and affirmed.

Wickliffe Matthews and Matthews & Walter, all of Los Angeles, for appellants.

Victor H. Koenig, of Los Angeles, for respondents.

SHENK, J. The plaintiffs sued to quiet their title to an improved residence lot in the county of Los Angeles. By answer the defendants denied the plaintiffs' title, and by cross-complaint sought to recover from the plaintiffs the sum of $950, which was the amount of the initial payment from the defendants to the plaintiffs under a contract of conditional purchase and sale of said property. The contract was dated February 16, 1925, and provided for the total payment of $5,300—$950 upon the execution of the instrument, $45 on the 23d day of March, 1925, and $45 on the 23d day of each succeeding month thereafter. The initial payment was not made in cash, but was covered by the transfer to the plaintiffs of a note in that amount secured by a trust deed on property in Arizona. The defendants took possession under the contract, and the defendant Elizabeth McGraw resided on the premises until April 26, 1925, on which day she moved out of the house, leaving the premises entirely vacant, and delivered the key to a neighbor, with the statement that she was going North to be with her son, and might be back in six months and might never be back. None of the monthly payments provided by the contract was made, notwithstanding numerous demands for payment made by the plaintiffs upon the defendant Elizabeth McGraw before she vacated the premises. These demands were always met with the statement by said defendant to the effect that she did not have the money, but hoped to obtain the same, either through her own resources or from her son, a nonresident of the county.

The trial court found the title of the property to be in the plaintiffs, and rendered judgment accordingly. Judgment was also entered in favor of the defendants on their cross-complaint and against plaintiffs for the sum of $950. From the judgment on the cross-complaint the plaintiffs prosecute this appeal.

[1] The agreement between the parties provided that time was the essence thereof with the usual provisions for the release of the seller and forfeiture by the buyer in the event of the buyer's failure to comply with the terms of the contract. The court found that none of the stipulated payments, except the first, had been made, but also found that the plaintiffs had waived the prompt payment of the monthly sums required to be paid, and had waived the strict performance of the terms of the contract. The plaintiffs' main contention on the appeal is that the finding as to such waiver is not supported by the evidence. In this respect the record supports the contention. There was no acceptance of delayed payments by the plaintiffs and no evidence by statement or conduct on their part upon which a claim of waiver could properly be based. The entire action of the plaintiffs was a continued effort to collect the installments provided for by the contract, none of which was ever paid, and with no promise of forbearance, tending to mislead the defendants to their detriment or to estop the plaintiffs from standing on the contract as written.

[2, 3] The plaintiffs took possession of said premises on May 9, 1925, without notice to the defendants. The court found that the defendants had not abandoned the premises and were entitled to notice of cancellation of the contract and re-entry by the plaintiffs. This finding, too, is unsupported by the evidence. There was no showing that the defendants intended to make the delinquent payments and no evidence that they intended to return to the premises after they vacated the same. Under these circumstances, no notice of the termination of the contract was required. Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 P. 420. The plaintiffs were required to pay an agent's commission of $250 on account of the sale, were deprived of the rental value of the property during the time of the defendants' possession under the contract, and have been put to the expense of clearing the title. No good reason appears why equity should require the return to the defendants of any of the purchase money paid.

The judgment is modified by striking therefrom the provision for the recovery by the defendants from the plaintiffs of the sum of $950. As so modified, the judgment is affirmed, the appellants to recover their costs on appeal.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

96 Cal. App. 747

MORTON v. SLOAN. (Civ. 6307.)★

District Court of Appeal, First District, Division 2, California. Feb. 13, 1929.

Rehearing Denied March 17, 1929. Hearing Denied by Supreme Court April 11, 1929.

1. Taxation ⚷627—Description of realty in delinquent tax list as certain numbered lots in stated block held sufficient, though not referring to map (Pol. Code, § 3650, subd. 2).

Description of realty in delinquent tax list as "Block 6295, Bd. by Spreckels and Gundlach Sts. Visitacion Ave. and lands in acres. * * * Lots Nos. 1 to 14 incl.," *held* sufficient, under Pol. Code, § 3650, subd. 2, though not referring to any map, in view of evidence that large map, delineating streets and blocks, was pasted on wall in recorder's office and treated by all city and county officers as index to assessor's block books, showing subdivisions by lot numbers, metes, and bounds.

2. Taxation ⚷627, 658(1), 758—References, in delinquent tax list addenda, notice of sale, and deed, to assessment map "on file" in offices wherein merely deposited, held mere surplusage.

References to assessment map, in addenda to delinquent tax list, notice of tax sale, and tax deed, as "on file" in various offices, *held* mere surplusage, not invalidating sale or deed, though map was not formally filed or recorded, but merely deposited in such offices, where list and notice sufficiently described property and deed contained description by metes and bounds, as well as lot and block numbers shown on map.

3. Taxation ⚷435—Paper, such as assessment map, is filed when delivered to proper officer, without indorsement of filing.

A paper, such as assessment map, is filed when delivered to the proper officer, though filing is not indorsed or certified by him.

4. Taxation ⚷769—Tax deed reciting payment only of taxes assessed before year preceding that of sale held not void, in view of corrected deed (Code Civ. Proc. § 956a, as added by St. 1927, p. 583; Pol. Code, § 3785b).

Tax deed reciting payment of all taxes assessed before year preceding that in which sale was made *held* not void, where corrected deed, reciting admitted fact that all taxes assessed before sale had been paid, was offered in evidence under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, though statutes do not require such recital; date of purchase being left blank in form prescribed by Pol. Code, § 3785b.

5. Taxation ⚷789(1)—Corrected tax deed held admissible as against objections that it assumed invalidity of first deed, contained recitals contrary to record, and was barred by limitations (Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Corrected tax deed, reciting payment of all taxes levied and assessed against property before sale, *held* admissible in evidence under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, as against objections that it assumed invalidity of first deed, reciting only that taxes assessed before year preceding that of sale were paid, contained recitals contrary to record, and was barred by statute of limitations.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by George T. Morton, individually and as administrator of the estate of Patrick C. Morton, deceased, against Villard W. Sloan. Judgment for defendant, and plaintiff appeals. Affirmed.

Philip C. Boardman, of San Francisco, for appellant.

Jackson & Peterson, of San Francisco, for respondent.

Bacigalupi, Elkus & Salinger and Clarence A. Linn, all of San Francisco, amici curiæ.

NOURSE, J. Plaintiff sued to quiet title to certain real property situated in the city and county of San Francisco. Defendant answered, setting up his own title through a tax deed. Judgment went for defendant, quieting his title, and the plaintiff has appealed on a typewritten transcript.

[1] Plaintiff claimed ownership to the property as heir to the estate of his father, who died June 8, 1912. Defendant claimed under a tax deed executed July 14, 1920, wherein the property was conveyed to him by the tax collector for nonpayment of taxes for the year 1914. This claim of defendant was resisted on the ground that the tax levy was invalid, because the property assessed and sold was inadequately described, and because the recitals in the deed were insufficient.

The description contained in the delinquent tax list published June 11, 1915, was "Block 6295, Bd. by Spreckels and Gundlach Sts. Visitacion Ave. and lands in acres. Patrick C. Morton, lots Nos. 1 to 14 incl.—$50.72." It is argued that the description is insufficient because it contains no reference to any map, and Miller v. Williams, 135 Cal. 183, 67 P. 788, and Fox v. Townsend, 152 Cal. 51, 56, 91 P. 1004, 1007, are cited in support of the contention. There is no quarrel with the rule of the cases cited. They merely hold that such descriptions are prima facie insufficient, but both cases recognize the rule that these descriptions can be made sufficient by other evidence.

The latter rule we had occasion to consider in Green v. Palmer, 68 Cal. App. 393, 229 P. 876, where we held that, where the description used in the assessment was merely indefinite and could be readily ascertained by reference to the assessor's block book, evidence was admissible on the trial to show the true description and that, when this was done, it became sufficient to answer all the requirements of the law. In that case we re-

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★Rehearing denied. Hearing denied by Supreme Court.

lied upon Campbell v. Shafer, 162 Cal. 206, 212, 121 P. 737; Furrey v. Lautz, 162 Cal. 397, 400, 122 P. 1073; and Fitzimons v. Atherton, 162 Cal. 630, 632, 124 P. 250. A petition for a transfer to the Supreme Court was filed in the Green Case and denied, and we again had the same question before us in Jacoby v. Wolff, 198 Cal. 667, 247 P. 195. As we adhered to the same views expressed in the Green Case, counsel applied for a transfer to the Supreme Court, which was granted. Upon a rehearing and reconsideration of that case, the Supreme Court adopted the opinion of Mr. Justice Sturtevant on that branch of the case and therefore the question should now be deemed settled. But in passing we should quote again the very clear statement of the basis of the rule by Mr. Cooley in his work on Taxation, which was quoted with approval in the Green and Jacoby Cases: "The designation of the land will be sufficient if it affords the owner a means of identification and does not positively mislead him or is not calculated to mislead him."

Here the evidence is that a large map, 3 feet 10½ inches by 4 feet 9¾ inches in size, was prepared under the direction of an ordinance of the board of supervisors of November 29, 1913; that copies of this map were deposited in the offices of the assessor, tax collector, auditor, and recorder; that the map was pasted on the wall in the recorder's office in plain view for ready reference; that on this map all streets and blocks were delineated, each block being given a separate number, but the map did not show the lots into which the blocks were subdivided; that this map was used by all the public offices of the city and county as the official assessment map, but was treated more as an index to the official block books, of which there were 28 volumes and which were prepared under the direction of the same ordinance; that these block books were bound volumes of single page maps which showed in detail the subdivisions by lot number and by metes and bounds and the respective owners of each of the various blocks of land delineated upon the map in question. Evidence was also offered that there was but one block numbered 6295.

From this evidence it is apparent that the description used in the assessment was not false or misleading, and that, if there had been any uncertainty in the description, it could have been cleared readily by reference to the proper block book in the assessor's office. The evidence brings the case squarely within the rule of Lummer v. Unruh, 25 Cal. App. 97, 104, 142 P. 914, and Fitzimons v. Atherton, 162 Cal. 630, 632, 124 P. 250, which were followed in the Green and Jacoby Cases above referred to.

[2] Having determined that the description in the delinquent list was sufficient in view of this ordinance, the reference in the addenda to the delinquent list to the assessment map as being "on file" in various offices was mere surplusage, and cannot affect the description. Green v. Palmer, supra. But appellant argues that, as this reference was carried into the notice of tax sale and into the tax deed, the failure to formally file or record the map invalidated the sale. The point is that the map was merely deposited in these various offices and did not bear an official stamp of filing or recording. But the rule as to the sufficiency of the description in the notice of delinquent sale is the same as that in reference to the original delinquent list and thus the reference to the map in that notice is surplusage and not misleading. As to the tax deed, the point becomes unimportant because the lands were described by metes and bounds in addition to the description by lot and block number as appearing on this assessment map. Thus, so far as concerns the tax deed, all reference to the assessment map might be omitted, and the deed would still contain a sufficient description. Surplusage of this character which does not mislead or confuse cannot affect the validity of the deed. Cadwalader v. Nash, 73 Cal. 43, 45, 14 P. 385.

[3] We have said that the reference to the map was surplusage and have assumed the correctness of appellant's position that it was not properly filed because not endorsed or certified by the proper officer. But in this respect appellant's position is not sound. "A paper is filed when delivered to the proper officer, and indorsing it with the time of filing is not a part of the filing." Smith v. Biscailuz, 83 Cal. 344, 358, 21 P. 15, 18. To the same effect, Edwards v. Grand, 121 Cal. 254, 256, 53 P. 796. The map in question was deposited in the various public offices mentioned and was used and treated as a part of their records. This index map, taken with the series of block books which showed the subdivisions of the various blocks marked on the map, were the bases for the assessment of all lands in the city and county. The map was sufficiently identified by the tax proceedings as the one on file in the various public offices. The law does not require the recordation of a map before it can be used in tax proceedings. The identity of the map being conceded, the reference to it in the addenda, though unnecessary, did make it a part of the taxing system of the city and county and the description of the property in suit by lot and block number was all that was required by section 3650, subdivision 2, of the Political Code, which authorizes the description of city and town lots by "naming the city or town, and the number of the lot and block, according to the system of numbering in such city or town."

[4] It is argued that the tax deed is void because it recites that the sale was made

June 24, 1920, and that all taxes levied and assessed against the property prior to the year 1919 had been paid, whereas it should have recited that all taxes levied and assessed prior to the sale had been paid. The insertion of the figures "1919" in the tax was obviously a clerical error which has been corrected by a new deed executed August 2, 1928. This deed is now offered in evidence under the provisions of section 956a, Code of Civil Procedure (added by St. 1927, p. 583). This offer is objected to on the ground that it would deprive appellant of his defense to such deed. The taxation statutes do not require the tax deed to contain the recital that all taxes levied and assessed to the date of purchase have been paid; in the form prescribed in section 3785b, Political Code, this date is left blank. These statutes do require that all such taxes must be paid. But the fact of payment is not disputed and the corrected deed merely recites what is admitted to be true. The authority of the tax collector to execute a corrected deed to conform to the facts has been recognized by the decisions. Fox v. Townsend, 152 Cal. 51, 54, 91 P. 1004, 1007; Webster v. Somer, 159 Cal. 459, 462, 114 P. 575. The principle of the cited cases is that the law requires the tax collector to make a deed in which the recitals conform to the facts, and that, if he has made an irregular or imperfect deed, he may be compelled by mandamus to correct it.

[5] The only defenses to the corrected deed suggested by appellant are that it assumes the invalidity of the first deed, that it contains recitals contrary to the record, and that any rights under it are barred by the statute of limitations. The new deed merely assumed that the first deed was irregular because it failed to contain a true recital of the facts. If the tax collector assumed that the first deed was invalid, his view would not be binding upon the courts. The second objection is based upon the claim that the descriptions of the property in the assessment proceedings were insufficient—a point which we have determined adversely to the appellant. We cannot perceive how the question of the statute of limitations arises. If the respondent was seeking by mandamus to compel the tax collector to execute a new deed, the question of the limitation of time might arise, but, with the act performed, respondent's delay in requesting it is of no concern to the appellant. The new deed should therefore be received in evidence. New findings are not necessary, as those signed fully cover the issues.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

96 Cal. App. 753

SCHAINMAN v. ALL PERSONS, etc.

SAME v. HUNTER et al.

(Civ. 6495.)★

District Court of Appeal, First District, Division 2, California. Feb. 13, 1929.

Rehearing Denied March 15, 1929. Hearing Denied by Supreme Court April 11, 1929.

1. Taxation 🔑421(7)—Description of property on assessment roll by lot and block numbers shown on assessment map held sufficient, in view of block books treated as assessment maps (Pol. Code, § 3650, subds. 2, 3).

Description of property as "Lot 41, Block No. 3756," on assessment roll with notation at top of each page that property was described "by lot and block number as delineated on the assessment map * * * on file in" certain offices, *held* sufficient, in view of evidence that there was but one block and lot so numbered and that such map, showing every block, and block books, showing lots and treated as maps for all tax purposes, were prepared under authority of ordinance enacted pursuant to Pol. Code, § 3650, subd. 3; reference to map not being required, in view of subdivision 2, while any uncertainty in description could be readily cleared by reference to proper block book.

2. Evidence 🔑48—That block books constitute assessment maps used by all public offices in San Francisco is matter of common knowledge (Pol. Code, § 3650, subd. 3).

It is a matter of common knowledge that block books, prepared under authority of ordinance, enacted by board of supervisors of city and county of San Francisco, pursuant to Pol. Code, § 3650, subd. 3, constitute assessment maps in use by all public offices therein in matters of real estate taxation.

3. Taxation 🔑435—Papers, such as assessment map and block book maps, are filed when delivered to proper officer, without indorsement of time (Pol. Code, § 3650, subd. 3).

Papers, such as assessment index map and block book maps, prepared under direction of ordinance enacted by board of supervisors pursuant to Pol. Code, § 3650, subd. 3, are filed when delivered to proper officer, without his indorsement of time of filing.

4. Taxation 🔑439—Failure to endorse time of filing of assessment map and block book maps held cured by statutes (Pol. Code, §§ 3658a, 3650, subd. 3; St. 1917, p. 1653; St. 1907, p. 290).

Failure of officer, to whom assessment index map and block book maps, prepared under authority of ordinance enacted by board of supervisors, pursuant to Pol. Code, § 3650, subd. 3, were delivered, to indorse time of filing thereon, was cured, if such endorsement were necessary, by St. 1917, p. 1653, providing that any map recorded or filed with county recorder shall be deemed properly recorded or filed "for all purposes," and later acts; St. 1907, p. 290, and Pol. Code, § 3658a, being inapplicable.

★For opinion on rehearing, see 276 P. 113. Hearing denied by Supreme Court.

5. Taxation 🔑630—Printing of owner's name as "Sissions," instead of "Sessions," in publication of delinquent tax list, did not invalidate assessment (Pol. Code, §§ 3628, 3807).

Under Pol. Code, §§ 3628, 3807, printing of owner's name as "Sissions," instead of "Sessions," in publication of delinquent tax list, did not render assessment invalid.

6. Taxation 🔑840—Complaint that delinquent tax penalty was fixed at $4.06, instead of $4.0565, held without merit.

Complaint that auditor fixed penalty on amount of delinquent taxes at $4.06, whereas exact amount was $4.0565, *held* without merit.

7. Taxation 🔑769—Indefinite and insufficient recitals in tax deed as to taxes delinquent and paid held cured by corrected deed.

Contention that tax deed, reciting delinquency of taxes assessed "in the year 1915–16" and payment of "all taxes levied and assessed against said property prior to the year 1920," was void on its face for indefiniteness of first recital and insufficiency of second because sale was made in 1921, *held* without merit, where corrected deed, containing true recitals in accordance with undisputed facts, was received in evidence.

Appeals from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Actions, tried together, by Paul Schainman against all persons, etc., claiming any interest in or lien on certain realty, and by Sophie Schainman against James Hunter and others. Judgments for plaintiffs, and defendants appeal. Affirmed.

Frederic Appelman, of San Francisco, for appellants.

Clarence A. Linn, of San Francisco, for respondents.

NOURSE, J. These two actions to quiet title to the same piece of real property situated in the city and county of San Francisco were tried jointly by stipulation and the appeals in both are presented on a single typewritten record. The trial court gave judgment for the plaintiff in each case. Plaintiff claimed title under a tax deed issued to Paul Schainman on June 30, 1921, following a sale for nonpayment of taxes for the year 1915, and it is stipulated that the defendants are entitled to judgment unless their title has been divested by this deed. The main issues raised in these cases were considered in Morton v. Sloan (Cal. App.) 275 P. 223, but as they have been presented in a different way it will be necessary to treat them separately.

[1, 2] Primarily the attack is made upon the assessment of the tax for the year 1915, the claim being that the property was insufficiently described. On the assessment roll the property was described as: "Lot 41, Block No. 3756." At the top of each page of the assessment roll appeared the notation that the property was described "by lot and block number as delineated on the assessment map of the city and county of San Francisco, state of California, adopted by the board of supervisors, November 29, 1913. Said assessment map is on file in the office of the assessor, tax collector, recorder, and auditor." Ordinance No. 2511 (New Series) enacted by the board of supervisors of the city and county on November 29, 1913, was received in evidence. After reciting that it was enacted pursuant to subdivision 3 of section 3650 of the Political Code for the purpose of providing a uniform system of writing the real estate assessment rolls, it authorized the assessor and the city engineer, "to prepare and formulate a system of assessing the lots and blocks of land * * * by lot number and block number. They are hereby authorized to make and compile a map or maps, indexes, and map books. * * * The assessor is hereby authorized and directed * * * to write the real estate assessment rolls describing each parcel of land by lot and block number, or tract number, as delineated on said map and block book. * * * A copy of said block books shall be filed in the office of the assessor, tax collector, auditor, and recorder."

Acting under authority of this ordinance such a map was prepared showing each block in the city and county numbered from 1 to 7068. Upon the same authority block books were prepared showing the subdivision of each block into lots with the number, description, and owner of each. These block books consisted of 28 volumes. Each volume consisted of separate pages depicting each block according to the number appearing on the large map, the pages being fastened securely together and bound in a substantial binding. The large map was used by all the public offices as an index map for the purpose of locating the block by number. The block books were so arranged that this block number served as an index to the page of the block book upon which the map of the particular block appeared.

One of these block books was received in evidence indorsed "Volume 23, blocks 3747 to 4030, records of the recorder's office, 1915," and evidence was received that the other volumes were similarly endorsed and, if put together in their relative positions, they would make a complete picture of the map of the entire city and county. Evidence was also received that there was but one block numbered 3756 in the city and county, and but one lot numbered 41 therein. The plaintiffs rely upon this block book as the "assessment map" according to which the land was assessed and sold for nonpayment of taxes, whereas, in the case of Morton v. Sloan, the parties relied upon the so-called index map.

The appellants here, though relying upon different evidence, raise the same questions of law—that the description is indefinite because the map referred to was not properly filed. As we said in the other case, it was not necessary to refer to any map; the property could be assessed by lot and block number "according to the system of numbering" in the particular city. Subdivision 2, § 3650, Pol. Code. It is not disputed that the system of numbering lots and blocks in the city and county of San Francisco is that which has been pictured above. This system was authorized by the board of supervisors; it has been in use in the city and county for many years; it has been impliedly approved by the supervisors through their use of the block books while sitting as a board of equalization; and it has become a matter of common knowledge that the block books constitute the assessment maps in use by all the public offices in matters of taxation of real estate.

If, therefore, there was any uncertainty in the description of the property in suit it could be readily cleared by reference to the proper block book. It seems to be the position of appellants that the block book was not a map because it was called a block book, and that the reference in the assessment must, therefore, have been to the index map which did not show the subdivisions of the block. But the evidence is that for all purposes of taxation of real property the block books are treated as the maps covering the entire city and we see no difficulty in the fact that these appear on separate pages of a bound volume rather than on a single sheet of paper. However, the evidence at the trial clearly identified the property and disclosed that there was no uncertainty in the description and this is sufficient to answer all the requirements of the law. Green v. Palmer, 68 Cal. App. 393, 401, 229 P. 876; Jacoby v. Wolff, 198 Cal. 667, 677, 247 P. 195.

[3, 4] But, aside from this, the index map and the various block book maps were valid official maps duly filed in the public offices mentioned in the assessment proceedings. They were prepared under the direction of the ordinance, deposited in these offices, and used by these officials, and the public as official maps. "A paper is filed when delivered to the proper officer; and indorsing it with the time of filing is not a part of the filing." Smith v. Biscailuz, 83 Cal. 344, 358, 21 P. 15, 18, Edwards v. Grand, 121 Cal. 254, 256, 53 P. 796. Appellants' attack on these documents is on the ground that they do not bear any filing stamp by the officer with whom they were deposited. If this were necessary, the failure to so indorse them was cured by the act of 1917 (Stats. 1917, p. 1653) and three later acts of similar purport. The 1917 act provided that "any map or plat recorded or filed with the county recorder * * * shall *for all purposes* be deemed to have been properly so recorded or filed and to comply with all the requirements of the laws in force at the time it was so recorded or filed." We are satisfied that the reference in the assessment proceedings to the assessment map "included the large index map (in evidence in the case of Morton v. Sloan, and used on this appeal by stipulation) and the block books in evidence here, and that these all constitute one system or set of maps. We are also satisfied, in view of these validating acts, that these maps were properly filed in the public offices referred to in the assessment proceedings.

In reaching this conclusion we have not overlooked the act of 1907 (Stats. 1907, p. 290), which relates to the sale of private property by reference to a map of a private subdivision, or the provisions of section 3658a, Political Code, covering the preparation and recording of an official map. The first act is a penal statute not applicable to the state in tax proceedings. The code section provides that when a map is prepared and recorded as called for in the section, it shall be available "for all purposes of this section." The law does not require the filing or recording of any map for assessment purposes, and the proceedings here under review do not come within the purview of section 3658a.

[5] The attack is made upon the publication of the delinquent tax list in that the name of the owner was printed as "Ellen Sissions," whereas the true name of the owner was Ellen Sessions. The answer is found in sections 3807 and 3628 of the Political Code which provide that no mistake in the name of the owner of real property shall render the assessment invalid. Hanson v. Goldsmith, 170 Cal. 512, 517, 150 P. 364.

[6] Complaint is made that in computing the penalty on the amount of taxes due the auditor fixed the sum at $4.06, whereas the exact amount of the penalty was $4.0565. The point is wholly without merit. Bell v. Fee Title Co., 69 Cal. App. 437, 443, 231 P. 598; Jacoby v. Wolff, 198 Cal. 667, 684, 247 P. 195.

[7] It is argued that the tax deed is void on its face because it contained the recital that the delinquency was for taxes assessed "in the year 1915–16," and the further recital that "all taxes levied and assessed against said property prior to the year 1920" had been paid. It is claimed that the first recital is indefinite and that the second is insufficient because the sale was made in 1921 and the deed should therefore have recited that taxes for the year 1920 were also paid. During the trial a corrected deed containing true recitals in accord with the undisputed facts was received in evidence. This

disposes of the point as we have held in Morton v. Sloan, supra.

The judgments are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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96 Cal. App. 708

CITY OF STOCKTON v. ELLINGWOOD et al. (Civ. 3408.)★

District Court of Appeal, Third District, California. Feb. 13, 1929.

Rehearing Denied March 15, 1929. Hearing Denied by Supreme Court April 11, 1929.

1. Eminent domain 🔑131—Law contemplates that owner shall be compensated for full market value of land taken.

In eminent domain proceedings, law contemplates but one purpose, and that is that landowner shall be compensated for full market value of his property taken, irrespective of what elements may be which enter into making up of that value.

2. Eminent domain 🔑134—Major factor in determining damages for taking lands valuable for reservoir purposes is market value of land for such purposes, and not its worth to condemnor.

In proceedings to condemn land for reservoir purposes, if lands are peculiarly valuable for reservoir purposes, major factor to be considered by court in awarding damages is market value of land for reservoir purposes, and not its worth to condemnor for reservoir purposes, and fact that condemnor does not purpose to make highest use of lands is not determining factor.

3. Evidence 🔑474(18)—Witness, understanding adaptability of lands sought to be taken for particular purposes, may state its market value, though unacquainted with other elements of its value.

If witness in condemnation proceedings, by reason of his skill, learning, or technical training, understands adaptability of lands in question for particular purpose and demand for land for such purpose, he may state market value of land, though entirely unacquainted with other elements which would be considered by different buyers competing for same property.

4. Evidence 🔑474(18)—Witness, having knowledge of market value of lands sought to be taken, may state such value, though possessing no technical skill or training.

If witness in condemnation proceedings has knowledge of market value of lands, even though he possesses no technical skill, training, or ability, he may state the market value.

5. Evidence 🔑502—Elements considered by witnesses in giving opinions as to market value of lands sought to be condemned may be inquired into on cross-examination.

Different elements considered by witnesses in giving their opinions as to market value of lands sought to be condemned may be inquired into on cross-examination, and if, on such cross-examination, it appears that their testimony is based on improper considerations, or is speculative only, it should be stricken from record or withdrawn from consideration.

6. Eminent domain 🔑262(5)—Refusal to strike out opinions of expert witnesses on direct examination as to market value, based on adaptability of land for reservoir purposes, because of testimony elicited on cross-examination, held not prejudicial error.

In proceedings by city to condemn lands for reservoir purposes, court *held* not to have committed prejudicial error in refusing to strike out opinions of expert witnesses of landowners, given on direct testimony, as to market value of respective parcels of lands based on their adaptability for reservoir purposes, because of testimony elicited from such witnesses on cross-examination, especially since award by court was less than value stated by such witnesses.

7. Eminent domain 🔑134—That owner of property sought to be condemned is making only minor use of it cannot deprive him of higher market value for major use.

If owner of lands sought to be condemned is making only minor use of premises, he cannot be deprived of its value for a major use, if such major use gives it higher market value, regardless of whether he utilizes property for purposes which give it its major use or not.

8. Eminent domain 🔑131—"Reasonable time" in which to find purchaser in determining market value must be construed in connection with circumstances affecting market value and extent of demand.

In determining market value of land sought to be condemned, "reasonable time" in which to find purchaser must be construed in connection with all conditions and circumstances affecting market value and extent of demand for property involved, possessing adaptability shown to exist.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Reasonable Time.]

9. Eminent domain 🔑202(4)—Union of lands sought to be condemned for reservoir purposes not shown impossible, evidence of its adaptability for reservoir purposes held properly admitted.

In proceedings by city to condemn lands for reservoir purposes, it not being shown that it is impossible to unite different parcels of lands sought to be condemned into one parcel for reservoir purposes, *held*, that testimony of landowners' expert witnesses as to adaptability of the several parcels for reservoir purposes was properly admitted.

10. Evidence 🔑5(2)—Common knowledge that unused reservoir sites available for development are becoming fewer in number in California.

It is common knowledge that unused reservoir sites available for development are becoming fewer and fewer in number in the state of California.

★Rehearing denied. Hearing denied by Supreme Court.

11. Evidence 🔑5(2)—Common knowledge that great progress has been made in developing reservoirs to conserve flood waters coming down western slope of Sierra Nevada Mountains.

It is common knowledge that great progress has been made in acquiring and developing of reservoirs for purpose of storing and conserving, for irrigation and power purposes, flood waters that come down from western slope and foothills of Sierra Nevada Mountains.

12. Eminent domain 🔑69—Absence of market value for land taken does not absolve condemnor from paying compensation.

That there is no market value, in the strict sense of the word, for land sought to be condemned, does not entitle condemnor to take lands without paying just compensation.

13. Evidence 🔑5(2)—Common knowledge that irrigation districts and power companies are looking to mountains to collect winter rains as sources of water supply.

It is common knowledge that reservoir sites along the Merced, the Stanislaus, and the Tuolumne rivers are being rapidly developed and utilized, and that irrigation districts and power companies are looking more and more to mountains, where there is available area to collect winter rains, as sources of water supply.

14. Eminent domain 🔑262(4)—That court allowed greater market value than testified to by some of witnesses is not ground for reversal.

That court, in condemnation proceedings, allowed greater market value than that testified to by those who understood only and gave opinions only on value of land based on their uses for one of several uses to which lands were adaptable, or even found greater market value than appellate court would conclude from same testimony, furnishes no ground for reversal.

15. Eminent domain 🔑130—Several contiguous governmental subdivisions owned by brothers as partners held properly considered as one tract in determining severance damages (Code Civ. Proc. §§ 1246, 1248).

In proceedings to condemn land for reservoir purposes, notwithstanding different governmental subdivisions of tract appeared in records, in name of one or other of two brothers, *held* that, under Code Civ. Proc. §§ 1246, 1248, where such subdivisions were owned as one tract by brothers as partners, and subdivisions were contiguous, court did not err in considering whole tract as one parcel in determining severance damages.

16. Eminent domain 🔑85—Award of damages for alleged easement in highway appurtenant to lands not contiguous to lands sought to be condemned was error.

Allowance of damages for alleged easement in highway appurtenant to certain land was erroneous, where such lands were not contiguous to lands sought to be condemned.

Appeal from Superior Court, Amador County; C. P. Vicini, Judge.

Consolidated actions by the City of Stockton against William W. Ellingwood and others. From the judgment, plaintiff appeals. Modified and affirmed.

Hearing denied by Supreme Court: WASTE, C. J., and SHENK, J., voting for a hearing.

J. Le Roy Johnson and Thos. S. Louttit, both of Stockton, and William G. Snyder, of Jackson, for appellant.

F. J. Solinsky, of San Francisco, Nutter, Hancock & Rutherford, of Stockton, Joe Huberty, of San Andreas, and Ralph McGee, of San Francisco, for respondents.

PLUMMER, J. The transcript in the above-entitled cause includes the record on appeal of 19 actions consolidated for the purposes of trial. Five of these actions have been dismissed, leaving for our present consideration the appeals in 14 of said actions. For the purposes of convenience, the defendants and respondents will hereafter be referred to as defendants and respondents, without naming the particular defendant or respondent, only in cases where necessity requires.

The actions are all eminent domain proceedings, instituted by the city of Stockton to acquire certain lands and premises to be used as a reservoir site. In the year 1924, the voters of the city of Stockton, pursuant to an election had in accordance with resolutions adopted by the city of Stockton, authorized a bond issue in the sum of $1,500,000, for the purpose of constructing a flood control dam on the Calaveras river, in the county of Calaveras. The defendants in the actions referred to are the owners of several tracts of land lying easterly of the site of the dam proposed to be erected for restraining and controlling the flood waters of said stream, which would, in part, be submerged in the event of the construction of the flood control dam. The action involves the ascertainment of the value of the land proposed to be submerged, and the value of adjacent lands thereto, which would be injured or lessened in value by reason of the severance therefrom of the lands submerged.

The cause was tried before the court sitting without a jury, findings made, and the judgment entered fixing the value of the submerged lands, the lessened value caused to contiguous lands by severance, and the value of the improvements which would be injured or destroyed by the holding back of waters of the Calaveras river. The record shows that the city of Stockton proposes to erect a restraining dam of the height of about 144 feet on the Calaveras river, at the site mentioned in the proceedings; that by means of spillways and flood gates it proposes to control the flood waters of said stream during the rainy season, in such manner as to avoid the danger of periodical flooding to which the city was subjected prior to the year 1911, when a diverting canal was built to the east and north of the city of Stockton, since which time the flood waters of said stream have been thrown back upon the agricultural lands adjoining the city. By means of the proposed restraining dam the flood waters gathered by the Calaveras river would be allowed to escape from the reservoir created by the building of the dam in question, in such quantities only as would not endanger the flooding of the city of Stockton or any of the adjoining territory. Between the city of Stockton and the site of the proposed dam there are several thousand acres of land, called the "plain land," before the foothills are reached, which gradually merge into the Sierra Nevada Mountains. The ascent from the plain land just referred to, to the site of the proposed dam, is more or less gradual, so that the elevation of the foot of the proposed dam is estimated to be at about 530 feet above the level lands lying to the west of the foothills just referred to.

The dam proposed to be erected by the appellant, when completed, will have a maximum elevation of between 670 and 680 feet above sea-level, and the 674-foot contour line mentioned in the testimony is the maximum height to which the impounded waters will reach after the construction of the proposed dam. The testimony introduced on the part of the defendants in most part had reference to, and was directed to a possible dam 200 feet in height, that might, owing to the adaptability therefor of the site on which the proposed dam was to be erected, place the maximum flood contour line at an elevation of 730 feet. Expert witnesses were placed on the stand by the defendants and proceeded to testify as to the adaptability and possibility of erecting a 200-foot dam. The testimony tends to show that the watershed lying easterly of the site of the proposed dam covers some 394 square miles; that such a dam would have a reservoir capacity of 350,000 acre feet, and would afford water for irrigation purposes of from 34,000 to 50,000 acres of land lying in the foothills and plain lands of Calaveras and San Joaquin counties to the westward, to which water for irrigation and other purposes might be conducted by gravity; that such a reservoir would afford water for domestic purposes for the citizen towns of San Joaquin and adjoining counties; that the waters from the reservoir might also be used for power purposes at a point near Jenny Lind, in Calaveras county, where a drop of approximately 200 feet might be had.

The record on appeal is exceedingly voluminous, comprising 14 volumes of testimony of approximately 500 pages each. The examination of witnesses, both direct and cross, was almost interminable, and the testimony introduced can only be set out in this opinion to a limited degree and by way of illustration.

Three grounds of error are assigned by the appellant for reversal herein, to wit: (1) That the trial court misapplied the rule concerning severance damages, in action No. 3176, as that number is given the cause in the trial court, concerning lands operated by Louis Vogelgesang and Gustave D. Vogelgesang, doing business as partners. (2) That the trial court erroneously awarded damages in action No. 3161, as that number appears in the trial court, for alleged destruction of an easement over a certain road or highway claimed by Ellingwood and Vogelgesang. (3) That the findings of the trial court as to the compensation to be awarded the various defendants for the land taken, and also as severance damages, are not supported by legal evidence, and that the judgment based upon such findings is erroneous.

We will consider the assignments in the inverse order in which they are made, by reason of the fact that the major contention upon this appeal involves the testimony relative to the reservoir adaptability of the lands sought to be taken, the method of ascertaining the sums that should be paid therefor by the city of Stockton, and to what extent the damages may be claimed, whether only to the 674-foot contour line or to the 730-foot contour line, as contended for by the defendants. As there are somewhere between 40 and 60 different parcels or tracts of land involved, the question is also presented for consideration whether testimony as to reservoir possibilities or adaptability of the different tracts should be admitted as an element of ascertaining value, in view of the fact that none of the parcels of land, taken singly, would have adaptability for reservoir purposes.

[1, 2] The testimony introduced on the part of the respondents was practically all directed to the availability and adaptability of the lands for reservoir purposes, and that the special value for such purposes gave to the land sought to be condemned a market value largely in excess of that which should be given, when other purposes for which the land was adapted were considered. On the part of the appellant practically all of the witnesses based their estimate of the market value of the lands sought be to condemned upon their agricultural possibilities, to wit, their value for farming, grazing, and stock-raising. While a great deal of language has been used in different decisions having to do with the fixing of values, it is evident that the law contemplates one purpose in eminent domain proceedings, and that is that the landowner shall be compensated for the full market value of his property taken, irrespective of what the elements may be which enter into the making up of that value.

Market value, also, is a relative term. While the distinction is not clearly made in many of the cases, it requires only the application of a little common understanding for the court to appreciate that one seeking land for grazing purposes, or to use for ranging sheep would not consider the purchase of lands adaptable, for example, to the cultivation of asparagus. On the other hand, a purchaser looking for asparagus land would find no marketable value whatever in lands suitable only for grazing. No one would consider for a moment the correctness of estimating lands suitable for asparagus culture, upon the basis of use for stock-raising, or a score of other like uses to which such lands might possibly be devoted. Likewise, in determining the market value of asparagus lands, common understanding would lead one to inquire as to the price which a willing buyer would pay who wanted land suitable for asparagus culture. The market value of land suitable for asparagus culture would also be determined, to some extent, upon the number of people in the market for that character of soil. In the case at bar the testimony of the respondents' witnesses fixed the major portion of the lands to be submerged at $100 per acre. On the other hand, the values fixed by the witnesses for the appellant reached an average of about $25 per acre.

An examination of the testimony which we have read, page after page, as given by the different witnesses, exhibits clearly that the different sets of witnesses had in mind different elements in fixing values. Thus, the witnesses for the respondents accentuated the values given to the lands by reason of their natural location, for use as a reservoir for storing waters gathered from the watershed to which we have referred. Conversely, many of the witnesses for the appellant testified as to values based upon the availability of the lands for grazing and general agricultural purposes. A few only of the witnesses for the appellant possessed the engineering ability or capacity, gained either by study, observation, or experience, to take into consideration and testify to the availability of the lands for reservoir purposes, or the value of such lands adaptable for such purposes. Again, when it is said that the market value of lands is the price which a willing buyer will pay and a willing seller accept, if we leave out of consideration the purpose for which the land is peculiarly available, and the length of time ordinarily required to find a purchaser who wants lands for which the lands to be condemned are peculiarly adapted, or the length of time which it would require the landowner to find such a purchaser, we overlook an essential element of value. Thus there may be a large number of people who probably are ready to buy grazing lands on which they may herd sheep or cattle, but the number of persons having the capital, or the number of corporations or municipalities seeking lands for reservoir purposes, is, from the nature of the case, more or less limited. Thus it is readily apparent from this statement that, if the value of lands which are peculiarly adapted to a purpose that gives a much higher value, it would be taking the lands without returning just compensation, if an award is made based upon testimony of witnesses considering the minor elements only.

In this particular we speak of the major element as that which gives the highest value; minor elements, those which enter into establishing the lesser values. If the lands sought to be condemned are peculiarly valuable for reservoir purposes, we think the following is a correct statement of the law as applied to the pending actions: What the land is worth in the market for reservoir purposes, not what it is worth to the condemnor for reservoir purposes, is the major factor to be considered by the court in making its award of damages. Again, the fact that the condemnor does not propose to make the highest use of the lands is not a determining factor. If the highest use of the land to which it is adapted for reservoir purposes would be subserved by a 200-foot dam, we think such testimony admissible. As said by this court in the case of City of Stockton v. Vote, 76 Cal. App. 369, 244 P. 609: "The fact that the party seeking to condemn is not proposing to make the highest use of the condemned property is not a matter to be taken into consideration in determining values, any more than the value of the use of the property to the condemnor is likewise not to be considered. Both of such elements are inadmissible."

[3-5] Appellant makes the preliminary objection that the witnesses for the respondents were not qualified to testify as experts, or were not qualified to testify as to the market value of the lands. Their competency as hydraulic engineers, their experience in building reservoirs, their acquaintance with other reservoir sites, their experience in obtaining rights of way, easements, and lands to be used for reservoir purposes, do not appear to be seriously questioned. The argument challenges the competency of the various witnesses to testify as to the market value of the lands involved. The rule of law applicable to such witnesses is succinctly stated in the case of Reed v. Drais, 67 Cal. 491, 8 P. 20: "'Where a witness is produced to testify in the character of an expert, as to the value of property, it should appear that he has some special skill or experience, or peculiar knowledge of the value of the class of property about which it is proposed to question him, such skill or knowledge having been acquired by him in the line of his profession or business.' * * * There is no doubt that a witness acquainted with the value of property may give an opinion as to such value, but he must first be shown to possess the requisite knowledge, and then, although such knowledge is not the result of any peculiar skill in a particular pursuit or branch of business, or department of science, he may yet be heard."

Applied to this case, the two rules would govern as follows: If a witness, by reason of his skill, learning or technical training, understands the adaptability of the lands in question for a particular purpose, and the demand for land for such purpose, he may state the market value of the land, although he may be entirely unacquainted with the other elements which would be considered by different buyers competing for the same property. On the other hand, if the witness has knowledge of the market value of the lands, even though he possesses no technical skill, training or ability, he may state the market value. The different elements considered by the witnesses in giving their opinions as to market value may be inquired into upon cross-examination, and if, upon such cross-examination, it appears to the court that the witnesses' testimony is based upon improper considerations, or upon what is usually termed as speculative only, it should be stricken from the record or withdrawn from the consideration of the court or the jury. While the qualifications of the witnesses may be inquired into with considerable minuteness upon direct examination, it does not appear that testimony as to the value of lands for any special purpose may be given by the witness in dollars and cents. The witness may be questioned as to every adaptability that would give value, but his opinion must not be expressed in the general terms of so much money as the market value. For instance, it is common knowledge that many of the mining properties in the foothills of the Sierras afford considerable forage, and in outward appearance resemble ordinary range lands. A witness, by reason of his technical skill, learning, capacity and training where the question is involved, might be allowed to express his opinion as to the market value of the properties, and though his opinion as to market value took into consideration the value of the premises for mining purposes, it could not be logically argued that such testimony should be stricken from the record because other witnesses saw only a surface value as a range for sheep or cattle.

[6] We have read the direct examination of every one of the witnesses whose competency to testify is challenged, and while perhaps in one or two cases the preliminary examination is not as full and complete as it might have been, we think the objection urged by appellant on this ground is untenable. The volume of the testimony precludes setting forth any of that given by the witnesses upon direct examination. To support its contention that the motion to strike from the record the testimony given by the respondents' witnesses should have been granted, portions of the cross-examination of each witness is set forth in appellant's brief. While we have read the full cross-examination, we will confine ourselves to the excerpts found in the brief, of which we can set forth only a limited portion by way of illustration. The first illustration is from the testimony of the witness O'Shaughnessy, on cross-examination:

"Q. What do you mean when you state that these lands have a market value of a certain figure, what do you mean by the term 'market value'? A. The value they are worth to any corporation, private or public, who will proceed to develop a water system in this region.

"Q. Am I to infer from that, that that is the price you think they would be justified in paying cash for this land? A. I believe the development of projects will justify this price.

"Q. When you say 'justify,' what do you mean? A. I mean to say that if those lands, acquired at the figure I have designated and a proper designed dam is built on your proposed dam site and the waters of this stream are conserved, that the income obtained from the waters and the power combined will be a fair return on the investment. * * *

"Q. That is, you are taking the prices that were paid for other reservoirs? A. In similar localities.

"Q. And applying it to this one? A. I am.

"Q. Now, in determining the market value of these lands in 1924, didn't you consider the total cost of the entire reservoir basin? A. I made comparisons between this water project as a whole on this river and the development of the Stanislaus river south of here, development on the Tuolumne river and the development on the Merced river and made broad comparisons of the drainage areas tributary to all those rivers; the annual run-off flow of water obtained for a period of years on each watershed and the relative and economic value of dam construction on all those rivers, and I might say that I might be credited with a very broad experience in the United States and Hawaii on reservoirs and dam sites in general.

"Q. Have you made any inquiry to determine whether or not the power that might be generated here might be sold? A. I have not.

"Q. Then your opinion is based upon what has happened elsewhere, is it? A. North and south.

"Q. How many horse power, in your opinion, could be developed at this plant? A. Possibly twenty-five or thirty thousand horse power.

"Q. I presume that you contemplate that that power will be sold in the San Joaquin Valley? A. It will have to be sold in the valley.

"Q. In considering the possible sale of that energy did you consider the city of Stockton as a possible purchaser of it? A. No.

"Q. In contemplating the development of energy at this place, did you contemplate that as part of an irrigation district or part of an irrigation use? A. Just as in the Merced case, the energy developed during the irrigation season.

"Q. Do you think that the Merced district and this situation are comparable? A. They are exactly similar.

"Q. And you are comparing the situation here, I presume, as a complete scheme, are you, in comparing it with the Merced district? A. I am.

"Q. Well, in utilizing this energy as a by-product of irrigation, do you believe that you could sell all of it? A. I believe every bit of energy could be sold."

We may here state that the court, in estimating damages, fixed the value at an average of $80 per acre, although the witnesses for respondent gave their opinion of value as $100 per acre, and the witnesses for the appellant, at an average of about $25 per acre.

Upon cross-examination the witness Galloway testified as follows:

"Q. The lands we seek are in sections 5 and 8; you gave the value of the lands we seek; what was the basis of your computation in this particular case? A. For the lands that are completely submerged and below the 730-foot contour, $100 per acre; for the lands in the tract sought to be condemned above the 730 contour, $15 an acre; and the value destroyed on the whole tract outside of the portion condemned, $85 an acre.

"Q. Then your value in that particular case did include damage in your opinion to the lands that we do not seek in this case? A. Yes; that is true.

"Q. And your unit price for the lands below the 730-foot contour, which I presume you designate as reservoir lands, is $100 per acre? A. That is correct.

"Q. How did you arrive at a figure of $85 per acre damage to the lands which we do not seek and which are below the 730-foot contour? A. I arrived at it in this way: It is my general opinion that the submerged lands below the 730-foot contour are worth $100 an acre; in taking the whole site for a reservoir, certain lands that you do not take have a reservoir value destroyed; the total value is $100 an acre; if you do not take the land, but destroy the reservoir value, the only value that is left to the owner is the value of about $15 an acre; therefore, the destroyed value is $85 an acre.

"Q. Did you give any of them a higher unit price than $100 an acre? A. I did."

This witness then testified as to the value of certain gravel deposits which appears to have been disregarded by the court in its findings, and, therefore, will not be given space in this opinion. The witness was then further interrogated:

"Q. How did you arrive at the $100 per acre? A. Through a general consideration of a large number of factors; the price of lands in other regions; the price of lands in other reservoir sites of which I endeavored to keep track and what is paid for them; by general experience in dealing with matters of that sort in relation to the construction of reservoirs and the relation between the size of the reservoir, the cost of constructing the dam, the flow of the stream and the developments of various types such as irrigation and power that may be had from such a reservoir. I took into consideration all those elements and endeavored to arrive at a value of the land.

* * *

"Q. As I understand your explanation, the land which lies above the 730-foot contour is valued at $15 per acre? A. That is correct.

"Q. And the land immediately below that contour line is valued at $100 per acre? A. That is correct.

"Q. The difference is due to its reservoir adaptability? A. That is true.

"Q. Mr. Galloway, in considering the reservoir adaptability of any individual parcel of this proposed basin, I presume you assumed its junction with the other necessary parcels? A. One must have it so.

"Q. And isn't it a fact, Mr. Galloway, that your information concerning the reservoir adaptability of these lands is based upon your belief that from the engineering standpoint, a project at this place is feasible? A. Certainly, I think it entirely feasible."

The witness Ellis, on cross-examination, testified:

"Q. When you stated you had two unit prices, what were those unit prices on which you based your values? A. I used for reservoir lands, or lands to be submerged, $100 an acre, and for lands which were above the 730-foot contour line, $20 an acre.

"Q. How did you arrive at the figure as to the market value of this land in 1924? A. That was my estimate as to what it was worth as a site for a dam.

"Q. As to what it was worth to whom? A. To any one building a dam.

"Q. How did you arrive at that particular unit price? A. That is simply my judgment; I have no mathematical formula; that is a price that I would recommend a client to pay for a dam site of that character."

This witness testified that the particular land on which the dam was to be located was of the value of $250 an acre.

"Q. How long would it take to obtain a purchaser at your figure? A. I could not say; I conceive that land as being acquired and sold as a part of a reservoir. My reasoning was this: Any one developing that reservoir would naturally want that dam site; that a reservoir project of that character and with its very salient features of economy for reservoir development would have a strong appeal in the modern trend up and down the mountains which flank the valley, with a reasonable time I think the dam site and reservoir lands and all those would be sold at a figure I put on them.

"Q. Now, your value of $100 an acre, how did you arrive at that figure? A. My value of $100 an acre was influenced by several factors. I first felt that this land had a very high reservoir value, higher even than comparable lands in many other instances, due to the fact that with the 200-foot dam there can be impounded 350,000 acre feet, which is something rather rare; that means that your cost per acre foot of storage would be very much less, far away less, than ordinarily encountered, without going into any figures as to the cost. The mere fact that a 200-foot dam would have impounded 350,000 acre feet indicated a high reservoir value. In other words, a person could afford to purchase that land and erect a dam and develop very cheap storage for three purposes, for irrigation, power, and domestic supply. Again I had some knowledge of reservoir lands that had been acquired. I had in mind prices that were paid for lands by the city of San Francisco for lands lying adjacent—particularly adjacent to the Hetch-Hetchy reservoir, for which the price, as I recall it, was something in the neighborhood of $115 an acre."

This witness then gave a rather extended statement of elements entering into the value of reservoir properties, and his experience therewith, and his opinion that, if the properties were not clouded by this proceeding, purchasers therefor could be had at the values estimated by the witness. The witness Polk testified along similar lines upon cross-examination, and also to the further fact that he made no inquiry of sales of land for agricultural purposes, and then answered questions as follows:

"Q. The buyer you have in mind must necessarily have been one who at the time would have been buying it for the purpose of using it in the development of this reservoir scheme that you have testified to? A. Yes, sir.

"Q. When you speak of your experience, you refer to results, primarily, in other districts where water projects have actually been developed? A. Partly; yes.

"Q. Contemplating those matters, and looking forward to the time when the project would be developed, you arrived at the figure you gave for the market value of the land? A. Yes.

"Q. It is always as a reservoir and water storage proposition that you are dealing with, the value that you are giving here? A. Yes, sir.

"Q. And in arriving at your value, of course you necessarily assume that the lands would be united? A. Certainly."

The witness Pache, after testifying as to his experience with the South San Joaquin and Oakdale irrigation districts, answered questions as follows:

"Q. And you believe there is a comparable project here in this vicinity? A. All things considered, I do.

"Q. And that is one of the bases upon which you form your opinion as to the value of the lands in the Calaveras river basin? A. Yes, sir.

"Q. In January and February, 1925, you were procuring options on property in this basin for the irrigation districts, were you not? A. Yes, sir.

"Q. And the land was being purchased, as I understand, exclusively for reservoir purposes? A. Exclusively for the districts.

"Q. Now, in these lands that you designate as reservoir lands and value them at $100 per acre, will you explain to the court by what process you arrive at that valuation of $100 per acre? A. By observation; my own experience in buying lands of similar character for reservoir purposes.

"Q. And in fixing that value, do you take into consideration the possible yield which may be produced by the use of that land for reservoir purposes? A. No, sir.

"Q. And the only reason you fixed the price at $100 per acre is because of the comparison of this situation with your experience in buying reservoir lands for the two irrigation districts on the Stanislaus river? A. And my general observation of the beneficent results, creation of reservoirs, the water thereof to be used for various purposes.

"Q. Now, on that land which is available for reservoir purposes what, in your opinion, is added to the value of this reservoir available lands by reason of the fact that there are improvements located thereon? A. In my opinion, the value of the land if utilized for reservoir purposes, the market value of that land, as between a willing buyer and a willing seller, for reservoir purposes, is $100 per acre, and the improvements thereon shall be paid in addition to that $100."

[7] The foregoing excerpts illustrate the general trend of the testimony elicited from the defendants' witnesses upon cross-examination, save and except as to the few witnesses on the part of the defendant who testified only as to lands not lying below the 730-foot contour line, and constitute the basis of the appellant's motion to strike from the record the opinions of the witnesses as to market values testified to upon direct examination. In 10 Cal. Juris. p. 1020, it is said: "Where a witness testifying as to value, bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are chief elements in the calculations which lead to his conclusions, his testimony should be rejected. This applies with great force where the opinion is based upon pure speculation. Thus, in a proceeding to condemn land for reservoir site, estimates of value based upon speculative matters, increases of population, extension of water system, and the profits which would result from the distribution and sale of the water, are not admissible."

The objectionable basis, if it exists, is made to appear in some of the answers given by the witnesses upon cross-examination. However, in these answers we do not find anything which indicates that the opinion of any one of the witnesses is founded upon mere speculation; they all speak from experience, as to the adaptability of the premises for reservoir purposes. It is true they all speak of lands taken as a whole, and not as to individual parcels. This goes only to the weight of the testimony, if the testimony value of the different parcels for reservoir purposes is to be considered in union with other lands. There is nothing in any of the answers which takes into consideration increases of population or extension of water systems. No witness attempted in this case to figure out the profits of the enterprise, but several of the witnesses, upon cross-examination, stated that they thought an intending purchaser would be justified in paying $100 an acre for the land, for the purposes for which it was best adapted. One or two of the witnesses testified that there was a growing inquiry for reservoir sites, and that he thought the lands could be sold for the figures named, within a reasonable time.

The words "reasonable time," we think, bear the proper interpretation of the time required to reasonably launch or dispose of projects to which the witness was referring, and not merely the days or weeks that might be required to sell the land for grazing purposes. The appellant, in this particular, quotes from the case of San Diego Land Co. v. Neale, 88 Cal. 56, 25 P. 978, 11 L. R. A. 606, as follows: "Market value is to be the measure of damages, and evidence of value for a special purpose is only to be considered as an element of the question. Neither the value in use to the plaintiff nor to the owner is to govern."

This quotation is correct so far as it goes, but it is evident that, if the owner is making only a minor use of the premises, he cannot be deprived of its value for a major use, if that major use gives it a higher market value, irrespective of whether the owner does or does not utilize the property for the purposes which give it its major value. If the quotation means that, because an owner uses premises only for grazing sheep, he is not to be deprived of the market value of the premises given to it for some other special use, to which it is peculiarly and highly adaptable, then the quotation is correct. In other words, neither the use nor the nonuse by the owner determines value.

What we are here stating is more clearly set forth in the case of Spring Valley Water-Works v. Drinkhouse, 92 Cal. 531, 28 P. 684: "It may be adapted for a reservoir site, but its value for such a purpose would be qualified by the prospect, greater or less, of anyone seeking to build such a reservoir. Its market value is affected by such contingency, but is not to be determined by the fact that the party seeking to condemn it has already determined to build a reservoir. To allow that element to enter into the computation would be to make the plaintiff's necessity the owner's opportunity." That is another way of saying that the value of the land for the purposes for which it is best adapted depends upon the prospect, greater or less, of any one seeking to procure such land for the purpose for which it is best adapted. We think it may also be properly stated that because there are fewer purchasers looking for reservoir sites than for agricultural or grazing lands does not preclude the court from taking into consideration the major availability of the lands, when determining their market value.

In City of Oakland v. Parker, 70 Cal. App. 295, 233 P. 68, and in 10 Cal. Juris., page 338, it is said: "In proceedings for the condemnation of land, the present market value thereof taken is the measure of damages. The phrase 'market value' is synonymous with actual value. In determining market value, the test is not value for a special purpose, but fair value in view of all the purposes to which the property is naturally adapted. Market value is the highest value in terms of money which the land will bring if exposed for sale in the open market, with a reasonable time to find a purchaser, buying with full knowledge of all the uses and purposes to which it is adapted, and for which it is capable of being used." The term "reasonable time" must be interpreted in the light of all the circumstances affecting the sale of the land and the efforts required to make sale of like property. Santa Ana v. Harlin, 99 Cal. 542, 34 P. 224.

[8] A reasonable time within which to find a purchaser looking for a particular quality or kind of land adaptable to a particular purpose is not, and cannot be, held a proper definition or limitation of time when applied to purchasers seeking land for an entirely different purpose. As we have said, the reasonable time and open market, as applied to the sale and purchase of grazing lands, is entirely different from the reasonable time and price to be applied where one is seeking lands suitable for raising asparagus, sugar beets or other like products having great value. In other words, because a purchaser looking for land for only a minor or less valuable purpose may be more quickly found than one seeking lands having a more valuable adaptability we think cannot be taken as the reasonable time and proper limitation when applied to the latter purchaser. We think "reasonable time" must be construed in connection with all the conditions and circumstances affecting the market value and the extent of the demand for the property involved, possessing the adaptability shown to exist. In the principal case of San Diego Land Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L. R. A. 604, heretofore cited, we find the following statements:

"The question was, not what the property was worth to a person intending to acquire it and the dam site and the remainder of the reservoir by purchase or condemnation for the purpose of supplying water over the territory tributary to the system, but what was the market value of the property itself. In other words, what the defendants could have obtained for their land if it had been offered for sale in the market, a reasonable time being given within which to make the sale. * * *

So far as the value of the land in controversy may have been increased to purchasers generally by the construction and use of the plaintiff's dam and reservoir, or as a part of the entire reservoir site, such fact should be considered, but the value of the land when used in connection with the plaintiff's land cannot be taken as a criterion, for this would be taking the value to the plaintiff as the measure of compensation. The jury had a right to consider the fact, in determining the market value, that the land in controversy was in proximity to a dam site, and to consider its adaptability for reservoir purposes, and to determine whether or not its market value had been enhanced by improvements put upon adjoining property; but for the reason stated its adaptability for reservoir purposes should not have been considered 'in connection with such dam site and other adjacent lands.' * * * It is sufficient to say that any facts showing the nature of the land in controversy, and its adaptability for reservoir purposes, may be shown. The area of the watershed and amount of water were matters proper to be considered; for a reservoir would be useless without water. That there was land irrigable from the reservoir, and cities and towns which were being supplied with water from wells," would likewise tend not only "to show that it was a practicable reservoir site, but bearing directly upon its value. The condition of the property, the uses to which it may be put, having regard to the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future, are all matters for consideration in estimating the value of the lands." Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

The reference in the foregoing quotation to the "dam site and adjacent lands" is understandable, when read in connection with the instructions of the trial court, which, in effect, told the jury that the probable profits of the uses to which such property was being put might be considered in fixing the value of defendants' land.

[9] Before considering other authorities bearing upon the character of testimony that may be introduced in eminent domain proceedings seeking land for reservoir purposes, we will review the cases cited by the appellant in support of its contention that such testimony is wholly inadmissible in this case by reason of the fact that the land is owned in different parcels by a number of persons, the contention being that where a union of the lands can only be accomplished by the intervention of eminent domain proceedings, the owners of the land are not entitled to share in any enhancement of their property by virtue of the expected exercise of that power. The principal cases where this subject has been considered are those involving the Ashokan and Medina valley reservoirs.

In applying the rule stated in the cases about to be referred to, it is necessary to keep in mind the distinction between instances where the very nature of the case precludes a possibility of a union of the lands without the exercise of eminent domain—that is, where there appear obstacles which would reasonably be insuperable without the exercise of such power—and instances where such apparently insuperable obstacles do not appear, and nothing is set forth in the record indicating that any attempt has been made to unite the lands, other than by eminent domain proceedings. In other words, if the fact of the practical impossibility of uniting the lands does not appear from the very circumstances surrounding the case, the appellant cannot exclude the testimony as to the adaptability of the lands for reservoir purposes simply by instituting eminent domain proceedings. A careful consideration of the cases cited, we think, shows that the broad application of the rule as contended for by the appellant is unsupported.

In Medina Valley Irrigation Co. v. Seekatz, 237 F. 805, the Circuit Court of Appeals of the Fifth Circuit, in passing upon this question, holds as follows: "It is not suggested that the defendant's land, standing by itself, was eligible as a water storage reservoir site. The fact that it was so situated as to be available for a union with other lands to make up a reservoir site may have had effect in adding to the amount obtainable for it by the owner from someone desiring to buy it. It was open to the defendant to prove the market value of his land, by whatever circumstances or influences that value may have been affected. But in the circumstances of the case the questions mentioned were calculated to elicit, and did elicit, estimates of value based, not upon a knowledge of what the land, as the defendant owned it was worth, but upon opinions as to what it was or would be worth as a part of a reservoir site, whether the union of all the lands required for that purpose could or could not be brought about without an exercise of the power of eminent domain. The admission in evidence of such estimates of value involved the hypothesis that the defendant was entitled to the value which was added to his land by the condemnation of it, together with other lands, in behalf of another. Such estimates were based upon a consideration of contingencies which were too remote and speculative to have any legitimate effect upon the valuation of the land as it was owned by the defendant, and the admission of evidence of them involved the unwarranted assumption that the defendant was entitled to share in an exhancement of value resulting from an exercise of the power of eminent domain."

The question which called for this ruling is in these words: "Q. Assuming that below plaintiff's lower or diversion dam there is approximately 100,000 acres of land that could be put under irrigation by proper canals and ditches; that plaintiff's reservoir for impounding water contained 6,790 acres; that defendant's land sought in this case to be condemned forms part of said reservoir; that the water supplied by said reservoir was sufficient to annually irrigate over 100,000 acres of land; that 58 acres of defendant's land was in actual cultivation; 192 acres was susceptible of cultivation, and the remaining, grazing land. What, in your opinion, is the value of the entire tract of land sought in this case to be condemned?" This question was asked as a part of defendant's testimony in chief, fixing the valuation of the lands sought to be condemned. The question shows clearly that the court was ruling upon a question which comprehended a completed project and the valuation of the defendant's property as a part of the completed project after it had been united with other lands and subjected to the purposes for which the condemnation proceedings were being had.

The language of the court, however, when scrutinized, does not indicate that the court intended to exclude testimony as to the adaptability of lands for reservoir purposes in condemnation proceedings. It only, in fact, holds that the value, added to the land in use by the condemnation proceedings, was not to be considered. There is nothing in the ruling of the court which excludes testimony as to any element which added value to the land as it stood irrespective of the action then being tried.

In the principal case of City of New York v. Sage, 239 U. S. 57, 36 S. Ct. 25, 60 L. Ed. 143, the Supreme Court of the United States holds: "The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The city is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give."

The recital of facts preceding the opinion from which we have just quoted shows that city lots were involved and that there were several hundred parcels of land necessary to be taken by the city of New York for the purposes of creating a reservoir. The facts appearing in this case are more fully disclosed in the opinion of the courts below, but the different recitals establish clearly, and we think warranted the court holding, as a matter of law, that there was no practicable means of uniting the lands other than by eminent domain proceedings. Even with that in view the Supreme Court of the United States does not by its ruling exclude or remove from consideration testimony as to the adaptability of the land for any purpose. In fact, only excludes, as in the Medina Case, the consideration of the enhanced value which the land might be given by reason of its union with other lands by condemnation proceedings. It is apparent, of course, that a city lot which must be joined to hundreds of other parcels (we think the record shows between 900 and 1,000), as a matter of fact precludes a possibility of any value being added thereto by reason of its so-called reservoir adaptabilities when standing alone.

In the case of McGovern v. City of New York, 229 U. S. 363, 33 S. Ct. 876, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391, the question was again before the United States Supreme Court, and here again the court did not exclude testimony as to adaptability of lands for reservoir purposes. The court, in fact, only held that (quoting from the syllabus): "An award to the owner of one of many parcels of land taken by eminent domain for a site for a reservoir for a municipal water supply cannot be said to deny due process of law, where made without prejudice, in due form, and after full hearing, because the commissioners and courts refuse to take into consideration the value of the land as part of a natural reservoir site." In so holding the court further used the following language: "The plaintiff in error relies upon cases like Mississippi & River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, to sustain his position that while the valuation cannot be increased by the fact that his land has been taken for a water supply, still it can be by the fact that the land is valuable for that purpose. The difficulties in the way of such evidence and the wide discretion allowed to the trial court are well brought out in Sargent v. Merrimac, 196 Mass. 171, 11

L. R. A. (N. S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970. Much depends on the circumstances of the particular case. We are satisfied on all the authorities that whether we should have agreed or disagreed with the commissioners, if we had been valuing the land, there was no such disregard of plain rights by the courts of New York as to warrant our treating their decision, made without prejudice, in due form, and after full hearing, as a denial by the state of due process of law."

[10, 11] In United States v. Chandler-Dunbar W. P. Co. et al., 229 U. S. 53, 33 S. Ct. 667, 57 L. Ed. 1063, where an allowance had been made of $15,000 as strategic value, the court held: "The 'strategic value,' for which $15,000 has been allowed is altogether speculative. It is based not upon the actual market value for all reasonable uses and demands, but the possible worth of the property to the government. A 'strategic value' might be realized by a price fixed by the necessities of one person buying from another, free to sell or refuse as the price suited. But in a condemnation proceeding, the value of the property to the government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes"—citing a number of cases.

While the natural location of the lands involved in this proceeding has been very fully disclosed, and its adaptability for all purposes that would give it value testified to by different witnesses, there is nothing in the record which indicates that the defendants are taking advantage of any strategic value or profiting by the necessities of the city of Stockton. It is not an instance of where a city is seeking the only available water supply, nor does the record show that the city of Stockton could not be protected from flood waters by other available means, as by building a wide and straight channel conveying the same directly to the sea. It is common knowledge that unused reservoir sites available for development are becoming fewer and fewer in number in the state of California. It is likewise common knowledge that great progress has been made in the acquiring and developing of reservoirs for the purpose of storing and conserving for irrigation and power purposes the flood waters that come down from the western slope and foothills of the Sierra Nevada Mountains, and whether the defendants, through good fortune or good judgment, became possessed of lands valuable and adaptable for reservoir purposes, the cases which we have cited, and relied upon by the appellant, to exclude testimony in relation thereto, we construe as holding exactly contrary when applied to the circumstances here presented. There is nothing in the record indicating that any attempt whatever has been made to unite the lands in one parcel without resort to eminent domain proceedings. To hold that testimony as to the adaptability of the lands for reservoir purposes inadmissible under the circumstances would be to hold that a plaintiff, by simply instituting eminent domain proceedings, can thereby render such testimony incompetent and exclude it from consideration by either court or jury.

In the case of Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, heretofore referred to, the Supreme Court of the United States, speaking through Justice Field, holds such testimony admissible. The property to be taken was available and adaptable for boom purposes, not as it stood alone, but as a part of the boom about to be created. In speaking of this phase of the controversy the court there said: "The position of the three islands in the Mississippi, fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river, as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." This case has been frequently cited, and we think admits the testimony as to the adaptability of lands for reservoir purposes in all cases where nothing further appears than the simple fact of the institution of eminent domain proceedings.

In City of Stockton v. Vote, 76 Cal. App. 369, 244 P. 609, supra, this court quoted from the opinion of Gearhart v. Clear Spring Water Co., 202 Pa. 292, 51 A. 891, to this effect: "The location alone fixed the value. Whether the land was available for the use testified to was a question of fact, and the argument directed to the court against the admission of the testimony should have had great weight with the jury in determining the value. The question was submitted with instructions that if the land, by itself, could not be used for building a reservoir, an estimate of its value for that use in connection with other properties which the plaintiff did not own, and could not acquire, should be disregarded by the jury." This court then said: "If it should appear in the case at bar that there are other lands which the defendant does not own and cannot acquire, then and in that case, which is a fact for the jury to pass upon, the value of the land for reservoir purposes should be eliminated."

In Brack et al. v. Mayor & City Council of Baltimore, 125 Md. 378, 93 A. 994, Ann. Cas. 1916E, 880, where it was sought to condemn land for storage purposes to supply a city with water, it was alleged that plaintiff's land, through which the strip was condemned, was specially adapted for reservoir purposes. The trial court excluded evidence of the special adaptability of the land for such uses, on the ground that the owner had no right to impound waters flowing through his land, etc., without the consent of the city as a lower riparian proprietor, and, therefore, there was no actual increase in the value of the land by reason of its abstract availability. This ruling was reversed, and the Supreme Court of Maryland stated that "in the absence of affirmative showing in the record that the use of the land for reservoir purposes would necessarily involve an invasion of the riparian rights of the city, and the offer of proof being decisive to show that the land had an independent availability for reservoir purposes, evidence as to its value for such use was improperly excluded." While the court uses the expression "independent availability," a reading of the case shows that the eminent domain proceedings were instituted for the purpose of using the lands in connection with other lands and water rights belonging to the city.

In Spring Valley Water-Works Co. v. Drinkhouse, 92 Cal. 528, 28 P. 681, reversed for other reasons, the court, nevertheless, set forth the rule which we think supported by reason and authority when defendant's land is only part of a reservoir site. It is there said (quoting from the syllabus): "In an action to condemn land for a reservoir site, where the land sought to be condemned, by reason of its situation and because it is part of a basin adapted for reservoir purposes, would be regarded as more valuable by purchasers generally than if it did not possess such advantages of location and adaptability for use as a reservoir, the plaintiff should be permitted to show, by the testimony of competent witnesses, the value of the land for reservoir purposes." The word "plaintiff" should read "defendants," as applied to the case at bar.

In the case of San Diego Land Co. v. Neale, supra, the lands under consideration were only a part of a larger reservoir site. To think the authorities above considered support the opinion of this court in City of Stockton v. Vote, supra, to the effect that unless the testimony shows the impracticability or the insuperability of uniting several parcels of land by reason of the very nature of the situation, the practicability of uniting the lands in one parcel for reservoir purposes is a question of fact to be determined and considered by the trial court in awarding damages, taking into consideration all the purposes for which the lands may be adaptable or which may give them value. We find nothing in the record in this case showing either insuperability or impracticability. So far as the record discloses, no attempt was made in this case to unite the lands in one parcel by other than condemnation proceedings, and the mere fact that there may be highways running through the proposed reservoir site does not, in our opinion, create either an impracticability or an insuperability which may be declared such as a matter of law.

We hold, therefore, that in this case testimony as to the adaptability of the several parcels of land for reservoir purposes was admissible. The question then recurs: Did the court err in refusing to grant the appellant's motion to strike out the opinions of defendants' witnesses as to the market value of the respective parcels of land, the motion being based upon the testimony elicited upon cross-examination, illustration of which we have set forth? That some portions of the testimony elicited upon cross-examination might have been stricken out if a motion had been made for that purpose, may be admitted without further elaboration, but in view of the comprehensive motion made in each instance, a comprehensive consideration of the testimony becomes necessary, and if, upon the whole, the motion should be denied, the appellant has no grounds for complaint.

[12] In determining values in actions of this kind where, for certain purposes, the lands are extremely valuable, and for other and different purposes, of little or no value, courts are always confronted with many difficulties, the chief of which is sometimes the apparent fact that there is no market value, in the strict sense of the word, but this does not entitle the plaintiff to take the lands without paying just compensation. In the case of Portneuf-Marsh Valley Irrigation Co. v. Portneuf Irrigating Co., 19 Idaho, 483, 114 P. 19, this difficulty is aptly stated: "It is often difficult to determine the market value of property, for the reason that there may be no general demand for the same, or it may be that the property is only valuable for a specified purpose, as was the case here, and the value can only be estimated upon the basis of the fitness of the property for the specific use on account of its formation, its location, or other specific, natural or artificial adaptability to the use for which it is sought. In a case, therefore, where no general market value can be ascertained, these latter elements must be taken into consideration and are proper subjects of inquiry, in arriving at the value of the property. 'Generally speaking,' said the Supreme Court of Iowa, in Ranck v. Cedar Rapids, 134 Ia. 563, 111 N. W. 1027, 'the true rule seems to be to permit the proof of all the varied elements of value; that is, all the facts which the owner would properly and naturally press upon the attention of a buyer to whom he is negotiating a sale, and all other facts which would naturally influence a person of ordinary prudence desiring to purchase.'" See, also, North American Telegraph Co. v. Northern Pac. R. Co. (C. C. A.) 254 F. 417.

In Marin Water & Power Co. v. R. Commission of California, 171 Cal. 706, 154 P. 864, Ann. Cas. 1917C, 114, the court, after considering the admissibility of testimony before the commission, which set forth the quantity of rainfall per annum, the amount of water that could be stored, and practically all of the elements going to make up reservoir values, or the value of lands adaptable for such purposes by reason of a topographical location and quantity of rainfall and extent of watershed, concluded its opinion as follows: "If the undisputed evidence had shown that the property had a special additional value, as, for example, that by reason of the situation and topography of a parcel of the land a quantity of water could be annually caught, stored thereon, and sold at a profit, and that the commission had refused to allow such value, as a part of the compensation fixed, it may be conceded that this would have been a deprivation of property without due process of law, and disregard of the petitioner's right to just compensation, and, therefore, a violation of both the federal and state Constitutions"—citing a number of authorities.

The court then found that the commission did not refuse to allow compensation for such added value. If the exclusion of such testimony from consideration by the Railroad Commission would work a deprivation of property without due process of law, and, therefore, violative of the federal and state Constitutions, how can it be said that testimony brought out by cross-examination in the case at bar, as to all of the physical capacities and adaptabilities of the land sought to be condemned, and even their value therefor, on such examination, furnishes any basis for striking out the witnesses' opinion, given upon direct examination, as to the general market values. It would be no less a deprivation of property rights by the courts than by the Railroad Commission, if such testimony were excluded, or furnished the basis for the exclusion of the answers of the witnesses to the general questions.

In the case of Tracy v. City of Mount Pleasant, 165 Iowa, 435, 146 N. W. 78, where the court had under consideration eminent domain proceedings to condemn land which constituted a part of a reservoir site, we find the following (citing Russell v. R. Co., 33 Minn. 213, 22 N. W. 380): "If, therefore, the land sought to be condemned in this action, by reason of its situation, and because it is part of a basin adapted for reservoir purposes, would be regarded as more valuable by purchasers generally than if it did not possess such advantage of location and adaptability for use as a reservoir, the defendant should be permitted to show its value with reference to such facts by the testimony of competent witnesses." And then in that case, as here, with reference to the cross-examination of witnesses who had testified as to the market value, and the cross-examination elicited much testimony as to the peculiar special values by reason of adaptability and expressed itself in these words: "Undoubtedly inquiry would be proper on cross-examination as to what purpose a witness thought the property available for and his notion of its market value for such purpose. If so, it would not seem that error might be predicated on permitting this to be drawn out on direct examination." The last sentence of this quotation is inapplicable to the present case, by reason of the fact that all of the testimony to which we are referring was brought out upon cross-examination.

In Southern Pacific R. Co. v. S. F. Savings Union, 146 Cal. 290, 79 P. 961, 70 L. R. A. 221, 106 Am. St. Rep. 36, 2 Ann. Cas. 962, the court in passing upon a motion to strike out direct testimony, based upon what the witness stated upon cross-examination, ruled as follows: Appellant "insists that the trial court" heretofore "granted its motion to strike out the testimony of the witness Rusk, called on behalf of defendant, as to the market value of the property in question, on the ground that it appeared from his cross-examination that his testimony in that respect was merely conjectural and speculative. We do not think so. The witness fully qualified himself on direct examination to give an opinion on the subject. On cross-examination he testified as to the matters which would influence him from the standpoint of a contemplating buyer in determining the market value of land in an oil-bearing territory; the number of wells which could be economically placed on the amount of land taken and ordinary losses therefrom; and the general relation of outlay to income. On cross-examination he entered into no details, nor gave any estimates. These were matters which, it appears to us, would naturally be taken into calculation in forming a public and general estimate of the value of land of this character, and which would influence the minds of sellers and buyers with relation to it, and to which the witness could properly testify." It was there said that, because the witness did testify as to some matters on cross-examination which were speculative in character, would not have justified the striking out of his testimony, although such particular matters might have been eliminated upon proper motion. Just as in the case at bar, some of the answers elicited upon cross-examination may be admitted to be more or less speculative, but cannot be taken advantage of now.

In the case of Brack v. Mayor & City Council of Baltimore, supra, in addition to what we have said as established by that case, we find it authority in support of the testimony introduced in the case at bar. We quote the following: "If we were to preclude the inquiry which the defendant proposes on that subject [availability of the land for reservoir purposes], we could not be certain, as the case is now presented, that his rights were receiving the full measure of recognition to which they may be justly entitled. In our opinion, the defendant should have the opportunity if he desires to prove, if he can, that the property being condemned has an independent value and marketability as a reservoir site." As heretofore stated, the rule seems to be that upon direct examination the value for a specific purpose may not be stated, but in this case holding such testimony admissible upon direct examination is certainly good authority for holding that such testimony is proper when elicited upon cross-examination, and if proper testimony to be considered, it furnishes no basis for striking out testimony given upon direct examination which conforms to the accepted rule in California.

A considerable portion of the testimony upon cross-examination was directed to what a purchaser would be willing to pay for the property, who was seeking it for a particular purpose, or for the particular purpose in the minds of the witnesses which makes the decision in the case of Ely v. Conan, 91 Minn. 127, 97 N. W. 737, pertinent, to wit: "Any evidence is competent and any fact proper to be considered, which legitimately bears upon the market value of the property"—citing cases. "That by market value of property is meant what purchasers generally would pay for it; not what men would pay who had no particular object in view in purchasing, and no definite plan as to the use to which to put it. The owner has a right to its value for the use for which it would bring the most in the market." That is, in substance, what the witnesses were testifying to upon cross-examination, that it would bring the most in the market for purchasers who had in view its chief adaptability.

In Portland & S. Ry. Co. v. Skamania Boom Co., 59 Wash. 191, 109 P. 814, the Supreme Court of Washington held that a witness having knowledge of one purpose or adaptability for which the land was valuable might testify as to such value. There it was contended on the part of one of the parties that it was chiefly valuable for agricultural purposes. On the part of the other party, that it was chiefly valuable for boom purposes. The court solved the question in this manner: "If the jury should find that the land is chiefly valuable for booming purposes, they would of course disregard testimony tending to show its value for agricultural purposes, and if they found it chiefly valuable for agricultural purposes, they would disregard the testimony tending to show its value for booming purposes. The witnesses were therefore competent to give testimony on a material issue in the case, and the objection to their competency was properly overruled."

In Gearhart v. Clear Springs W. Co., 202 Pa. 392, 51 A. 891, where the location of the land fixed its value, peculiarly for use as an ice pond, expert witnesses were permitted to state their opinions of the market value of the land, based upon such uses.

In Idaho Farm Dev Co. v. Brackett, 36 Idaho, 748, 213 P. 696, the Supreme Court of Idaho reviewed the different questions here involved, citing many authorities in relation to the rule followed in different jurisdictions, and a number of cases holding that it is permissible to show the market value, and that while the land may be shown to be valuable for a specific purpose, the money value of the specific purpose may not be shown upon direct examination; and comes to this conclusion: "We conclude that, if the land sought to be condemned is shown to have a special value for a specific purpose, the landowner may show whether it has a market value for that purpose, and, if so, what it is." The cause was reversed for other reasons, and testimony as to the market value of other reservoir sites held inadmissible. In the Idaho case the court approves the rule admitting such testimony upon direct examination. By much stronger force would it be an authority in support of the statement that the admission of such testimony upon cross-examination is insufficient upon which to base a motion to strike out an estimate of value given upon direct examination.

The record shows that the trial court did not award damages in any case equal to the opinion given by any of the expert witnesses, either upon direct examination or upon cross-examination. The cross-examination elicited from the expert witnesses a statement from every one of them that the market value of the lands for reservoir purposes was $100 per acre. The award made by the court was in the sum of about $80 per acre. Thus the ruling of the court in denying the appellant's motion cannot be held prejudicial, because it left in the record a great volume of testimony, elicited by the appellant, amply sufficient to support the award in each case. In other words, the cross-examination brought out the possibilities considered by the Supreme Court of Massachusetts in the case of Moulton v. Newburyport Water Co., 137 Mass. 163. It is there said:

"The petitioners were not entitled to swell the damages beyond the actual fair market value of the land at the time, by any consideration of the chance or probability that, in the future, authority might be acquired, by legislation or purchase, to carry the water in pipes to neighboring towns. Such chance or probability must needs enter to some extent into the market value itself; and, so far as the market value might be enhanced thereby, the petitioners were entitled to the full benefit of it. If there were different customers who were ready to give more for the land on account of this chance, or if there were any other circumstances affecting the price which it would bring upon a fair sale in the market, these elements would necessarily be considered by the jury, or by a witness, in forming an opinion of the market value. Nevertheless, the value for these special and possible purposes is not the test, but the fair market value of the land in view of all the purposes to which it was naturally adapted"—citing cases.

The court had thus placed before it all of the special and possible purposes for which the lands were adapted, and which would necessarily be considered by any one inquiring into the possibilities of the land or the elements which would tend to give it an increased market value, and the purposes for which it was chiefly valuable, by reason of such peculiar adaptability.

[13] While the record contains only general testimony as to the demand for reservoir sites, and no specific testimony indicating a present demand for the particular reservoir site in question, the record does show what we think the court may take knowledge of—the fact that water development in the state is causing an increased inquiry for available reservoir sites, and that the number of undeveloped reservoir sites are becoming fewer. This is due to the fact that nature, and not man, has marked out the course of the mountain streams and fixed the available reservoir sites thereon. It is common knowledge that the reservoir sites along the Merced, the Stanislaus, and the Tuolumne rivers, occupying the same general territorial vicinity, are being rapidly developed and utilized, and that irrigation districts and power companies are looking more and more to the mountains where there is available area to collect the winter rains as sources of water supply.

Appellant stresses the ruling in the case of Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979, as conclusive in favor of its contention that the refusal of the trial court to strike out the testimony of the expert witnesses on the subject of market value constitutes good ground for reversal. An excerpt from the testimony of the witness McWilliams, referred to in the opinion in the Heilbron Case, is set out in appellant's brief. The salient features of the objectionable testimony are found in the following questions and answers:

"Q. Now, you say you stated to Mr. Seymour, in your judgment this land would sell, February 14th, in the market, for six or seven hundred dollars, and afterwards, between seven and eight hundred dollars. What do you mean? A. $700.

"Q. Why? A. I said—

"Q. Between six and seven hundred, and afterwards you said between seven and eight hundred? A. I said, for the purpose that I might use it myself; yes.

"Q. You mean to say that if a man wanted it to do a nursery business, he might be willing to pay that much? A. I believe he would if he knew the quality of the soil and resources.

"Q. Suppose there was no man that wanted to go in the nursery business who wanted to buy it, what would it be worth? A. For growing hay, I don't think it would be worth as much.

"Q. You base your opinion of it, as worth that much, upon the fact that a man who wanted it would buy it for flowers—nursery stock business? A. For the purpose that I have already stated, yes.

"Q. (By the Court): Is that the basis of your valuation, Mr. McWilliams, or is the basis of your valuation founded upon the fact that you know what the land will do, and therefore, you are of the opinion that it would sell on the market for the price you have named? A. Founded on the facts which I have already told you it would produce.

"Q. You don't know of any sales down there, do you? You are not basing this opinion on any sales of property like the Heilbron property? A. No, sir, not any sales, any sales that I know of that have been made.

"Q. You are basing your opinion of the market value entirely upon the fact that you think it would sell for that much for that particular purpose, if a man wanted to use it? A. Yes, sir."

In dealing with this testimony, the Supreme Court, in its opinion, indicates that there was testimony lacking which is not completely wanting in the case at bar. The court, in the Heilbron Case, said: "McWilliams' evidence as to the price which he thought would be paid for the land by one desiring it for nursery purposes was not admissible. It was not even contended that McWilliams qualified himself to testify as to the market value, and his testimony amounted to no more than that the land was suitable for nursery purposes, and that for such purposes a purchaser could be found who would pay so much per acre. Here is an excellent view of the domain of speculation which is open by the introduction of testimony such as this." The ruling of the trial court striking out the testimony of the witness was upheld.

If nothing more appeared in the record in the case at bar than two or three answers given by the witness O'Shaughnessy, in the beginning of the excerpt of his testimony which we have set forth, under the Heilbron Case we would be under the necessity of holding the refusal of the trial court to strike out his testimony erroneous, but whether of such prejudicial nature as to necessitate reversal, in view of section 4½ of article 6 of the Constitution, is another matter. The cross-examination of the witness O'Shaughnessy discloses that after having laid an apparent foundation, based upon the Heilbron Case, for a motion to strike out his testimony, all the facts and circumstances which the court, sitting without a jury, might properly consider and weigh in determining whether the availability of the lands and premises sought to be condemned for reservoir purposes were so available for that purpose as to increase their market value over and above that which ordinary grazing lands or similar agricultural lands lying just outside of the contour lines of the reservoir basin might have. With these facts all laid before the court, we cannot very well come to the conclusion that the trial court in making its award was prejudicially influenced.

We do not need to go into a discussion of the weight or value of opinion evidence, further than to state, in the language of the Supreme Court of Minnesota, in the case of City of Ely v. Conan, supra: "Ordinarily, the admission or exclusion of opinion evidence, where it is not of a determinative character, is not regarded as sufficient to justify a reversal." And, further, as to the admission or exclusion of opinion evidence, we wish to call attention to the direct and cross-examination, in that case, as set out in the opinion of the court appearing on page 738 of 97 Northwestern Reporter [91 Minn. 127] and the holding of the court that testimony practically similar to that which was introduced in this case was insufficient to warrant reversal.

We may also call attention to the fact that the trial court was not bound by the testimony of the expert witnesses, and that in every instance to which our attention has been called a very material less value was found by the trial court than testified to by the experts, which would indicate that the trial court took into consideration all the testimony introduced in the case in endeavoring to arrive at the fair market value of the property, instead of giving effect to the extreme views of any witness, and in so doing we think followed the rule set out in 10 Cal. Juris. 972, to wit: "The province of such testimony is only to aid in coming to a conclusion" (referring to expert testimony) "and it does not exclude consideration of other evidence which is pertinent to the issue involved. Even if several competent experts concur in their opinions, and no opposing opinion is offered, the jury are still bound to decide the issue upon their own judgment, assisted by the statements of the experts. * * * It is for the trial court, and not the court of review, to determine the weight to be given to such evidence."

Even though, as claimed by the appellant, the experts were inclined to envisage a completed project, in testifying as to the adaptability of the properties concerned for reservoir purposes, the material modification made by the court in awarding damages from the values testified to by several of the expert witnesses justifies the conclusion of this court that all the difficulties of combining the several parcels in one tract were duly considered and weighed before the making of findings and the entry of judgment.

[14] The cross-examination clearly followed the rule laid down in the case of Santa Ana v. Harlin, 99 Cal. 538, 34 P. 224, where it is held that great latitude should be allowed in the cross-examination of witness for the purpose of testing their knowledge and judgment. By this examination the experience, knowledge and judgment of the engineers who had had to do with reservoir projects was clearly shown to the court, and the mere fact that the court allowed a greater market value than that testified to by those who understood only, and gave opinions only upon the value of the land, based upon their uses for grazing or stock-raising purposes, or even that the trial court found from the testimony a greater market value than this court would conclude from the same testimony, furnishes no ground for reversal.

Again, the reasonable time element for making sale, as stated in the case of Santa Ana v. Harlin, supra, was a question for the trial court to consider. The reasonable time is defined in the Santa Ana Case practically as we have heretofore set forth. In the Santa Ana Case it is said: "By the term 'present market value' is meant not what the owner could realize at a forced sale, but 'the price that he could obtain after reasonable and ample time, such, as would ordinarily be taken by an owner to make sale of like property.'"—citing authorities. In connection with what a witness may properly state as to adaptabilities and values of reservoir property, as well as to considering such matters when several parcels are united, we may also cite the well-considered case of Brown v. Weaver Power Co., 140 N. C. 333, 52 S. E. 954, 3 L. R. A. (N. S.) 912.

[15] In action No. 3176, as that number appeared in the case below, being for the condemnation of 310 acres belonging to Louis Vogelgesang and Gustave Vogelgesang, appellant contends that the court erred in relation to severance damages. The complaint mentions only 480 acres of land standing in the names of the two parties just mentioned, out of which it is proposed to take 310 acres. The two Vogelgesangs, by their answer, set forth that the 480 acres, out of which it is sought to take 310 acres, was really a part of a larger parcel containing 1820 acres. It appears from the map set forth in appellant's brief that the 1820 acres, irrespective of the question of ownership, lies in one continuous parcel. The contention is made by appellant that as different governmental subdivisions of said tract appear of record in the names of the different defendants, some of the tracts appearing in the name of Gustave Vogelgesang, and other governmental subdivisions appearing in the name of Louis Vogelgesang, there is not a unity of ownership.

The defendants, by their answer, to which we have referred, allege that the land is in fact owned by them as partners, and the testimony set forth in the record warranted the court in finding that while the different governmental subdivisions of the tract stood of record in the names of the different defendants, it was in fact owned by the partnership. The testimony shows that the two defendants were using the tract, as described in their answer, as one parcel. Section 1248 of the Code of Civil Procedure specifies that: "If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned" shall be considered in fixing damages. Section 1246, Code of Civil Procedure, allows all persons having an interest in the land to come in as parties.

In the case of Perelli-Minetti et al. v. Lawson et al., 272 P. 573, the Supreme Court of this state adopted as its opinion the opinion of this court prepared by Presiding Justice Finch, setting forth the rule of law as to when real estate may be held to be partnership property, though standing in the names of different partners, which is applicable here. The ownership of the property is in fact what is involved. The record shows further that the real estate used as one parcel and standing in the names of the different partners was purchased with partnership funds, while, as stated in 20 Cal. Juris. 722, § 39: "A partnership cannot at law be the grantee in a deed, or hold real estate. If real property be purchased with partnership funds for partnership purposes, and conveyed to all the partners, describing them as composing a partnership, they will nevertheless take as tenants in common. * * * The title can be controlled, and the property itself sold or otherwise administered in equity, for the benefit of the firm, but until such disposition is made the legal title will remain where it is placed by the conveyance." And, as further stated in section 40: "Although at law partners are deemed to be tenants in common of firm real estate, in equity a different rule prevails. There the real purpose for which the property was acquired is considered, and under the principles of trust the court will regard real estate held for partnership purposes as personal property so far as it may be necessary to settle the equities between the firm and its creditors, or between partners and themselves. In view of equity it is immaterial in whose name the legal title to the property stands, whether in the name of one partner or the names of all." The partnership, in fact, was shown to be the owner and in the use and occupation of the 1820 acres. That the tract was used as one parcel appears not to be disputed.

The case of Oakland v. Pacific Coast Lumber Co., 171 Cal. 392, 153 P. 705, is cited in support of the statement that unity of use should not be regarded as the controlling factor. This may be admitted, but such admission does not carry with it the correlative that unity of use should not be considered. Unity of use is considered and is a factor to be considered. This appears to be the settled rule as shown by the notes following the case of Sharpe v. United States, as reported in 57 L. R. A. 932. See, also, 20 Cal. Juris. 737. Unity of use is simply not alone sufficient. There must be contiguity; that is, the governmental subdivisions must in fact constitute one parcel, and not divided by either natural or artificial objects or ways so as to divide the land into two or more separate parcels. The question of ownership also enters into the consideration. The partnership being the owner, the different governmental subdivisions all being contiguous and there being unity of use, we conclude that the trial court did not err in considering the whole tract as one parcel.

[16] The final objection which we deem necessary to consider is the award of damages in the sum of $1,060 in action No. 3161 as given in the court below, on account of an alleged easement in a highway appurtenant to two tracts of land, one denominated a 540-acre tract, the other a 320-acre tract. These lands are not contiguous to the lands sought to be condemned in action No. 3161 above mentioned. The map shows that there is a certain highway called the Petersburg road, running through certain lands belonging to the defendants Ellingwood and Vogelgesang; that this road continues on down through the reservoir site, and at a point distant from the lands sought to be condemned another highway leading past the 540-acre tract connects with the Petersburg road. From the highway so connecting with the Petersburg road, at a very considerable distance, a trail leads off from, and connects with, the 320-acre tract. The closing of the Petersburg road, as found by the trial court, does not prevent ingress and egress to either the 540-acre tract or the 320-acre tract. In other words, both those tracts have other means of reaching the state highway.

The defendants allege that the road through the Petersburg road is a private way. The testimony set forth in the record would lead us to the conclusion that it is a public highway. But, irrespective of whether it is a public or a private highway, the record shows that neither the 540-acre tract nor the 320-tract is so connected with, or contiguous to, anything involved pertaining to the condemnation of the lands described in action No. 3161. as to furnish a basis for an award of damages herein. The reasoning which would award damages to these lands would award damages to lands owned any number of miles away, if the defendants were accustomed to travel over highways leading therefrom to the lands condemned.

The sum of $1,060 allowed in action No. 3161 just referred to should be stricken from the judgment in that case, and it is so ordered. In all other particulars, the judgments in the actions pending upon this appeal are affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

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97 Cal. App. 144

CUMMINGS v. CUMMINGS. (Civ. 6117.)★

District Court of Appeal, Second District, Division 1, California. Feb. 21, 1929.

Rehearing Denied March 21, 1929. Hearing Denied by Supreme Court April 22, 1929.

1. Pleading 🔑68—Allegations of complaint verified by attorney were properly based on information and belief (Code Civ. Proc. § 446).

Under Code Civ. Proc. § 446, allegations of complaint, verified by attorney for plaintiff, for the reason that plaintiff was absent from the county where attorney had his office, were properly based on information and belief.

2. Appeal and error 🔑1039(2)—No prejudice resulted because allegations of complaint were made on information and belief, where trial court found such allegations to be true.

Where allegations of complaint made on information and belief were found by court to be true, no prejudice resulted to defendant's rights because of fact that allegations were so made on information and belief.

3. Divorce 🔑245(1)—Judgment for alimony is not subject to modification as to sums already accrued.

A judgment for alimony is not subject to modification as to sums already accrued and past-due, though subject to modification as to future payments.

4. Pleading 🔑276—Trial court held not to have abused discretion under circumstances in imposing conditions before permitting defendant to file supplemental answer.

Trial court *held* not to have abused discretion in imposing condition that defendant in action to recover past-due alimony pay a sum of $500 and submit to taking of deposition within 60 days before filing a supplemental answer, in view of showing that injection of new issues would delay the trial and make it necessary that plaintiff be present and meet such issues in case motion was granted.

5. Pleading 🔑276—Motion to file supplemental answer is for discretion of court.

A motion to file a supplemental answer is addressed to sound legal discretion of trial court.

6. Pleading 🔑280—Court in granting application to file supplemental answer may impose just and proper terms.

Trial court in granting an application to file a supplemental answer may impose such terms as are just and proper.

7. Appeal and error 🔑959(2)—Order imposing terms in granting application to file supplemental answer will not be disturbed without abuse of discretion.

Order of trial court imposing terms in granting an application to file a supplemental answer will not be disturbed, in the absence of abuse of discretion.

8. Appeal and error 🔑205, 301—Erroneous ruling granting motion precluding defendant from giving evidence on defenses set up in answer to supplemental complaint held without prejudice, where there was no offer of evidence and error was not made ground for new trial.

Ruling of trial court granting motion to preclude defendant from giving any evidence on defenses set up in answer to supplemental complaint *held* without prejudice, though statement on which court relied on granting motion was not literally true, where defendant's attorney made no denial of statement and did not subsequently call court's attention to error by motion for new trial, or in any other way, and did not make an offer of any proof as to issues.

9. Appeal and error 🔑882(1)—Appellant cannot urge error which he is estopped from raising.

An appellant will not be heard to urge as a ground for reversal an error which he is estopped from raising.

10. Appeal and error 🔑205—Ordinarily, exclusion of evidence will not be considered without showing it was offered.

Ordinarily the exclusion of evidence will not be considered on appeal, where there is nothing to show that it was in fact offered.

11. Divorce 🔑331—Judgment of another state for alimony showing court had jurisdiction was sufficient for recovery of past-due payments.

Judgment of another state granting alimony showing on its face that court had jurisdiction was sufficient to authorize recovery of accrued payments thereunder.

12. Divorce 🔑331—Court could enforce judgment of another state, so far as applying to future payments of alimony, so long as decree remained unmodified (Const. U. S. art. 4, § 1).

State court was not precluded under the full faith and credit clause of the Federal Constitution, art. 4, § 1, from enforcing judgment of another state, in so far as it applied to future payments of alimony, so long as decree of such court remained unmodified.

13. Appeal and error 🔑901—Appellate court has no duty to search record for errors.

It is not the duty of an appellate court to search the record for errors upon which to grant a reversal of judgment of trial court.

Appeal from Superior Court, Los Angeles County; Leonard Wilson, Judge.

Action by Lulu Cummings against Frank Cummings, also known as Frank Wilson. From a judgment for plaintiff and an order imposing conditions on which an amended

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★Rehearing denied. Hearing denied by Supreme Court.

answer might be filed, defendant appeals. Affirmed.

Harrah, Louis & Quillian, of Los Angeles, and H. B. Pool, of Venice, for appellant.

James W. Mack, of Los Angeles, for respondent.

CRAIL, Justice pro tem. The first cause of action set up in the complaint is one to recover on a judgment of the Supreme Court of the state of New York granting to the wife $65 per week for the support of herself and her two children. And appellant sets out four errors in regard thereto which he claims entitle him to a reversal.

[1-3] It is first contended that "plaintiff's complaint does not state facts sufficient to constitute a cause of action, as all material allegations of the complaint are based upon information and belief and further that paragraphs 9 and 10 of the first cause of action of the complaint are not sufficient allegations of the judgment and entry thereof." A more direct statement of appellant's contention would be that plaintiff may not allege upon information and belief facts known to her or which are ascertainable from an inspection of the public records of New York. The complaint was verified by the attorney for plaintiff for the reason that the plaintiff was absent from the county where the attorney had his office (Code Civ. Proc. § 446), and the allegations were properly based upon information and belief (Brown v. Sandell, 79 Cal. App. 313, 249 P. 209). Also, it must be remembered that, although the allegations were made on information and belief, the trial court found such allegations to be true. No prejudice resulted to defendant's rights in the premises, and he cannot be heard to complain on appeal. Appellant's further contention that paragraphs 9 and 10 of the first cause of action are not sufficient falls for the same reason. Appellant contends that these two paragraphs only are not based upon information and belief and are therefore the only allegations which are good. We find that the other allegations, even though based upon information and belief, are good, and hence there are sufficient allegations of the judgment and entry thereof.

Appellant also contends in this regard that the complaint is not sufficient for the reason that it does not contain an allegation that the New York decree is not subject to modification by the court which passed it. Such an allegation is not necessary. A judgment for alimony is not subject to modification as to sums already accrued and past due. This is the law of California and New York. Soule v. Soule, 4 Cal. App. 97, 87 P. 205; Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061. Plaintiff's complaint shows that she had a vested right in past due payments of alimony.

[4] Appellant by motion sought permission of the trial court to file a supplemental answer, wherein it was alleged that plaintiff had been paid $2,275 which should have been applied on the judgment, and also that the parties executed a contract subsequent to the filing of the original answer whereby the New York judgment was settled. The law and motion department of the trial court, Judge B. Rey Schauer presiding, granted the motion upon the conditions that defendant pay plaintiff $500 and that he submit to the taking of his deposition within 60 days. Appellant's second contention is that the trial court erred in imposing these conditions.

[5-7] Prior to the time this order was made the defendant's deposition had been taken; in this deposition he admitted virtually every allegation of the complaint and revealed that two weeks prior thereto, when he knew he was to be examined, he disposed of his property in California, taking the proceeds in the sum of $16,500 to the state of Arizona, "to put it in a safe place." The plaintiff in opposition to defendant's motion set forth the above facts and also filed an affidavit setting forth the fact that plaintiff and the two children of the parties were in destitute circumstances and also the necessity for immediate relief. It pointed out also that plaintiff's case was ready for trial, but that the injection of the new issues would delay the trial, and further, that it would be necessary to have the plaintiff present at the trial to meet the new issues in case defendant's motion was granted. Such a motion is addressed to the sound legal discretion of the court. Jacob v. Lorenz, 98 Cal. 332, 33 P. 119; Greenwood v. Adams, 80 Cal. 74, 21 P. 1134. In granting an application to file a supplemental answer, the court may impose such terms as are just and proper. And such an order will not be disturbed in the absence of abuse. Merced Bank v. Price, 9 Cal. App. 177, 98 P. 383; Greenwood v. Adams, supra. We are of the opinion that under the circumstances there was no abuse of discretion.

[8-10] After the entry of the above order the plaintiff filed a supplemental complaint alleging merely the accrual of additional sums from the time of the commencement of the action. Without complying with the court's order the defendant filed an answer to the supplemental complaint in which he incorporated the alleged defenses referred to in his motion for permission to file an amended answer. The reporter's transcript shows that the day before the trial defendant's counsel sought a stipulation from plaintiff to withdraw said defenses on the ground that he was not prepared to prove said defenses. At the beginning of the trial there was a running argument as to whether this dismissal should be with or without prejudice, and the attorney for defendant stated to the court that he was not ready for trial on the defenses above referred to. Thereupon the

plaintiff moved "to preclude the defendant from giving any evidence" on such defenses "on the ground that he has not complied with the terms of the order of the court under which such defenses might be set up." The transcript proceeds:

"The Court (Judge Leonard Wilson presiding): Do you want to speak on that motion?

"Attorney for Defendant: No, your honor.

"The Court: Motion granted. Now are you ready for trial?

"Attorney for Defendant: Yes, your honor."

Defendant's third contention is that the court erred in granting this motion. It will be observed that the statement made to the court and on which the court relied in granting the motion, i. e., "he has not complied with the terms of the order under which such defenses might be set up," is not literally true with reference to the answer to the supplemental complaint. Nevertheless, the attorney for defendant made no denial of the statement, even though asked by the court if he wished to speak. He should have challenged the statement, and not permitted the court to be misled into an erroneous ruling. The error was not subsequently called to the court's attention by a motion for new trial or in any other way, and the point is raised for the first time in this court. An appellant will not be heard to urge as a ground for reversal an error which he is estopped from raising. 2 Cal. Jur. 844. The trial court is entitled to protection against such a proceeding. Furthermore, it will be observed that the appellant had not as yet made an offer of any proof as to these issues. It is equally true that at no subsequent stage of the trial did he make any such offer of proof; but, on the contrary, he had already stated in open court that he was not prepared thereon. Ordinarily the exclusion of evidence will not be considered on appeal where there is nothing to show that it was in fact offered. 2 Cal. Jur. 696; Doak Gas Engine Co. v. Fraser, 168 Cal. 624, 143 P. 1024. Under the circumstances of the instant case and in the absence of some offer of proof, we are constrained to hold that this ruling was without prejudice.

[11] Appellant's fourth contention is that the evidence of the New York judgment was not sufficient. It would serve no useful purpose to set out the evidence herein. It is sufficient to say that the judgment showed on its face that the New York court had jurisdiction. Appellant's contention has been already decided adversely to him in McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036, 101 Am. St. Rep. 125, and in Uplinger v. Yonkin, 47 Cal. App. 435, 190 P. 822. His further contention in this regard that the copy of the judgment, which was offered in evidence, was not duly authenticated, is based on a mere mistake in the reporter's transcript and is without merit.

[12] Appellant states his fifth contention as follows: "That the decision is against the law as that part of the judgment which was based upon plaintiff's second cause of action is against the law, and the complaint on plaintiff's second cause of action does not state facts sufficient to constitute a cause of action." This is a vague and indefinite statement of an alleged error, and some explanation is necessary. Plaintiff's second cause of action was one for separate maintenance for herself and two children against the defendant, and, among other things, the complaint sets forth that the defendant is a resident of California and has property in this state; that defendant is a vaudeville performer and is constantly traveling; that he is rarely in any town more than a week, and that he resides in hotels; that his earning capacity is from $200 to $250 per week—more than sufficient to pay weekly installments of alimony of $65. It repeats the recitals as to the New York judgment by reference to count 1, and states that defendant has ample means to pay all sums accrued thereon to date, but that he openly states that he refuses to apply any of his property to the payment of the New York judgment, and that he refuses willfully and openly to obey the mandate of the said judgment; that the alimony herein sought is for the maintenance and support of plaintiff, as wife, and of two children of the parties, aged 4 and 6 respectively, and that they are financially distressed and in dire need of financial assistance, depending upon charity for the necessaries of life, all as a result of defendant's failure and neglect; that there is no way of obtaining relief in New York, and that there is no adequate relief by repeated suits throughout the several states; that at the time of the commencement of the action defendant had an interest in real property in California; that during its pendency he had disposed of the property and removed the proceeds to the state of Arizona with the intent of depriving the courts of this state of the means of enforcing the judgment, and that the plaintiff has no speedy or adequate remedy at law. Equitable relief was prayed. The judgment of the trial court was for a sum equal to the amount due under the New York judgment, including all installments down to the entry of the judgment, and for $65 per week thereafter, but only so long as the decree of the New York court remains unmodified, leave being granted to apply for a modification if the New York court modifies its decree, and restrained the defendant from transferring, assigning, or otherwise disposing of the money in Arizona except to apply the same on the payment of the judgment, and other proper equitable relief.

Appellant's contention, stated in his own language as it appears both in his opening brief and in his reply brief, is as follows: "Under the full faith and credit clause of the Federal Constitution [article 4, § 1], the courts of one state must enforce a judgment for alimony rendered in another state for a definite sum, but are not bound to enforce the judgment so far as it applies to future payments. Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061; McCullough v. McCullough, 203 Mich. 288, 168 N. W. 929; Levy v. Dockendorff, 177 App. Div. 249, 163 N. Y. S 435; Richards v. Richards, 87 Misc. Rep. 134, 149 N. Y. S. 1028; Campbell v. Campbell, 28 Okl. 838, 115 P. 1111." From this premise he argues that because our state courts are *not bound* to enforce the judgment of our sister state so far as it applies to future payments, therefore our courts are *bound not* to enforce it. His premise is good, but his logic is bad, and it leads him into a position which is untenable. This is especially so in California, where our Supreme Court has said: "There is, however, no possible consideration of public policy which could be suggested in support of precluding a nonresident wife, * * * from invoking the aid of our courts to compel support from her husband who is a bona fide resident of the state." Hiner v. Hiner, 153 Cal. 254, 94 P. 1044. While the question seems to be a new one in this state, yet there is respectable authority in other states to support the doctrine that a judgment for alimony of a sister state may be enforced in the same manner that it could have been enforced if originally obtained here. Fanchier v. Gammill (1927) 148 Miss. 723, 114 So. 813; Barber v. Barber, 21 How. 582, 16 L. Ed. 226. And by analogy the doctrine is upheld in California. In Spalding v. Spalding, 75 Cal. App. 569, 243 P. 445, it was held that a decree of a Wisconsin court directing a conveyance of property is a sufficient basis for an action in the courts of this state to compel such conveyance. It is not necessary for us to take this position, however, in order to sustain the judgment of the trial court on this appeal. It should be borne in mind that appellant's complaint is not of the failure of our courts to recognize a judgment of a sister state as required by the full faith and credit clause of the Federal Constitution. His contention is that the trial court gave too much faith and credit to the New York judgment. Hence there is no federal question involved.

[13] This is the only question raised by appellant against the plaintiff's second cause of action, and it is without merit. The second count of plaintiff's complaint seems to state a cause of action for separate maintenance under our California laws regardless of the New York judgment. That judgment is evidentiary and incidental merely, and unnecessary even, to the second cause of action. At least appellant does not call our attention to any failure of the second count to state a cause of action other than the federal question above referred to, and it is not the duty of an appellate court to search the record for errors upon which to grant a reversal of a judgment of the trial court. The facts alleged and proved entitled the plaintiff to equitable relief, and the relief granted seems appropriate. The trial court, in an obvious effort to protect defendant in case of subsequent modification of the New York decree, required defendant to pay future installments only so long as the New York decree remains unchanged. If the New York court modifies its decree the judgment of the trial court grants permission to apply for a similar modification. This safeguard was unnecessary, but, as it was wholly in favor of defendant, we do not see how he may well complain of it.

Judgment and order affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

97 Cal. App. 1

HAYDEN PLAN CO. v. WOOD, State Superintendent of Banks. (Civ. 6479.)★

District Court of Appeal, First District, Division 1, California. Feb. 16, 1929.

Rehearing Denied March 18, 1929. Hearing Denied by Supreme Court April 15, 1929.

1. Banks and banking 🔑311—Provision of Bank Act, making trust companies subject to regulation of superintendent of banks, is constitutional.

Bank Act (St. 1909, p. 87), as amended, is constitutional, and trust companies are subject to regulation by superintendent of banks as therein provided.

2. Trusts 🔑1—Delegation to another of power of representation necessarily includes some element of trusteeship; "trust."

In every case where one delegates to another a power of representation, there is necessarily some element of trusteeship; "trust" being used to designate a formal transference of property or money for purpose of having it held and administered by transferee in behalf of another person, in view of Civ. Code, § 2216.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Trust.]

3. Trusts 🔑1—Whether instrument creates trust depends on way in which trustees conduct affairs committed to them, and, if they act as principals, "trust" is created.

A declaration of trust, or other instrument providing for holding of property by trustees for benefit of owners of assignable certificates representing beneficial interest in the property, may create a "trust," and whether it does so depends on way in which trustees are conducting affairs committed to their charge, and, if they act as principals and are free from control of certificate holders, a trust is created.

★Rehearing denied. Hearing denied by Supreme Court.

4. Trusts ⚷171—Generally trustee is principal and not agent for cestui que trust.

As a general rule, a trustee is a principal and not an agent for the cestui que trust.

5. Trusts ⚷44(1)—Expression of intention to hold legal title for benefit of another necessarily implies intention to create trust.

When one expresses the intention to hold the legal title to property, but that another shall have the beneficial interest, the implication of intention to create a trust necessarily follows.

6. Banks and banking ⚷315(1)—Foreign corporation, organized to receive money for investment, which money became property of corporation, free of certificate holders' control, held subject to control as doing "trust business" (Bank Act, § 6, as amended by St. 1913, p. 137, § 4).

Where foreign corporation was organized to receive money of investors under power of attorney, whereby investor appointed corporation his agent and attorney in fact for purposes specified, and title to all funds contributed passing to corporation for investment for profit, contributors having nothing to say about management of company, selection of investments, kind of business for which their money shall be used, or the conduct of business, such matters being committed exclusively to directors who were not directly answerable to contributors, *held* that corporation's business was a "trust business," subject to supervision of state superintendent of banks, under Bank Act (St. 1909, p. 88) § 6, as amended by St. 1913, p. 137, § 4.

7. Action ⚷6—Action for declaratory judgment to secure court approval of plan of investment business held not favored procedure.

Action for declaratory judgment to secure approval of court to plan or scheme of doing investment business in state without being subject to state regulation of any sort, is not a favored procedure; no question of public interest being involved, and no actual controversy calling for declaration of rights having arisen.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Hayden Plan Company against Will C. Wood, as State Superintendent of Banks. From an adverse judgment, plaintiff appeals. Affirmed.

Kimball Fletcher, of Los Angeles, for appellant.

Albert A. Rosenshine, of San Francisco, for respondent.

PARKER, Justice pro tem. The purpose of the action is to secure a declaratory judgment, and, as ancillary thereto, a judgment and order restraining and enjoining the defendant, as superintendent of banks, from interfering in any wise with plaintiff corporation or its conduct of its business. Judgment in the court below was against plaintiff, and the appeal follows. It is the contention of plaintiff corporation generally that it is not amenable to the regulation of, nor subject to the control of, the superintendent of banks, inasmuch as the business in which it is engaged is not in any of its features a business such as contemplated in the California Bank Act. Without further generalization we will examine into the detail of the case. The plaintiff is a corporation organized and existing under and by virtue of the laws of the state of Delaware, and by compliance with the general corporation laws of the state of California is qualified to transact business in the state. The term of corporate existence is perpetual. The powers of the corporation are very broad and in particular include the power "to act as the general or special agent, or attorney in fact, for any public or private corporation or person."

The plan of business of the corporation may be briefly summarized as follows: The corporation receives the money of the individual investor, either in a lump sum or in installments, and the investor executes and delivers to the corporation a power of attorney wherein and whereby he appoints the corporation his agent and attorney in fact for certain limited purposes. Upon receipt of such document the corporation delivers to the investor a textual duplicate bearing the acceptance of the appointment indorsed at the bottom. The power of attorney authorizes the corporation to deduct from the moneys paid by the investor 20 per cent. for its own use as payment for its services in creating the united funds and in handling and investing the same. It further authorized the corporation as such agent, to unite the funds of each investor with those of each other investor, received upon substantially similar terms, and limits the permanent investment of the funds received to the class of real property usually known as "income property." From the net annual proceeds of the operation of such income property the corporation is empowered to set aside 2 per cent. as a sort of surplus fund; to pay itself, as a commission for its services, 18 per cent., and to distribute the remaining 80 per cent. substantially pro rata to the individual investors. The power of attorney is declared to be irrevocable, and contains no provision for the return of the principal sum invested under any circumstances. This outlines the general features of the proposed activities, though the detail is more elaborate. The methods employed may be further investigated. Naturally, the first step in the plan is to obtain funds. The investor is solicited, and, if the solicitation is successful, he pays his money into the corporation, either in a lump sum or in installments, and as evidence of his payment he receives a copyrighted receipt or certificate, which reveals to him exactly the nature of the investment. In case the article of agreement might not fully advise the investor, there is pointed out at the top these words: "Built for Eternity."

The actual agreement provides: The investor pays a certain sum and makes the corporation his true and lawful attorney to do the following things, namely: One. To unite the funds he pays or shall pay with all other funds paid to said agent on substantially similar terms by any person whomsoever. Two. To use the funds so united at and in the sole discretion of the board of directors of said corporation in the purchase, leasing, furnishing, construction, operation, sale, and exchange of income producing buildings, either in the state of California or elsewhere. To acquire by purchase, lease, exchange or otherwise, land, buildings, and hereditaments of any tenure or description, etc. The power to operate shall include the power to act as innkeeper, apartment house operator, warehouseman, or in any other capacity, either of like nature or otherwise, at the sole discretion of the corporate directors. Any power given to acquire and hold property may be exercised by, through, or in the name of any other person, firm, or corporation as the directors of the corporation may direct. Three. Provisions for default and forfeiture. Four. The investor agrees that he will not attempt to transfer his rights prior to full payment of his subscription unless the corporation shall consent thereto. Five. The corporation is given the right to deduct from the payment its percentage and retain the same for its services in promoting the creation of the united funds. Six. After the investor has paid his subscription in full, the corporation is to hold the money he has paid in a special fund to be known as the "Building Fund"; there is to be added to the building fund all proceeds of the sale of properties acquired with its funds, but all proceeds of such sale in excess of the original cost, plus carrying charges of the individual property, may, at the sole discretion of the board of directors, be added to "Income Account." On the sole direction of the board of directors, they may discriminate between the investors who have made partial payments, and the discrimination may be in using the partially paid amounts of some and not others for investment. Seven. To create a special fund known as "Income Account" from the net proceeds of operating income producing buildings; and from the "Income Account" and from "Building Fund" and "Replacement Fund" during such times as there are not sufficient funds in "Income Account," to pay general administration, clerical, legal, and other expenses at the sole discretion of the board of directors. Eight. To set aside from said income account each year, as a "Replacement Fund," the percentage of the original cost of each building constructed by the corporation and then so held and of the estimated original cost of each other building then so held which, if so set apart annually, will be sufficient, with interest at 5 per centum per annum, compounded semiannually, to rebuild such business at its original cost 40 years from its construction or acquisition; this fund shall be invested and reinvested in securities of the classes that are or may be legal investments for court trusts according to the laws of New York or California. To use said "Replacement Fund," or any part thereof, in remodeling, reconstructing, repairing, or replacing any building held by the corporation and to transfer to the building fund, if and when any building is sold or otherwise disposed of, the amount held in said fund to replace said building; anticipating that normally a rate of interest will be secured upon the "Replacement Fund" greater than 5 per centum per annum, to hold such excess in the building fund or income account as the board of directors may determine. Nine. Annually from the income account (after making the deductions required by clauses 7 and 8) to deduct, hold, and use to the use of the corporation, 18 per centum as commission for services and to deduct 2 per centum of the whole and held in a separate fund, to be known as "Protection Fund," and to pay the balance, annually or oftener, to the contributors to the united funds, pro rata. Provided, that prior to the expenditure of the entire "Building Fund" this right to pro rata payments from the "Income Account" shall not extend to all contributions, but only to a certain class of contributors, to be determined by the directors in accordance with the following rules: (a) When the amount of expenditure from the "Building Fund" in acquiring the first building has been ascertained the board of directors shall enumerate the amounts held in the building fund in order of date of appropriation to that fund, together with the names of the contributors thereof (except the names of those who have forfeited) until the total of amounts shall equal the amount of said expenditure, and shall then close the list; (b) the contributors so named shall constitute the class to receive the pro rata payments in the manner provided herein until the first net proceeds from the second building shall have become a part of the income account; (c) then said board of directors shall add to said list, in like manner, until the amounts added shall equal the amount of expenditure for the second, and shall then again close said list; (d) all of the contributors named in the list, as amended, shall constitute the class to receive said pro rata payments until the first net proceeds from the third building shall have become a part of the "Income Account"; (e) the board of directors shall in like manner determine the class to receive said payments upon the coming into the income account of the first net proceeds of each successive building until all contributors to the fund shall be included within the class; provided that the distribution share of any contributor, whose partial payments shall have been added to the "Building Fund" prior to his having paid the full sum, except he have forfeited under clause 3, shall be in such proportion to a full share as the amount paid to said agent at the time of transfer to that fund shall bear to $200; and provided further that the distributive share of any contributor who shall have contributed more than $200 in a single payment and shall have executed a single certificate shall be in such proportion to a full share as the amount so contributed shall bear to $200; the "Protection Fund" to be held and banked or invested in such securities as are described in clause 8 hereof and at the sole discretion of the board of directors of the corporation, to be transferred, from time to time, wholly or in part, either to the "Income Account" or "Building Fund." Eleven. To deposit any funds in hand in any reputable banking institution or to invest the same, pending the opportunity to disburse them in accordance with the foregoing directions, in such securities as are described in clause 8 hereof, paying all interest and profits net into the "Protection Fund." And if, at any time or times, it be required by law or any public officer or authority that taxes, assessments, license fees, or substantially similar charges (not including individual income, inheritance, or estate taxes of the several contributors) be paid in deposits of moneys or securities be made by the corporation, in behalf of itself or its contributors, the corporation may, at the sole discretion of its board of directors, use and make such payment or deposit any funds in the corporation's hands or control, including "Building Fund," "Protection Fund," and "Replacement Fund." The agreement then confers a general power of attorney upon the corporation, with power of substitution, and the power of attorney thus conferred is irrevocable.

The plaintiff in its complaint sets up the facts detailed and the form of contract it purposes to make, as outlined. It then alleges that the defendant superintendent of banks will, unless restrained by court order, or unless plaintiff corporation complies with the law of California relating to trust companies, cause plaintiff, its officers and agents, to be prosecuted for violation of such laws if plaintiff makes contracts with principals in California. Plaintiff sought judgment declaring the rights of the parties and restraining defendant as such superintendent of banks from interfering in any wise with plaintiff or its conduct of the business. Defendant appeared in the court below in response to a preliminary order to show cause why an injunction pendente lite should not issue restraining the defendant from interfering with plaintiff or the conduct of its business, and the application was presented upon the verified complaint and was submitted on that alone. The order to show cause was discharged, and the application for injunction pendente lite was denied. Hence this appeal. It will be unnecessary at the outset to catalogue the contentions of each party. As the opinion proceeds, those contentions will be taken up as raised. Defendant superintendent of banks contends that the plan of business of plaintiff corporation constitutes a trust business and that a trust business is a banking function and properly falls within the regulation of the Bank Act of the state of California; also the defendant urges that the Bank Act is constitutional and a proper exercise of the police power, and that no trust business can be carried on by any corporation in California unless it shall have complied with the provision of the California Bank Act. The statute referred to as the Bank Act may be found in chapter 76 of the Statutes of 1909, page 87 of volume of 1909 Statutes, and such amendment hereto as may have taken place during the year intervening.

Section 2 of the Bank Act (as amended by St. 1913, p. 137, § 2) reads: "The word 'bank' as used in this act shall be construed to mean any incorporated banking institution which shall have been incorporated to conduct the business of receiving money on deposit, or transacting a trust business as hereinafter defined. * * * Banks are divided into the following classes: (a) Savings banks; (b) commercial banks; and (c) trust companies."

Section 6 of said act (as amended by St. 1913, p. 137, § 4) reads: "The term 'trust company,' when used in this act, means any corporation which is incorporated under the laws of this state for the purpose of conducting the business of acting as executor, administrator, guardian of estates, assignee, receiver, depositary or trustee under appointment of any court or by authority of any law of this state, or as trustee for any purpose permitted by law."

[1] We see no need here to discuss the constitutionality of the Bank Act. Nor is it necessary to detail the reasons underlying such legislation. The act is constitutional and a needful and legitimate exercise of police power. Estate of Wellings, 192 Cal. 506, 221 P. 628; Bank of Italy v. Johnson, 200 Cal. 1–12, 251 P. 784. Further, there can be no doubt that a trust business as defined in said act does fall logically and legally within the scope of the act and as a part of the principle underlying the legislation. Estate of Wellings, 192 Cal. 506–518, 221 P. 628. In the Wellings Case it is said: "Trust companies that receive deposits and make loans perform two of the most important functions that are performed by banks generally. For very obvious reasons they are subject to regulation to the same extent as banks are. In

classifying trust companies as banks, for the purpose of regulation, the legislature has acted on common knowledge that trust companies frequently do a general banking business in addition to their trust business, and that many banks are doing a more or less extensive trust business. We therefore entertain no doubt that it was competent for the legislature, considering the business which trust companies are doing in this state, to define such business as banking, if it were not such in fact, and to throw around it the general safeguards provided for the banking business proper." Further citation is unnecessary. It is now settled, beyond question, that the Bank Act is constitutional, and that trust companies are within the express terms and subject to the regulation therein provided. And the same act makes it the duty of the superintendent of banks to enforce the provision thereof. At least the act confers sufficient power upon the superintendent of banks as would preclude an order enjoining him from "in any wise interfering with a trust company or the conduct of its business," which is the relief here sought by plaintiff and appellant.

[2, 3] Thus prefaced, we may approach what is practically the only question presented, namely, "Does the plan of the plaintiff corporation include a trust business?" In other words, from the record before us, can the plaintiff corporation be classed as a trust company? It is evident from the record, and conceded by both of the parties hereto, that the business of appellant corporation is the sale of investment certificates such as outlined hereinbefore and the retention and investment of the proceeds as in the certificate provided. The appellant corporation stands on the claim that the plan of subscription and investment constituting its business creates a relationship of principal and agent as between the corporation and a subscriber, and that no trust is created. In support of the claim, many authorities are cited on the general questions of agency and trusts. Little aid comes from these citations, inasmuch as each case deals with a peculiar personal transaction affecting only the parties thereto. To follow through the varied relationships that parties may create as between themselves, and analyze and distinguish each in turn, would be a useless undertaking. Perhaps, in many of the cases cited, language is used which, standing by itself, might support the view of appellant. But it may be said, quite generally, that in every case where one delegates to another a power of representation there is necessarily some element of a trusteeship. And in every case where a trust is established there is some notion of representation implied. Therefore, rather than attempt any scientific differentiation, we content ourselves with the already accepted doctrines. Of the several uses of the term "trust," the most appropriate or accurate, perhaps, is the employment of the word to designate a formal transference of property or money for the purpose of having it held and administered by the transferee in behalf of another person. 25 Cal. Jur. 279. A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another. Civ. Code, § 2216. In Estate of Shaw, 198 Cal. 352, at page 360, 246 P. 48, 51, the court says: "As to the use of the words 'trust' or 'trustee' in an instrument it has been frequently held that there is no magic in mere words of this character and that the question as to whether or not a trust has been created by such instrument depends rather upon the powers and duties with which the persons named therein have been invested. * * * If it appears to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust." A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust. Whether or not it creates a trust depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals, and are free from the control of the certificate holders, a trust is created. Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009.

[4] A general rule in the law of trusts is that a trustee is a principal, and not an agent for the cestui que trust. In Betts v. Hackathorn, 159 Ark. 621, 252 S. W. 602, it is said, in substance: "The indenture makes the trustees absolute masters of the property and business. The only right accorded to the holders of certificates of stock is to share in profits or dividends. They are in the attitude of one lending money to a partnership for a share of the profits in lieu of interest. A reading of the trust instrument in its entirety has convinced us that the shareholders are not associated with each other and the trustees for the purpose of conducting a business in person or through agents for a profit." The language is adopted as being applicable to the case before us. In State v. Cosgrove, 36 Idaho, 278, 210 P. 393, an Idaho case, we find this language: "* * * Business trusts have been referred to as partnerships, where the shareholders retained control over the trustees and have had some authority as to the conduct of the business, but where the beneficiaries retain no control over the trustees, * * * and are not in fact associated in the actual carrying on of the business, but are limited in interest to having the trust administered in their interest, it is

held that it should be regarded as a * * * pure trust. * * * A business trust * * * in which the shareholders have no" substantial control or management of the trust property or funds "is regarded as an ordinary trust, the same as the usual testamentary trust." Without further quotation from authority reference is made to the following: Home Lumber Co. v. Hopkins, 107 Kan. 153, 190 P. 601, 10 A. L. R. 879; Crocker v. Malley, 249 U. S. 223, 39 S. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601; Taylor v. Mayo, 110 U S. 330. 4 S. Ct. 147, 28 L. Ed. 163; Liquid Carbonic Co. v. Sullivan, 103 Okl. 78, 229 P. 561.

[5] When one expresses the intention to hold the legal title, but that another should have the beneficial interest, the implication necessarily follows that the former intended to create a trust. Taber v. Bailey, 22 Cal. App. 620, 135 P. 975.

[6] It is said by appellant: "The directors are restricted in the handling of the funds to the precise terms of the power of attorney. The corporation never owns the funds. The funds contributed never became a part of the corporation's capital. *They are just as separate as the property of an individual trust held by a trust company.*" The plan of plaintiff corporation requires title to all funds contributed to pass to the company for investment for profit. The contributors have nothing to say about the management of the company, the selection of the investments, the kind of business for which their money shall be used, or the conduct of the business. These matters are committed exclusively to the board of directors, who personify the corporation and are not directly answerable to the contributors. The holder of the certificate is not a member of the corporation appellant. The corporation entity is something independent of him. He has not a share in it, nor has he any interest in connection with the profits of the corporation or its conduct. The corporation might take title to the real property purchased, either in the corporate name or in the name of a nominee. From the profits, if any, the corporation retains its share specified and is under no obligation to the certificate holder save paying him what the directors see fit. The purchaser of the certificate has parted with his money, and has no interest in the management of the property and the certificate contains no provision for the return of the principal sum invested, under any circumstances.

[7] We conclude that the business of appellant corporation is a trust business and that the court was correct in denying any injunction restraining the said superintendent of banks from interfering in any wise with plaintiff or the conduct of its business. This disposes of the appeal. Other questions are interjected throughout the proceeding which we find not necessary to determine. From the argument of appellant it would seem clear that it desires to do business in California under a plan or scheme that does not subject it to state regulation of any sort, and that to make sure of its legality it is desired that the scheme be submitted to the courts for approval. This is not a favored procedure. No question of public interest is involved, nor has any active or actual controversy arisen which calls for a declaration of rights.

The general laws make ample provision for the classification of all business enterprises and provide sufficient remedies where rights of business or property are being invaded or endangered. If the courts should be made convenient clearing stations where, at the outset, each financial scheme or enterprise might, on the demand of its sponsor, be analyzed and labeled, the entire plan of supervision and regulation would amount to naught.

Judgment affirmed.

We concur: KNIGHT, Acting **P. J.**; CASHIN, J.

97 Cal. App. 12

HAYDEN PLAN CO. v. FRIEDLANDER, State Commissioner of Corporations.★

(Civ. 6476.)

District Court of Appeal, First District, Division 1, California. Feb. 16, 1929.

Rehearing Denied March 18, 1929. Hearing Denied by Supreme Court April 15, 1929.

1. Licenses ⚷20—Permit to issue securities could not be granted to foreign corporation whose securities were not within Corporate Securities Act.

If contention of foreign corporation, which filed application with corporation commissioner for permit to issue securities, that it did not issue nor intend to issue securities within meaning of Corporate Securities Act (St. 1917, p. 673, as amended), was true, corporation commissioner was not authorized to issue permit sought.

2. Action ⚷6—Declaratory relief sought in proceeding to review corporation commissioner's denial of permit to issue certificates will be denied; no matter of public interest or dispute being involved (Corporate Securities Act).

Proceeding by foreign corporation seeking review of corporation commissioner's denial of its application for permit to issue securities within state under Corporate Securities Act (St. 1917, p. 673, as amended), and thereby in effect seeking declaratory relief, though not framing pleadings on that theory, will not be passed on by court; there being nothing of particular public interest involved nor any dispute concerning character of securities for which permit is sought.

★Rehearing denied. Hearing denied by Supreme Court.

3. Licenses ⟹22 — Refusal of permit to sell certificates of foreign corporation in which investor had no interest held within corporation commissioner's discretion (Corporate Securities Act).

Under Corporate Securities Act (St. 1917, p. 673, as amended), corporation commissioner had discretion to deny permit to foreign corporation to issue certificates where application therefor showed that certificates represented merely receipt for money paid, that purchaser of certificates had no right to inquire into affairs of corporation as shareholder, that certificate was not negotiable or transferable without corporation's consent, and that funds obtained by corporation could be invested in any state of Union, and its assets thus removed from control of local authority; investor having no means of surrendering his certificate and securing return of his principal or any portion thereof.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Proceeding by the Hayden Plan Company against J. M. Friedlander, as State Commissioner of Corporations, to review the action of the Commissioner in denying plaintiff's application for permit to issue securities within the state. From a judgment dismissing the writ of review and affirming the Commissioner's action, plaintiff appeals. Affirmed.

Kimball Fletcher, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for respondent.

PARKER, Justice pro tem. This is a proceeding commenced in the superior court, asking a review of the action of the corporation commissioner in denying plaintiff's application for a permit to issue securities within the state of California. The court below issued its order directing that the proceedings be brought before it for review, and, after a hearing, the said court made and entered its judgment dismissing the writ of review and affirming the action of defendant corporation commissioner. Plaintiff prosecutes the appeal. The record before the court below and the record before us consists of the petition for review, the application for a permit, and the order of the corporation commissioner denying the said application and refusing the permit sought.

[1, 2] The proceeding is novel. The petitioner contends at the outset that it does not issue, nor does it intend to issue, securities within the meaning of the Corporate Securities Act (St. 1917, p. 673, as amended); that, although its business does not fall within the scope of the Corporate Securities Act, plaintiff filed an application for a permit to issue securities. If this is true, then the corporation commissioner was not authorized to issue the permit sought. The plaintiff argues in the appeal, to the same effect as in the court below, that, as a matter of law, the corporation commissioner has no power either to grant the permit or to refuse it. The theory seems to be that, while the plaintiff does not require any permit authorizing it to issue the securities or certificates in question, nevertheless it fears that, if it has no permit, and proceeds with the business in hand, the corporation commissioner will cause the officers and agents of the plaintiff corporation to be prosecuted for violation of the Corporate Securities Act. In other words, though the pleadings are not so framed, the plaintiff seeks, in a measure, declaratory relief. Plainly, he asks the courts to determine, in the first instance, whether or not the securities it desires to issue are such as bring them within the scope of the Corporate Securities Act. We decline to take up the question. There is nothing of particular public interest involved. There is nothing before us to show that there is any actual or other dispute concerning the character of the securities for the issuance of which a permit is sought, nor is there any showing of interference by any person or agency of the state. The plaintiff corporation voluntarily submitted the application to the corporation commissioner, and that officer refused to issue the permit as applied for, or otherwise, or at all. It would be a rather novel situation if every person who might devise a scheme to secure money from the public would first go to the courts, and, under guise of declaratory relief, pass up to the courts the duty of analyzing each proposal or scheme and pointing out those which might come under the supervision of the corporation commissioner and those that would not. Therefore we hold that the only question before us on this appeal is in the action of the corporation commissioner.

Plaintiff applied for a permit to make contracts and issue certificates in the forms and denominations set out at length and appended to the application. The nature of the corporation's business and the plan of its operation is fully set out in the case of Hayden Plan Co. v. Will C. Wood (Cal. App.) 275 P. 248, this day decided. In the case of Doble Steam Motors Corp. v. Daugherty, 195 Cal. 165, 232 P. 140, the court says: "It seems to us manifest from the foregoing provisions of the 'Corporate Securities Act' that discretion is reposed in the Commissioner to grant or to deny a permit to a corporation to issue and sell any particular portion of its capital stock whenever upon the face of the application for such permit a state of facts is disclosed concerning which, taking them to be true as alleged in said application, there is room for a reasonable difference of opinion as to whether the proposed plan of the applicant for the issuance of its securities and the proposed methods to be used by it in issuing or disposing of them will be fair or unfair, just or unjust, equitable or inequitable; and as to whether their issuance and disposition upon the proposed plan of business of the applicant will or will not work a fraud upon the purchaser of such securities."

[3] In the case at bar, without attempting any final characterization of the scheme or plan of plaintiff, we conclude that there was ample room for a reasonable difference of opinion in the matter set forth in the cited case. The application was to issue certificates or securities, so called, in the amount of $1,000,000. These certificates really represented nothing other than a receipt for money paid. The purchaser of the certificates has no right or power to inquire into the affairs of the corporation as a shareholder therein. The certificate was not negotiable or transferable without consent of corporation. The corporation was a foreign corporation, and the scope of its activities was unlimited. It had no capital, other than a small amount of cash, and its balance sheet showed a large promotion expense, almost entirely dissipating the investment of those who had theretofore entered the scheme in other states. The investor had no means of surrendering up his certificate and securing the return of his principal or any portion thereof. No limit was placed upon the expense of management, and an elaborate, arbitrary, and complex system of investment and reinvestment was provided for. The funds obtained by the corporation could be invested in any state of the Union, and the property of the corporation or its assets would thus be under many jurisdictions and removed from the control of local authority. In the application to the commissioner this statement appears: "So far as the corporation is advised, the plan of financing upon a large scale is utterly new, as is the use in that connection of the special power of attorney, and to protect the plan from too close imitation the text and design of the certificate have been copyrighted." Conceding this, the plan was untried and purely experimental; it was an innovation in modern financing. That fact alone would warrant a close scrutiny, and could be and doubtless was considered by the commissioner in determining his action.

The Corporate Securities Act was enacted for the purpose of protecting the general public, not only against fraudulent or unlawful stock schemes or enterprises, but likewise to give to the state authority to regulate and control the class and character of securities or investments that might be offered to the public for purchase. All of the funds derived from the sale of these certificates were to be intrusted to directors not selected by the investors and in no wise subject to their control and beyond the power of the investors to remove. Whatever else may be stated concerning the corporation or its plan, it did furnish a wonderful opportunity for the perpetration of fraud and dishonesty, with little opportunity of regulation or redress. We cannot say that the commissioner of corporations acted beyond the limits of a sound discretion.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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97 Cal. App. 17

JOYNER v. KINGSBURY, State Surveyor General. (Civ. 3407.)★

District Court of Appeal, Third District, California. Feb. 16, 1929.

Rehearing Denied March 18, 1929. Hearing Denied by Supreme Court April 15, 1929.

1. Mines and minerals 🔑6—Tide or submerged lands within boundaries of cities held within prohibition against leasing or granting permits to prospect for minerals on such lands "fronting on" city (St. 1921, p. 404, § 4).

Tidelands and submerged lands within boundaries of cities and towns are included in prohibition of St. 1921, p. 404, § 4, against granting of permits or leases to prospect for oil and minerals on tide or submerged lands fronting on an incorporated city or for a distance of one mile on either side thereof, notwithstanding words "fronting on" in their ordinary acceptance refer to land which in its exterior boundary reaches to, impinges on, and is limited by line defining exterior boundary of some other tract, parcel, or object.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Fronting and Abutting.]

2. Statutes 🔑181(1)—Courts must give effect to legislative intent in construing statute, unless this does violence to language of act.

It is duty of court in construing a statute to give effect to the full meaning and intent of the Legislature, unless to do so does violence to language of act.

Original application for writ of mandate by Thomas A. Joyner against W. S. Kingsbury, Surveyor General of the State of California, to require him to issue a permit to prospect for oil and gas. Writ denied.

Roy Maggart, Geo. B. Bush, Thomas A. Joyner, and Philip C. Farman, all of Los Angeles, for petitioner.

Faries & Williamson, of Los Angeles, amici curiæ.

U. S. Webb, Atty. Gen., and Thomas H. Christiansen, Deputy Atty. Gen., for respondent.

PLUMMER, J. This cause is before us upon the petition of Thomas A. Joyner, pray-

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★Rehearing denied. Hearing denied by Supreme Court.

ing that a writ of mandate be issued directed to the respondent, commanding him to issue a permit to prospect for oil and gas under the provisions of the act of May 25, 1921 (Stats. 1921, p. 404), on certain lands and premises described in the petition.

The petition sets forth that all of the requirements of the act referred to preceding the issuance of a permit have been complied with. It appears therefrom that the petitioner is a citizen of the United States; that notice has been given as required by the act, and without going into details, it is sufficient to state that all of the things required to be performed by the petitioner, leading up to the issuance of a permit, appear to have been performed in strict compliance with the act of the Legislature approved May 25, 1921. The lands upon which the petitioner seeks a permit to prospect for oil and gas are located in the county of Orange; contain about 100 acres; are irregular in shape, and located within the city limits and boundaries of the city of Huntington Beach. The lands are further described as tide lands belonging to the state of California, the width of the tract extending one-quarter of a mile along the line of ordinary high tide and the side lines thereof at right angles to said line of high tide, the length not exceeding 2½ times the width. The petition further sets forth that the said lands are not within any known geological structure of a producing oil or gas field. Upon the filing of the petition an order to show cause was issued by this court, and upon the return date fixed in said order the respondent appeared and filed a demurrer and answer to said petition.

Since the submission of this cause the Supreme Court in the case of Boone v. Kingsbury, 273 P. 797, and in six other cases involving similar questions, has decided all but one of the questions presented to us for consideration relative to the construction of the act of the Legislature herein referred to, leaving undetermined whether a permit may or may not lawfully be issued where the tide and submerged lands are situate within the corporate limits of a city or town.

[1] Section 4 of the act approved May 25, 1921, after providing fully for the issuance of permits, the method of procedure, etc., contains the following proviso: "Provided further, however, that in no case shall permits or leases be granted covering tide, overflowed or submerged lands fronting on an incorporated city, or for a distance of one mile on either side thereof." In the Boone Case and the others referred to therein, none of the lands involved fronted upon any incorporated city, nor were they situated upon any harbor, bay, inlet, or estuary, nor were they within the inhibitions of the distance limit found in section 3 of article 15 of the Constitution, concerning the sale of tide and submerged lands.

Are tidelands or submerged lands within the limits or boundaries of cities and towns included within the terms of the prohibition against leasing or the granting of permits found in section 4 above quoted? On the part of the respondent it is contended, first, that all of the lands for which the petitioner seeks a permit are included within both the letter and spirit of such prohibitory clause. On the part of the petitioner it is contended that the prohibitory clause refers only to tidelands that are situate outside and within one mile of the exterior boundaries of incorporated cities and towns. The respondent makes the second contention that the limits of the city of Huntington Beach are really along the line of high tide, even though the corporate limits of the city purport to extend out a sufficient distance over the tide and submerged lands bordering upon the ocean to include all of the area for which a permit is sought by the petitioner. These contentions call for an interpretation of the prohibitory clause found in section 4, which specifies that in no case shall permits or leases be granted covering tide, overflowed or submerged lands fronting on an incorporated city, or for a distance of one mile on either side thereof. The words "fronting upon," in their ordinary acceptance, undoubtedly bear the interpretation placed thereon by the petitioner, to wit, that it refers to the land which in its exterior boundary reaches to, impinges upon and is limited by the line which defines the exterior boundary of some other tract, parcel, or object. For example, lots fronting upon a street. The lots are outside of the street; the street is outside of the lots; the fronting line is the line of delimitation between the lots and the street. We may also admit that the petitioner's contention that when a parcel of land or object is spoken of as within a distance of one mile on either side thereof, the ordinary intendment is that reference is had to a parcel of land or an object within that distance beyond the exterior side lines of a city or town.

[2] But when it comes to the performing of an act which would be just as detrimental to the welfare, the business conditions, or the enjoyment and use of residential property, whether performed within one mile outside of the exterior boundaries of a city or town, or inside of the exterior boundaries of a city or town, then the prescribed distance of "one mile on either side thereof" takes on an added significance. It then becomes a question of giving effect, and to so read, the language of the statute as to give effect to the full meaning and intent of the Legislature, and it is the duty of the court to give such construction unless it does violence to the language of the act. A reading of the act in question leads, we think, unerringly to the conclusion that the Legislature had in mind the granting of permits and the leasing of oil lands in such a manner and to such an ex-

tent only as would in no wise interfere with the orderly enjoyment of city property and the demands of commerce and navigation, and in such a way as not in any manner to obstruct ingress or egress to and from the sea, and if any structure, work, or development upon tide or submerged lands within one mile of the incorporated limits of a city or town would work such injury or obstruction, we think it immaterial whether that obstruction, structure, or use was proposed to be erected or made on state lands, whether inside or outside of the side lines of an incorporated city or town. The evil to be obviated or prevented is just the same whether inside or outside. True, a city may prevent, by zoning ordinances, certain occupations, structures, or uses within prescribed areas within the exterior boundaries of its corporate limits, as argued by the petitioner, but the exercise of such dominion over state lands within the corporate limits of a city or town is an entirely different matter.

The petitioner has cited a number of different acts relative to the sale of marsh and swamp lands, where the language of the act refers to lands situate within the boundaries of cities and towns, and also where such lands are situate within a given number of miles of the exterior boundaries of cities and towns, and argues therefrom that, whenever the Legislature intends to prohibit any act in relation to state-owned lands which lie within the boundaries of any city or town, it uses the word "within," instead of the language as found in the prohibitory clause of section 4 of the leasing act under consideration. While this is true of many of the acts referred to, there is one section of the Political Code, and the construction given to it by the Supreme Court, which we think decisive of this case. Section 3488 of the Political Code, so far as pertinent here, reads as follows: "All swamp and overflowed salt marsh and tide lands within one mile of the State Prison at San Quentin, within the City and County of San Francisco, City of Oakland, or within five miles of the corporate limits of either, and tide lands within two miles of any other incorporated cities or towns, are excluded from the operation of this chapter."

In the case of Williams v. City of San Pedro, 153 Cal. 44, 94 P. 234, the court had before it the construction of language almost identical with that which we are considering, to wit, the words, " 'within two miles of' any incorporated city," and used the following language: "At the time of such application to purchase, and ever since, section 3488 of the Political Code provided in terms that all tidelands 'within two miles of' any incorporated city or town other than San Francisco or Oakland are excluded from the operation of the provisions of law authorizing the sale of state lands. This provision withheld from the state officers all authority to grant or sell tidelands within the city of San Pedro. The contention of appellant that this limitation as to lands subject to sale applies only to lands situated outside of, and not exceeding two miles beyond, the limits of incorporated cities and towns, is not of sufficient force to merit discussion. Lands in the city of San Pedro are necessarily within two miles thereof, and there is nothing in the language used by the Legislature in former statutes or in this particular statute with reference to tidelands in San Francisco or Oakland, which compels a contrary construction." The court held that the state officials had no authority to convey lands within the prescribed area.

We see no escape from the conclusion that the lands upon which the petitioner seeks a permit to prospect for oil are within the proscribed area. And for this reason the petition must be, and the same is hereby, denied.

I concur: FINCH, P. J.

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97 Cal. App. 77

COONEY v. GLIDE. (Civ. 3601.)

District Court of Appeal, Third District, California. Feb. 20, 1929.

1. Appeal and error 🔑273(2)—Sole ground of objection to complaint on appeal was failure to state cause of action, where no special demurrer was interposed and defendant consented to overruling general demurrer.

Where no special demurrer was interposed to complaint and general demurrer was overruled with defendant's consent, the only objection to the complaint available to defendant on appeal was that it did not state facts sufficient to constitute cause of action.

2. Work and labor 🔑22—Complaint charging defendant was indebted on account of materials and labor furnished at defendant's request in painting and repairing defendant's buildings stated cause of action.

Complaint charging that defendant was indebted to plaintiff for balance due on account of materials and labor furnished defendant by plaintiff in painting and repairing buildings, that materials and labor were furnished and performed at defendant's special instance and request, and that balance still remained due thereon *held* sufficient to state cause of action, though claims for painting and repairs were not separated.

3. Pleading 🔑207, 317(1)—Defendant desiring more specific pleading or more information should demur specially or demand bill of particulars (Code Civ. Proc. § 454).

Defendant who desires more specific pleading should demur specially to complaint, or should call for bill of particulars under Code Civ. Proc. § 454, if more information is desired as to respective items for which judgment is sought.

4. Contracts 🔑349(2)—Plaintiff's written proposal for painting defendant's buildings held admissible to show character of work and materials required, though actual agreement covered only part of buildings at lesser sum.

In action to recover balance due on contract for painting buildings, written proposal of plaintiff to paint 15 different farm buildings for specific price was admissible for purpose of showing kind and character of work to be done and materials to be used in the performance of the work, though actual agreement included only six buildings, which were to be painted for a lesser sum.

5. Work and labor 🔑14(1)—Contractor's recovery on common count for balance due was sustained under record showing abandonment of contract by mutual consent.

Where it appeared from record that owner of property declined to proceed further under contract for painting of his buildings, and it did not appear that contractor objected to discontinuance of work, contractor was entitled to recover balance due under common counts on account of abandonment of contract by mutual consent.

6. Evidence 🔑457—Testimony as to use of "Alpha White" by painters generally to give paint better whiteness and quality was admissible to show meaning of word "colors" in painting contract.

In action to recover balance due on contract for painting defendant's buildings, which called for "only the best white lead and pure linseed and colors," testimony that "Alpha White," containing lead, zinc, and oil, was used by painters generally in giving paint better whiteness and more lasting quality, was admissible to show what was understood by word "colors."

7. Appeal and error 🔑1170(7)—Overruling objection is not ground for reversal, where only objection legally tenable is to phrasing of question (Const. art. 6, § 4½).

Error of trial court in overruling objections is not ground for reversal under Const. art. 6, § 4½, where only ground for objection legally tenable is to the phrasing of the question.

8. Appeal and error 🔑1170(7)—Any error in admission of testimony concerning materials used under painting contract was harmless, where there was no evidence of inferior quality (Const. art. 6, § 4½).

In action to recover balance due under painting contract, any error in admission of evidence as to materials used was harmless and not ground for reversal under Const. art. 6, § 4½, where there was no testimony that any of materials used was of inferior quality.

9. Trial 🔑243—Instructions relative to contract requiring performance to defendant's satisfaction held not contradictory.

In action to recover balance due under contract for painting buildings, instruction relative to performance of contract to satisfaction of one party, and another instruction requiring plaintiff to prove performance of work in good workmanlike manner to satisfaction of defendant, were not contradictory.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by J. V. Cooney against Thornton S. Glide. Judgment for plaintiff, and defendant appeals. Affirmed.

Huston, Huston & Huston, of Woodland, for appellant.

Gaddis & McDonald, of Woodland, for respondent.

PLUMMER, J. The plaintiff had judgment against the defendant in the trial court for the sum of $583.25, as the balance due on account of materials furnished and work and labor performed by the plaintiff at the special instance and request of the defendant. From this judgment the defendant appeals.

The respondent is a painting contractor residing in the city of Sacramento. The appellant is a farmer residing in Yolo county, on the road between Winters and Davis. The record shows that on or about the 11th day of August, 1926, the appellant wrote to the respondent a letter, in which he stated he had some painting which he desired done. In response to the letter the respondent went to the appellant's place of residence, where the appellant pointed out a number of buildings which he desired painted. The buildings consisted of a dwelling house, a tankhouse, several bunkhouses, blacksmith shop, hay barns, etc. According to the testimony, the appellant stated that he wanted the buildings given two coats of white paint and desired the roofs to be painted green. There were 15 units, or 15 different buildings, pointed out by the appellant to the respondent, which the appellant stated he desired painted. After pointing out the buildings upon the farm where the appellant resided, the appellant and respondent then went to an adjoining farm facing on the Dixon road. This farm belonged to the appellant's mother, but was farmed by the appellant, and it appears that there was some tentative agreement as to the painting of the buildings situated on the latter-mentioned premises. However, these buildings were not considered in the further negotiations of the parties which led up to statements as to prices and figures and character of work to be done upon the premises involved in this action. After the respondent had examined all of the buildings pointed out to him by the appellant upon the premises where the appellant resided, it appears that the respondent had measurements taken thereof and made estimates of what he would agree to do the work for, and, in making such estimates, the painting of certain units involved in this action, 6 in number, was figured out as costing so much, and a statement of the amount that the painting of the 6 units would cost was made by the respondent to the appellant. After making the measurements, the respondent wrote out and delivered to the appellant the following letter or statement of what the total work would cost:

> "Capital Compressed Air Painting Co.
>
> "Sacramento, Cal., Aug. 14th, 1926.
>
> "Mr. Thornton Glide—Dear Sir: We submit herewith our estimate and bid in the sum of Fifteen Hundred Dollars ($1,500.00) for painting on your Home Ranch, located on the Winters Road, as follows: We propose to apply by air brush method of application, two coats best Lead and Linseed Oil Paint to all exterior surfaces including porches, dormitories, balconies and floors, and two coats lead and oil paint by hand brush on all sash, frames, openings, screens, cornice or other trim on the residence, and two coats W. P. Fuller's best green and pure linseed oil on all roof surfaces of the same: Two coats best lead in oil paint on the side walls of tank house and shed, bunk houses and any other buildings now painted with lead in oil paint, and two coats of the above green in linseed oil on all roof surfaces of the same, and two coats best lead and linseed oil on all sash, frames, doors, cornice and other trim: One heavy uniform coat best Metallic and linseed oil paint on the roofs and side walls and exposed columns of all other buildings on the ranch, including the tank, frame, and tank house some distance from the group of buildings. We propose to use only the best white lead and pure linseed and colors, manufactured by W. P. Fuller and Co., laid down on the job in their original containers or packages. We propose to do this work in a good workmanlike manner, to your satisfaction, starting the work when ordered and carrying the same through to an early completion. Trusting we may be awarded this work, and appreciating an early decision on the same, we are, Yours very truly,
>
> "Capital Compressed Air Painting Co.,
> "J.V.C.-G By J. V. Cooney."

This letter or proposal was delivered by the respondent to the appellant at the home of appellant, and at the time this letter or proposal was delivered by the respondent to the appellant, the appellant pointed out 6 units on the farm upon which he resided, which consisted of his dwelling house and certain other buildings, and requested respondent to give him an estimate of the cost of those buildings. The 6 units were a portion of the 15 units included in the prices quoted in respondent's letter. The respondent told the appellant that the 6 units would cost $854.50. To this the appellant replied that the price was all right, and asked respondent when he could get started. The respondent replied: "About the first of the week." The appellant said, "All right; go ahead." Following this, the respondent proceeded to paint the 6 units belonging to the appellant and mentioned in the conversation to which we have just referred. After giving the buildings referred to as the "6 units" one coat of paint, a conversation took place between the appellant and the respondent relative to certain repairs that should be made upon the buildings, such as repairing window screens, gutters, balustrades, posts supporting porches, reglazing, reputtying window sashes, repairing handrails, etc., which should be done before the second coat of paint was applied. The appellant responded that he could not get a carpenter to do the work, and asked the respondent to attend to the same. The respondent employed a carpenter and had the necessary repairs on the buildings made prior to applying the second coat of paint. There was some conversation about having the buildings on the Dixon farm painted, but, as nothing was done in relation thereto, it is not necessary to lengthen this opinion by any further reference thereto. At the conclusion of making the repairs and painting the 6 units as herein stated, the appellant paid to the respondent the sum of $500. Thereafter various excuses were made by the appellant that he had changed his mind, that he did not want any further painting done until the following spring, and that he had not had the paint which had been used on the 6 units analyzed. Following this respondent began suit to collect for the work and labor performed and materials furnished.

The complaint in its charging portion is in the following words and figures: "That the defendant is indebted to the plaintiff in the sum of Five Hundred Eighty Three and 25/100 ($583.25) Dollars, for the balance due on account of materials and labor furnished defendant by plaintiff in painting and repairing the dwelling house, tank house and certain out houses, all occupied by the defendant at his residence, in the County of Yolo, State of California; that all of said materials and labor were furnished, done and performed by the plaintiff for the defendant at his special instance and request within two years next preceding the commencement of this action; that the whole amount and aggregate value of the said materials and labor is One Thousand Eighty-three and 25/100 ($1,083.25) Dollars, no part of which has been paid, except the sum of Five Hundred ($500.00) Dollars, the balance of account first aforesaid still being unpaid." It is for this balance that the plaintiff asked for and had judgment.

To this complaint the appellant interposed a general demurrer, which demurrer the record shows was overruled by the consent of the appellant, and time allowed for him within which to answer. The answer contains a general denial and also a counterclaim against the appellant wherein it is set forth that the materials used were of inferior quality, etc., and damages prayed for against the respondent in the sum of $1,083.25. This contention on the part of the appellant appears to have been abandoned at the trial, as no testimony whatever has been called to our attention showing that the work was not done in a good and workmanlike manner, and that the materials were other than of the quality agreed to by the parties.

Upon this appeal the appellant contends that the court erred in admitting in testimony the letter set out in this opinion; that the contract was for an entire sum. While not stated in the specification, the inference would be that the contract was for painting 15 units for the sum of $1,500, and that the court erred in admitting testimony as to the sum for which the respondent stated he had estimated as the cost and which it would cost to paint the 6 units which were actually painted. The appellant also raises the point that the contract is an entire one, and that the court erred in admitting the evidence showing that it became a divisible one; likewise, that the court erred in admitting evidence as to custom or practice relative to the use of certain materials; finally, that the court erred in its instructions to the jury, that some of the instructions were contradictory and misleading.

[1-3] The record shows that of the $583.25 for which the respondent prays judgment, $228.75 thereof was for work and labor performed in making the necessary repairs upon the buildings referred to as the 6 units. In so far as the appellant's objection to the complaint is concerned, it is sufficient to state that as no special demurrer was interposed, and the general demurrer that was interposed was overruled by the consent of the appellant, there is no objection now available to him, save and except that the complaint does not state facts sufficient to constitute a cause of action. A mere reading of the complaint shows that this contention is untenable. The fact that the amount remaining due for painting, and the amount claimed by the respondent for work and labor performed, were not set out in different counts, does not render the pleading insufficient to state a cause of action or in anywise prejudice the rights of the appellant. If the appellant had desired a more specific pleading, he should have demurred specially, and also, if the appellant had desired more information as to the respective items constituting the total sum for which the respondent was asking judgment, he should have called for a bill of particulars. That the pleading is sufficient, see Donegan v. Houston, 5 Cal. App. 626, 90 P. 1073; Farwell v. Murray, 104 Cal. 464, 38 P. 199. Section 454 of the Code of Civil Procedure affords full remedy to a party who desires more specific information, and if he fails to take advantage, either by special demurrer or making the demand specified in the section referred to, we fail to see how a party so failing is injured by reason of the general character of a complaint such as appears in this action.

[4, 5] The chief contention of the appellant circles around the admission in testimony of the letter or proposal hereinbefore set forth, and the testimony which showed that after the proposal had been submitted by the respondent to the appellant, the appellant desired to know what it would cost to paint the 6 units, and the statement by the respondent that it would cost $845.50, and the following testimony showing that the appellant said, all right, he was satisfied with the price and to go ahead with the work. We are stating the testimony in narrative form. Was the writing admissible in evidence? We think so. The testimony shows clearly that the written proposal was never completed. It shows, we think, sufficient to sustain a finding which in this case is necessarily included within the verdict of the jury, that the respondent and appellant both understood and agreed that the 6 units should be painted for a specific price. The testimony set out in the record shows that the price of the 6 units which entered into the proposal submitted by the respondent to the appellant was separately estimated, although in the proposal included in the larger sum of $1,500, which included additional work. We think the conclusion was fairly inferable that the appellant never really intended to have more than the 6 units painted. But irrespective of these particulars, the proposal was admissible in testimony as showing the kind and character of the work to de done and the materials to be used in the performance of the work. And this would be true whether the contract was divisible or indivisible. The proposal sets forth that the respondent was to use only the best white lead and pure linseed oil and colors manufactured by W. P. Fuller & Co., laid down on the job in their original containers or packages. The proposal also sets forth the materials to be used on the walls, roofs, window frames, doors, cornices, etc., and that the work was to be done in a good and workmanlike manner to the satisfaction of the appellant, and that the paint was to be applied by the air-brush method. The respective units were to be given two coats of paint. All of these matters contained in the proposal rendered the proposal admissible in evidence, as we have said, to show the kind of materials to be used, the work to be performed and how it was to be performed. The record shows beyond controversy that the appellant declined to further proceed with the work. It does not appear from the record that the respondent made any objection to the discontinuance of the work, from which the inference necessarily follows that the contract, if it were in the first instance an indivisible contract, had been abandoned by the mutual consent of the parties. Under such circum-

stances recovery may be had upon a common count. In the case at bar the testimony shows that there was an understanding and agreement between the appellant and the respondent as to the price which should be paid for the painting of the 6 units, and the testimony shows that this price was agreed to. Whether there was any conflict in the testimony upon this phase of the case is immaterial. None has been called to our attention, but if it were denied by the appellant it would raise only a conflict in the testimony.

[6, 7] The only contention as to the materials used called to our attention is the fact that the respondent, in the performance of the work, used a small quantity of material called "Alpha White." This material contains lead, zinc, and oil, and, according to the testimony, is slightly more expensive, or at least just as expensive, as what is called pure lead and oil, and is used for the purpose of making the paint more durable and to give it a better whiteness. There is nothing in the testimony to show that this "Alpha White," used for the purposes stated, was not of a pure quality. Turning to the proposal, we find the following: "We propose to use only the best white lead and pure linseed and colors manufactured by W. P. Fuller & Co., laid down on the job in their original containers or packages." There is sufficient testimony in the record to show that all of the materials were manufactured by W. P. Fuller & Co., were laid down on the job in their original containers, and were of the best quality of materials manufactured by W. P. Fuller & Co. The "colors" mentioned in the proposal are not specified, and in this particular, testimony was admitted to show that Alpha White was used for the purpose, by painters generally, in giving the paint a better whiteness and a more lasting quality. This testimony was admissible under the proposal to show what was understood by the word "colors." That some of the questions asked were not in the proper form may be admitted, but the objection of appellant did not call attention to the phrasing of the questions, his contention being that it could not be shown, by custom of painters, that "Alpha White" should be used. This may be technically true, but it is nevertheless a fact that it can be shown by witnesses competent to testify what is understood by the trade when such words are used. This fact is shown even though the phrasing of the questions were not in all instances technically correct. Section 4½ of article 6 of the Constitution relative to the improper admission or rejection of evidence is applicable here. The fact which the jury was entitled to know was laid before the jury, and any error of the trial court in overruling objections where the only objection legally tenable was the phrasing of the question, and not as to the facts sought to be elicited, is covered by the provisions of the Constitution.

[8] In view of the fact that our attention has not been called to any testimony showing an inferior quality of any of the materials used in the performance of the work by the respondent, the error complained of, if admitted to be error, was not only not prejudicial, but absolutely harmless. In the six grounds assigned as reasons for reversal by appellant, no claim is made that the evidence was insufficient to support the verdict, and if the errors complained of in the admission of testimony did not result in a miscarriage of justice, section 4½ of article 6 of the Constitution precludes reversal.

[9] Appellant finally urges that the court misdirected the jury in matters of law, and that certain of the instructions given by the court were and are contradictory. Particular stress is laid upon the giving of instructions numbered 9 and 10. Instruction No. 9 was given at the request of the respondent, and instruction No. 10 at the request of the appellant. We have examined all of the instructions other than the two herein referred to by number, and find nothing that requires special attention. Instruction No. 9, given at the request of the respondent, is in its wording so nearly identical with the language found in 6 California Jurisprudence, p. 417, § 249, that reference to such section is all that is necessary to explain the instruction. Instruction No. 10, given at the request of appellant, is in the following words:

"You are instructed that if you find that the plaintiff agreed to do the work and furnish the materials of the kind and quality specified in the letter dated August 14, 1926, and that he failed to do the work and furnish the materials of the kind and quality specified in said contract, then your verdict must be for the defendant. The contract also provides that the work shall be done in a good workmanlike manner to the satisfaction of the defendant Glide, starting the work when ordered and carrying the same through to an early completion. Therefore, unless the plaintiff has established by a preponderance of the testimony that the work was done in a good workmanlike manner to the satisfaction of the defendant Glide, then your verdict must be for the defendant."

As we read instructions numbered 9 and 10, we find nothing "combative or contradictory," as urged by appellant. It does occur to us, however, that instruction No. 9 was really unnecessary, for the reason that the record in this case does not show any facts or circumstances which would admit of the application of the rule governing the interpretation of contracts where matters of fancy, taste or sensibility may be involved. In the present case there is another matter which may be considered. The record shows that the appellant was present every day during the progress of the work, saw the different units as they were being completed, and offered no objection whatever to any of the work as it was being carried on. In other words, no objection whatever was made to the work until after it was finally completed and for some time after the sum of $500 had been paid on account thereof. The principal case of Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 702, 182 P. 428, 6 A. L. R. 1493, relied upon by appellant, points out that in the case then pending before the Supreme Court the work was executory, and was not an instance where the contract had been completed. All the facts and the circumstances of the case at bar show that no arbitrary refusal to pay for the work by the appellant would be justified in law, and this is especially true in view of the fact that there is no evidence in the record, or at least that none has been called to our attention, which would justify a conclusion that the work was not performed in a good and substantial manner.

The judgment is affirmed.

I concur: FINCH, P. J.

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97 Cal. App. 64

INTERSTATE LUMBER CO. v. LOOP BLDG. CO. et al. (Civ. 3716.)★

District Court of Appeal, Third District, California. Feb. 20, 1929.

Rehearing Denied March 20, 1929.

1. Appeal and error 🔑1011(1)—Trial court's finding on conflicting evidence cannot be disturbed on appeal.

Finding of trial court on conflicting evidence cannot be disturbed on appeal.

2. Mechanics' liens 🔑280(3)—Written contract, not tending to prove price at which lumber was to be furnished, held properly excluded in action to foreclose mechanics' liens.

In action to foreclose mechanics' liens and for judgment for balance due, written contract, not relating to transaction involved and not tending to prove truth of conversations at which contract as to purchase price was claimed to have been made, *held* properly excluded.

3. Pleading 🔑149—Allegations against officer of corporate plaintiff individually held not proper as cross-complaint in action to foreclose mechanics' liens.

In corporation's action to foreclose mechanics' liens and to recover balance due, allegations, even if stating facts sustaining cause of action against cross-defendant, who was officer and director of plaintiff, for personal liability of said cross-defendant as owner of plaintiff's stock, *held* not proper as cross-complaint.

4. Pleading 🔑147—Cross-complaint respecting matters other than lumber for which mechanics' liens were sought to be foreclosed held not maintainable (Code Civ. Proc. §§ 389, 442, 1198).

Action to foreclose mechanics' liens for lumber sold and to recover balance due thereon *held* to involve separate and entire contract, not related to nor dependent on any other to which plaintiff was a party, and cross-complaint relating to other tranactions was not maintainable as one to settle all questions in dispute between parties, under Code Civ. Proc. §§ 389, 442, 1198.

5. Appeal and error 🔑907(4)—Presumptions support trial court's findings in absence of sufficient evidence before appellate court.

In absence of sufficient evidence before the court on appeal, all presumptions and intendments support trial court's findings.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by the Interstate Lumber Company against the Loop Building Company and others. From an adverse judgment, named defendant appeals. Affirmed.

Ray Howard and Lester Wm. Roth, both of Los Angeles, for appellant.

John F. Poole, John L. McGonigle, and R. L. Horton, all of Los Angeles, for respondent.

McDANIEL, Justice pro tem. This appeal is from a judgment in favor of plaintiff (hereinafter called the lumber company) and against the defendant Loop Building Company (hereinafter called the building company) in the sum of $1,470.85, together with interest at 7 per cent. per annum from the 27th day of April, 1922, and costs of suit taxed in the sum of $17.50.

The record is here on a bill of exceptions. The pleadings upon which the suit was tried were the complaint, answer, cross-complaint, and answer to the cross-complaint.

The plaintiff instituted the proceedings to foreclose mechanics' liens upon seven houses on lots described in the pleadings and for judgment in the sum of $2,643.91, balance claimed for lumber supplied and used in the construction of said houses.

The findings indicate plaintiff to have been entitled to its lien and foreclosure thereof, but, for reasons not apparent in the record, the trial court denied the lien. It, however, gave personal judgment for the balance of $1,470.85, above mentioned.

On page 4 of the opening brief it is stated: "Appellant does complain, however, that although a personal judgment, unsecured by a lien, may be given in such a suit even though a lien is found not to exist (which is on the theory that the suit is one in equity) the trial court was not consistent when it came to consider appellant's cross-complaint. *It then ruled that this was not a suit in equity, but*

★Rehearing denied.

was a special proceeding in which a cross-complaint did not lie." (Italics ours.)

We have been unable to find anything in the record to show such a ruling by the trial court. It is true, as hereinafter will appear, that objections to certain allegations set out in certain paragraphs of the cross-complaint were sustained, but not for the reason stated in the italicized part of the quotation from appellant's brief. In fact, the trial court admitted testimony and proofs in support of the cross-complaint, particularly of the allegations in paragraphs VII and XI therein.

There are three points relied on by appellant for a reversal herein as argued in his brief, namely: (1) The evidence does not sustain the finding as to the agreed price of the lumber; (2) evidence in support of the cross-complaint should be admitted and the issues thereof determined; (3) there is no adequate remedy at law for threatened cancellation of stock held in trust by a fiduciary nor for an accounting, nor to determine adverse claims, etc. These matters will be considered in the order stated.

Finding III was as follows, to wit:

"That after entering upon the construction of said buildings, defendant, Loop Building Company, entered into an agreement with plaintiff whereby plaintiff was to furnish certain materials and perform certain labor required in the construction of said buildings, and the following is a statement of the terms and conditions of the contract made by plaintiff with said defendant, in pursuance of which said materials were furnished:

"Plaintiff agreed to and actually did furnish certain lumber and such like materials to be and actually used in the construction of said buildings for an agreed price of $1,960.00 or $280.00 on each building, which is the reasonable market value of said materials. That certain extra material of the reasonable market value of $61.40 was furnished. That there are credits upon said amounts in the sum of $550.55, leaving a balance unpaid of $1,470.85, with interest thereon at the rate of seven per cent. (7%) per annum from April 17, 1922.

"That said materials were to be paid for upon completion of said work and were to be furnished and delivered as ordered."

Finding IV reads: "That said agreement was fully performed on the part of plaintiff and said sum of $1,470.85 remains wholly due, owing and unpaid, after deducting all just credits and offsets."

Supporting finling III in every particular excepting the one question as to the correct price, the record shows: "It was stipulated that each bill of lumber went into each house, and there were seven lumber bills and seven houses, and that *plaintiff* and not Mr. Newmire was liable directly to plaintiff for all materials so furnished."

Obviously a typographical error occurred in printing the transcript when the word "plaintiff," italicized by us, first appears in the quoted stipulation. It undoubtedly was intended to be the word "defendant." The stipulation left for the trial court's determination only the issue in complaint and answer as to price. This view is demonstrated by the admissions found in appellant's answer.

[1] The testimony as to the exact terms of the contract of sale and purchase as to this question of price was and is sharply in conflict. The witnesses H. E. Shannon and C. A. De Coo for plaintiff and Roland E. Loop, a witness for defendant gave their several statements on the stand. Shannon said in part: "Plaintiff sold lumber to defendant for seven houses at $325 per house, * * * there was also sold by plaintiff to defendant extras which entered into the construction of said houses amounting to $617.32; that $136 was credited for materials returned, and that nothing had been paid on the balance of $2,463.91." Again he said: "In view of the relationship between plaintiff and defendant and to help out defendant on the strength of the connection, I simply allowed a discount of 12½% from the retail price of the materials. There was no written or oral understanding on the subject that I know of, but the discount was just a voluntary gratuity."

It was stipulated that the acting directors of plaintiff were C. A. De Coo, J. H. Smith, H. E. Shannon, Roland E. Loop, and Ray Howard, and that the acting directors of defendant were J. H. Smith, H. E. Shannon, Roland E. Loop, Ray Howard, and Louis Henry.

Mr. Loop, vice president and manager of defendant building company, testified to various conversations had between Smith and Shannon and Louis Henry, Ray Howard, and himself, the three last mentioned acting as agents for the defendant. He stated: "The conversations were during the course of meetings in which these five persons were discussing an arrangement under which said five persons became associates and should acquire the ownership and control of plaintiff corporation, and that defendant should acquire the interests of the five associates, and that lumber should be sold by plaintiff to the five associates or any corporation in which any of them were interested, at cost plus 10%; it was there said that the lumber in question should be purchased for the purpose of building seven houses, which should be built on the same plan as that used by one Earl Newmire, a building contractor who had built numerous houses on those plans, and had purchased the lumber therefor from plaintiff at $225 per house; that if defendant should undertake the building of these seven houses the plaintiff should sell lumber to defendant at the same price; that in view of defendant's interest in the ownership of plaintiff's stock, the defendant would accept and make use of pieces of lumber which were of such length as not to be readily salable to the general public, but which were practically as good as the more salable lengths." The testimony as just shown having been conflicting, the finding of the trial court as to the issue cannot be disturbed.

[2] When the witness Shannon was under cross-examination, after identification of the signatures, it was sought to introduce in evidence Defendant's Exhibit 1 for identification for the purpose of showing "the price at which lumber was to be furnished to the Loop Building Company." The record discloses the following colloquy and ruling:

"Q. As a matter of fact, you know that it is one of the originals of a paper which was signed by those five parties? A. I presume it is.

"Q. Mr. Howard: I will offer this in evidence, Your Honor, and call particular attention to the paragraph beginning at line 2 on page 3.

"Mr. Poole: I wish to object on the ground it is incompetent, irrelevant and immaterial, no foundation laid, no authority—this is the Interstate Lumber Company against the Loop Building Company, and there is nothing there about any Loop Building Company, a corporation, or Interstate Lumber Company, a corporation; no authority of any officer of the company, or directors of the company, and not proper cross-examination.

"Mr. Howard: We are, of course, dealing with the subject of what conversation was had.

"The Court: I will have to read the agreement. I don't know what it is. (Inspecting document.) Objection sustained on the ground that there is nothing here binding or purporting to bind the Interstate Lumber Company.

"Q. By Mr. Howard: Mr. Shannon, do you remember of any discussion of either of this contract or of the oral understanding among the five persons named there in a meeting of the board of directors of the Interstate Lumber Company?

"Mr. Poole: I object to that, same objection, same grounds.

"The Court: Overruled. Answer the question, yes or no. A. I don't remember."

We are satisfied that the learned trial court's ruling was correct. The contract could not prove nor tend to prove the truth of the conversations at which the contract as to price and purchase was claimed to have been made, even though it be conceded the contents of Exhibit 1 were known to all participating in those conversations.

Appellant's and Defendant's Exhibit No. 1 for identification, a voluminous and somewhat complicated document, is set out verbatim in the bill of exceptions. It is the foundation in large part upon which rests his cross-complaint, particularly as stated in paragraphs 2, 3, 4, 5, 6, 8, 9, 10, and 11. Neither the Exhibit No. 1 nor the cross-complaint based upon it relates to, nor depends upon the contract, transaction, matter, or happening upon which this action is brought, nor does it affect the property to which the action relates, and it does not state facts nor supply grounds in the paragraphs mentioned to constitute a cause of action for cross-complaint herein. Section 442, Code Civ. Proc.

The court in effect gave judgment in favor of cross-complainant upon the averments of fact contained in paragraph VII of the cross-complaint to the amount of $550.55, upon which amount there is predicated no specification of error.

[3] The cross-complaint in paragraph VIII states facts perhaps actually sustaining a cause of action against cross-defendant De Coo, an officer and director of the plaintiff lumber company, but that cause of action was a personal one sought to be established as a personal liability of De Coo as the owner of certain lumber company's capital stock. It has no proper place as a cross-complaint herein. The controversy being solely between appellant and De Coo is involved in the case of Loop Co. v. De Coo, L. A. No. 9654, Civil No. 3740, here on appeal. Plaintiff herein is not a party in that case nor in that appeal. Appellant's suggestion that the case No. 9654 be considered and decided along with this appeal is not followed.

[14] We have examined appellant's argument that, as a suit to foreclose a lien is in the nature of a suit in equity, an equitable adjudication of all the rights of the parties to the original suit may be sought by means of a cross-complaint in order that all questions in dispute between the parties in relation to the subject-matter shall be finally settled. He cites 17 Cal. Jur. 165, § 112, and cases; Koch v. Sumner, 145 Mich. 358, 108 N. W. 725, 116 Am. St. Rep. 302, 9 Ann. Cas. 225, and notes; section 1198, Code Civ. Proc.; section 389, Code Civ. Proc.; section 442, Code Civ. Proc.

Appellant says: "Assuming as we must that the allegations of the cross-complaint are true and therefore *that the sale of lumber was part of a contract involving many other things, it follows that relief thereby sought related to and depended upon the contract sued upon.*" (Italics ours.) But the sale of lumber herein was not "a part of a contract involving many other things." It was a separate and entire contract, not related to nor dependent upon any other to which plaintiff lumber company was a party. The cited authorities uphold the trial court in keeping out of evidence the agreement, said Defendant's Exhibit No. 1 for identification.

From Koch v. Sumner, supra, we quote: "The issues raised by the cross-bill must be so closely connected with the cause of action in the original suit that the cross-suit is a mere auxiliary or dependency upon the original suit, but subject to this qualification, new facts, and new issues may properly be presented by a cross-bill"—citing many cases.

The principle so stated accords with our Code. Sections 389 and 442 of the Code of Civil Procedure.

[5] The trial court's ruling on the objection to the offer of the said agreement (Defendant's Exhibit 1 for identification) was adhered to at all times when it was offered either on cross-examination or in support of the cross-complaint. With that ruling upheld here it becomes unnecessary to discuss at length the other specifications of error numbered 2, 3, 4, 5, and 6. It may be said there was some evidence to support all the material and necessary findings. In the absence of sufficient evidence before the court on appeal, all presumptions and intendments support the findings. Williams v. Reed, 43 Cal. App. 425, 185 P. 515; Wolfsen v. Smyer, 178 Cal. 775, 175 P. 10; Hough v. Ferguson, 36 Cal. App. 120, 171 P. 804. Counsel's point 3 in argument also is eliminated by the ruling sustaining the said objection to Defendant's Exhibit 1 for identification.

We have considered Appellant's and Defendant's Exhibit 2, the letter of Mr. Ray Howard, attorney for appellant, to Mr. John F. Poole, attorney for respondent. There was no reply to the letter, but we find nothing in it, even if there were "apparent acquiescence therein for two years" as argued by appellant, to constitute a waiver of the legal right to make all proper objection at the trial to the introduction of evidence in support of the cross-complaint.

The judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

206 Cal. 575

FYNE v. COMMERCIAL CENTRE REALTY CO. (Sac. 4101.)

Supreme Court of California. Feb. 26, 1929.

Mortgages ⚷398—Purchaser could not require vendor, before payment of interest on mortgage, to indemnify it against executions and attachments against vendor's parents (Code Civ. Proc. § 542, subds. 1, 2).

Purchaser of premises, with full knowledge as to any interest of vendor's parents therein, and nevertheless approving the bona fides of the transaction and consummating purchase at a time when it was as fully informed on subject as it was on any subsequent day, was without right to require, as a condition precedent to payment of interest installments on mortgage, that vendor indemnify it against executions and attachments in actions brought against vendor's parents; there having been no attempt to attach the real property as provided by Code Civ. Proc. § 542, subds. 1, 2.

Department 1.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Eva Fyne against the Commercial Centre Realty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank A. Duryea, of Marysville, for appellant.

Harry I. Stafford and Dean Cunha, both of San Francisco (Daniel R. Shoemaker, of San Francisco, of counsel), for respondent.

SEAWELL, J. A statement of the case in which this appeal is taken from a judgment rendered for plaintiff and respondent may well be taken from the recital of facts set forth in appellant's brief. The action was an ordinary action for the foreclosure of a mortgage. The plaintiff alleged the execution and delivery of a note and mortgage by appellant, Commercial Centre Realty Company, a corporation, to respondent, Eva Fyne, on January 27, 1926, to secure payment of the principal sum of $10,000 five years after date, with interest at the rate of 7 per cent. per annum, payable monthly in advance. The note provides that, if interest is not paid within 30 days after the same becomes due, the whole of the principal sum shall forthwith become due and payable at the election of the holder of the note, without notice. It is alleged, and not denied, that the interest has not been paid since June 27, 1926. The complaint was filed February 1, 1927, and prays for judgment against the defendant for the whole of the principal, with interest according to the terms of the note from June 27, 1926, together with reasonable counsel fees and costs of suit, and for the sale of the mortgaged premises.

Defendant admitted the execution of the note and mortgage, but presented the issue that the plaintiff, Eva Fyne, was not the real party in interest, and alleged that E. T. Prather and Ray Prather, husband and wife, and parents of Eva Fyne, were the real owners and holders of the note and mortgage, and that defendant had been served with certain attachments and executions in actions brought against the Prathers; admitted that defendant had not paid the interest; but averred that it had offered to do so if indemnified by the Prathers against said executions and attachments; and offered to deposit the whole amount of interest due in court, subject to the orders of the court. A supplemental answer was filed on the day of trial, alleging the issuance of attachments and garnishments and the service thereof upon appellant in an action brought against the Prathers since the filing of appellant's answer, and, further, the issuance and service upon appellant of a garnishment issued in an action brought since the filing of said answer in which respondent, Eva Fyne, is joined as a party defendant with the Prathers. The entire transaction between the plaintiff and defendant corporation was conducted by Mr. A. Ruef, the manager of said corporation.

It is the contention of appellant that the Prathers were the owners of said mortgaged real property, and that they fraudulently caused it to appear of record as the property of Eva Fyne for the purpose of removing it beyond the reach of certain judgment creditors, more particularly to defeat a pre-existing indebtedness owed by them to J. T. and F. G. Bogle in the sum of $3,600.65, which indebtedness was reduced to a judgment rendered by the superior court of the county of Los Angeles on August 6, 1925, in an action brought by said Bogles against said Prathers. This judgment was fully satisfied March 5, 1926. It appears that the mortgaged property had been sold upon execution on account of said judgment and Mr. A. Ruef, the manager of appellant corporation, demanded that said judgment be satisfied. A portion of the purchase moneys was applied to the satisfaction of the Bogle judgment. The record title of said property, so far as the Prathers and Mrs. Fyne are concerned, shows that, on January 28, 1924, it was deeded by R. W. Stevens to E. T. Prather and Ray Prather; on November 3, 1924, by E. T. Prather to his wife, Ray Prather. On December 2, 1924, Ray Prather, the mother of Mrs. Eva Fyne, executed a gift deed of the same to her said daughter, Mrs. Eva Fyne. On January 19, 1926, Eva Fyne and her husband, George Fyne, by a grant deed conveyed said real property to Commercial Centre Realty Company, a corporation, appellant herein. On the same day Ray Prather and her husband, E. T. Prather, by a quitclaim deed, remised all their right, title, interest, estate, and claim in or to said real property to said corporation. The corporation to which the deed of grant ran from Mrs. Fyne purchased the property at the price of $20,000, and gave back to Mrs. Fyne a mortgage in the sum of $10,000. A portion of the purchase moneys was paid on account of the Bogle judgment and in satisfaction of a prior mortgage executed by Prather and wife to Pacific Coast Land Bank, and the balance was, according to Mr. Ruef's testimony, paid to Mrs. Prather or Mr. Prather. Mrs. Fyne, however, was treated at all times by Mr. Ruef as the owner of the legal title, and no moneys were paid to the Prathers or on their account without the written indorsement of Mrs. Fyne. It is the testimony of Mr. Ruef, and full credit is given to his testimony on the subject, that Mr. and Mrs. Prather practically negotiated the transaction herein, and that Mrs. Fyne, who was present at many if not upon all the meetings of the parties, had but a small part in the discussions which culminated in the purchase of said real property and the adjustments that attended it.

Mr. Ruef, in aid of his contention, also instances the passing of money paid on account of said sale to the Prathers and the discharge of the Prathers' obligation from the funds paid on the purchase price and a number of acts which tend to show that the Prathers' wishes were respected in the disbursement of said funds if, indeed, they were not the real parties in interest. He also testified that Mr. Prather stated that he would like to discount the mortgage in order to get the cash. Mr. Ruef further testified that at or about the time the mortgage was executed he drew the form of an assignment of said mortgage from Mrs. Fyne to Mrs. Prather; that Mrs. Prather thereafter stated to the witness that it had been properly assigned and she had the document in her safe deposit vault; Mrs. Fyne was present and made no comment; that he (Mr. Ruef) had a conversation with Mrs. Fyne in the presence of others with relation to the real ownership of said mortgaged property in February, 1926, in which Mrs. Prather said that she and her husband needed the money and that she would make a very liberal discount if Mr. Ruef would get some one to take the mortgage off her hands. The witness testified that Mrs. Fyne said nothing unless she would say: "I wish you would do something." Other conversations are testified to by Mr. Ruef in which the Prathers, in the presence of Mrs. Fyne, requested Mr. Ruef to negotiate a sale of the mortgage at a discount, as they were pressed for money.

Notwithstanding the fact that the Prathers negotiated the sale of said real property with

Mr. Ruef, acting for said corporation, and seemed to have dictated the terms of the mortgage and received a portion of the interest money, the title to said real property had stood unchallenged for more than a year in the name of Mrs. Fyne, and Mr. Ruef made the monthly interest remittances to her until he refused to make further payments after June 27, 1926.

Every circumstance urged upon appeal as tending to establish the Prather interest in said real property was known to said corporation through its manager, who negotiated the transaction from the beginning and who was fully informed as to the existing relationship of the parties with whom he was dealing, including the financial difficulties of the Prathers, as evidenced by judgments existing against them and which may have become liens on any real property owned by them. In fact the entire chain of title was available to appellant. From the record it appears that said corporation took steps to perfect the title to its satisfaction and conducted the entire transaction. In addition to the grant deed executed by Mrs. Fyne, the corporation, as a part of the same transaction, demanded and received from the Prathers their quitclaim deed and also took the precaution to obtain a quitclaim deed from the Bogles. Mr. Ruef was a participant in the mortgage transfer and actually drew the form by which the mortgage might be transferred from Mrs. Fyne to Mrs. Prather. There is no evidence, however, that the assignment was ever executed or that it was filed for record. Mr. Ruef seems not to have attached any significance to that circumstance, as he thereafter paid the interest direct to Mrs. Fyne. The attachments and garnishments served on appellant corporation are pursuant to a judgment and writs of attachment issued in certain actions brought against the Prathers. Mrs. Fyne was made a party in but one suit, and that was commenced long after this foreclosure proceeding was begun. No claim is made that any attempt has been made to attach said real property as provided by section 542, subds. 1 and 2, Code of Civil Procedure

The question presented for decision is whether appellant may, under the facts of this case, impose upon the respondent a condition precedent which was not a part of the mortgage contract of the parties thereto before she may be entitled to receive the interest secured by said mortgage. If the mortgagor entertained a doubt as to the sufficiency of the title it should have provided by contract for the indemnity it is now insisting upon. Appellant offered to pay the interest money into court subject to the determination of a court as to whether respondent or the Prathers were entitled to the same. This was not a covenant of the contract. Respondent's consent to such a proceeding would amount to a concession that there was ground for controversy between respondent and the Prathers as to the ownership of said property. Surely, the respondent could not be expected to place herself in a position of yielding to a suggestion that she was not the owner of said property or assuming a burden that was not legally hers.

Upon a consideration of the whole case, we are of the view that we would not be justified in directing the trial court to grant appellant the relief which it could not grant. While it may be possible to construe the conduct of the parties as giving some color to appellant's contention, it nevertheless approved the bona fides of the transaction between respondent and the Prathers at a time when it was as fully informed on the subject as it was on any subsequent day. All written communications with respect to appellant's refusal to continue to pay interest were with and in the name of Mrs. Fyne.

It does not appear that any unsatisfied judgment or lien was subsisting at the time appellant's deed was recorded.

No sufficient grounds appearing for appellant's refusal to pay the monthly installments of interest, we are not permitted to disturb the judgment of the trial court.

Judgment affirmed.

We concur: PRESTON, J.; CURTIS, J.

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206 Cal. 622

POTTAGE v. LUCKENBACH S. S. CO., Inc., et al. (S. F. 11821.) ★

Supreme Court of California. March 7, 1929.

Rehearing Denied April 1, 1929.

1. Seamen ⟹29(5)—Statute relative to employees' actions for injuries resulting from marine service is inapplicable unless relation of master and servant obtains (Jones Act, § 33 [46 USCA § 688]).

Jones Act, § 33 (46 USCA § 688), makes Federal Employers' Liability Act (45 USCA §§ 51–59) rule of decision in action by employees for personal injuries resulting from marine service to employers, but it does not apply to any such situation unless relation of master and servant does obtain.

2. Admiralty ⟹20—Hatch tender, employed by stevedore company, and injured while on steamship, held entitled to urge steamship company's liability under common law in state courts.

Hatch tender, employed by stevedore company, and injured while on board steamship when struck by part of loading apparatus, *held* entitled to urge issue that steamship company owning ship is liable to him for relief afforded by common law as applied in state courts.

★Rehearing denied.

3. Admiralty 🔑20—As against steamship company, employee of stevedore company injured on vessel may bring action in rem against vessel, in personam in admiralty court, or in personam in state court (Jones Act, § 33 [46 USCA § 688]).

Irrespective of Jones Act, § 33 (46 USCA § 688), employee of stevedore company injured while on board vessel has three courses open to him against steamship company—action in rem against vessel, or in personam in admiralty court, or in personam on common-law side of state court.

4. Appeal and error 🔑187(2)—Contention that defendants could not be properly joined cannot be relied on without special demurrer.

In action by employee of stevedore company injured while on board vessel, which was brought against both stevedore company and steamship company, contention that the two defendants having different rules of law applicable to them could not be properly joined as defendants, if sound, cannot be relied on where no special demurrer on such ground was urged, especially where stevedore company has passed out of case owing to delay in perfecting appeal.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for damages for personal injuries brought by William G. Pottage against the Luckenbach Steamship Company, Inc., and another. From an adverse judgment, plaintiff appeals. Reversed, with directions.

Reed M. Clarke, of San Francisco (Otto G. Kuklinski, of San Francisco, of counsel), for appellant.

Andros, Hengstler & Dorr, of San Francisco, for respondent Luckenbach S. S. Co., Inc.

Edwin T. Cooper, Charles T. White, and Redman & Alexander, all of San Francisco, for respondent California Stevedore & Ballast Co.

PRESTON, J. In this cause the judgment in favor of respondent Luckenbach Steamship Company, Inc., a corporation, is reversed, and the court below is directed to overrule the demurrer of said defendant. The basis for this ruling follows:

The action is for what may be termed a marine tort. On January 21, 1924, plaintiff, a hatch tender employed by the above-named respondent stevedore company, but not in the employ of the above-named respondent steamship company, while working on board the steamship "Edgar F. Luckenbach," owned by respondent steamship company, and then and there in the navigable waters of San Francisco Bay, at Pier 31, was struck by a sling, a part of the loading apparatus of the said vessel, filled with sacks of beans, thereby receiving serious personal injuries.

He sued both companies, charging as against the steamship company defective machinery and an unsafe place in which to work, and as against the stevedore company negligent manipulation of the sling by his fellow servants, the winch tenders. No point is made that negligence is not sufficiently alleged. The complaint also contains the following paragraph: "Plaintiff herein hereby elects to bring this action for damages at law, with the right of trial by jury, against said defendants under the express provisions of section 33, act of June 5, 1920, known as the 'Jones Act' (41 U. S. Stats. at Large, p. 1007)."

General demurrers challenging the jurisdiction of the court were interposed separately by the defendants. The court sustained both demurrers without leave to amend, and separate judgments for said defendants were entered in the premises and were so entered on different dates. Plaintiff appealed from both judgments in one notice. As to the stevedore company, his appeal was too late, and has heretofore been dismissed. His appeal, however, as to respondent steamship company was in time, and we are thus left to consider alone the allegations of the complaint against it.

It further appears from the record that, after the lodging of this complaint in the state court, said defendants sought removal of the cause to the federal District Court, upon the ground that the action arose under a federal statute. The cause, however, was remanded by the federal court to the state court, respondent steamship company says, by virtue of the provisions of section 33 of the so-called Jones Act, above referred to, which section reads as follows: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 41 Stat. L. 1007; Fed. St. Ann. 1920, Supp. p. 227; 46 USCA § 688, p. 149.

[1, 2] Appellant, however, insists that, at the time he inserted the above-quoted paragraph in his complaint, a construction of the Jones Act, taken in connection with other matters, rendered the law uncertain as to whether he could receive the benefits of said

act; that, since the filing of the complaint, the atmosphere has been cleared by judicial construction, and it now appears that he cannot rely upon said act because he was not an employee of defendant steamship company, and he asks that the court consider said allegation as surplusage and prays that the remaining portions of his complaint be considered for the purpose of ascertaining whether they state facts sufficient to constitute a common-law cause of action against said steamship company for negligence.

The Jones Act, as above noted, made the Federal Employers' Liability Act (45 USCA §§ 51–59) the rule of decision in actions by employees for personal injuries resulting from marine service to their employers. But it does not apply to any such situation unless the relation of master and servant does obtain; hence, in the cause before us, the act may have applied to the stevedore company, but it does not apply to the steamship company, and said paragraph is out of place now that the employer is out of the case. But respondent says that an irrevocable election to claim under it has been made. How can an election be made of something concerning which no right of election ever existed? Moreover, no attempt is made to controvert the proposition that the complaint, with this paragraph omitted, is amply sufficient to charge a cause of action for negligence according to the rules of the common law. Wherein, then, has respondent suffered detriment? Appellant was simply mistaken or in error as to the application of the Jones Act to him as against this defendant.

[3] But respondent, attempting to show detriment, says it was on the strength of this claim that plaintiff succeeded in having the cause remanded from the federal to the state court. This seems not to be entirely correct, for, under Judicial Code, § 24, subd. 3 (28 USCA § 41), the common-law remedy was "saved to suitors" in every case of admiralty cognizance where the common law was "competent to give it." In other words, irrespective of the Jones Act, this plaintiff always had three courses open to him as against respondent—an action in rem against the vessel, or in personam in the admiralty court, or an action in personam on the common-law side of the state court. The Jones Act, by adopting the Federal Employers' Liability Act, liberalized the rules of the common law in personal injury cases coming within its scope, but the one before us was not affected by this act, and the fact that appellant at one time may have mistakenly thought so is not controlling or of significance in the premises. The law was in a confused state at that time, and the court below may have been misled in this matter on that account.

[4] The contention that the two defendants, having different rules of law applicable to them, could not be properly joined as defendants (Schotis v. North Coast Stevedoring Co. [D. C.] 24 F.[2d] 591), if sound, cannot be relied upon here, as no special demurrer on this ground was urged, and, moreover, the stevedore company has heretofore passed out of the case.

The plaintiff is clearly entitled to urge the issue that respondent steamship company is liable to him for relief afforded by the common law as applied in the courts of California. Hence the judgment first above announced.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

206 Cal. 617

ATKINSON v. STATE. (Sac. 4072.) ★

Supreme Court of California. March 1, 1929.

Hearing Denied in Bank March 28, 1929.

1. Highways ⟹113(4)—Capacity of borrow pits in measuring material taken for highway held determinable by area not flooded, not area including flooded portion partially filled causing shrinkage in pits.

In action by contractor undertaking to construct embankment for highway under contract providing for payment by cubic yard for material used in construction by measuring borrow pits from which material was excavated, original capacity of borrow pits should be determined by measuring area not affected by flood waters in determining shrinkage caused by flood carrying earth into borrow pits, and not by area affected by flood waters and partially filled with dirt.

2. Highways ⟹113(4)—Whether extra material for highway embankment necessitated by contract changes was ordered and authorized involved questions of fact for trial court.

Where earthen shoulders for highway were constructed wider than called for by contract and at different angle which added much greater yardage of earth to embankment than plaintiff contractor was required to supply, but plaintiff was not allowed compensation for excess material as unauthorized, issue whether resident engineer in fact ordered extra material furnished, and whether he was authorized to do so, involved questions of fact for trial court.

3. Appeal and error ⟹1012(1)—Appellate court cannot pass on weight of evidence.

Weight of evidence cannot be passed on by an appellate court.

Department 1.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Guy F. Atkinson against the State of California. Judgment for defendant, and plaintiff appeals. Reversed.

White, Miller, Needham & Harber, of Sacramento, for appellant.

★Hearing denied in Bank.

Paul Fratessa and Fabius Finch, both of San Francisco, for the State.

Harry A. Encell, of San Francisco, for California Highway Commission.

SEAWELL, J. Appellant and respondent, acting by and through the department of engineering, entered into a contract whereby the former undertook to construct the embankment for a section of the state highway under construction between Coalinga and Fresno, beginning on said highway at engineer's station No. 439 and concluding at station No. 1071, a distance of approximately 12 miles. The plan of construction called for a 24-foot roadway, consisting of a 15-foot center strip of concrete and dirt shoulders 4½ feet wide on each side of the pavement. The earthen shoulder or embankment was required to slope outward from the concrete pavement, a distance of 4½ feet, at the ratio of 1½ feet horizontal to 1 foot perpendicular, which grade is known to engineers as a 1½ to 1 slope. The earthen shoulders were constructed wider than called for in the contract, and instead of having a drop of 9½ inches at the outer edge, as per contract, they were built at a grade almost level with the pavement, which added a much greater yardage of earth to the embankment than the appellant was required by his contract to supply. Appellant was not allowed any compensation for furnishing and placing this excess material, which, it is claimed, approximated 12,110 cubic yards of earth. The claim was disallowed on the theory that said resident engineer did not authorize the appellant to depart from the plans and specifications in the particular referred to, and if he had attempted to authorize a departure therefrom it would not have been effective, inasmuch as no request was first made to the commission for the performance of said work, nor was it done in obedience to a written order from the highway engineer of the department of engineering, prerequisites essential to give validity to any change or modification of the plans and specifications after the execution thereof. The second cause of complaint is placed upon the ground that the department of engineering adopted an unfair method of estimating the capacity of the excavation or borrow pits which previously had been disturbed by flood waters. The demand of appellant for the excess herein claimed over the final estimate made by the department some five months prior to the day appellant filed his claim against the state is 23,741.5 cubic yards, amounting to approximately $26,000.

The appellant was to be paid $1.10 per cubic yard for all excavation made by him in the construction of said embankment. This is to say, the holes from which the material was excavated, known as borrow pits, were to be measured, and the contractor paid for the number of yards, as shown by the capacity of the excavations or borrow pits. At about the time said embankment was completed, and before any measurements were taken, the easterly half of said highway was submerged by flood waters which carried into said borrow pits or excavations silt and earth in such quantities that their original areas could not be satisfactorily measured. The entire westerly half did not suffer such damage.

The finding of the trial court on this branch of the case is:

"That owing to the flood conditions it became impossible to measure the excavations according to the method provided in said contract and the defendant adopted said method of adding 21.1 per cent more material to the quantity found in the embankment; that plaintiff excavated more material than the measurements of the partially filled excavation would indicate, for which the said defendant has paid by the allowance of 21.1 per cent material more than actual measurement of the embankments; that the character of soil from stations 600 to 1071 was similar; that while the general contour, as shown by the maps and profiles, appears to be similar, as a matter of fact, the cuts and fills are dissimilar and not comparable; that the embankments between the same stations received the same general treatment of rolling and watering; that the excavations from stations 600 to 815 were unaffected by the flood, but the difference between the embankment and excavation, as measured after the storm, is unreasonable and cannot be taken as a standard for determining the quantities of excavation on the other portions of the work; that the excavations between stations 815 and 928 were partially filled by the flood, prior to the measurement thereof, but to a less degree than the excavations between stations 928 and 1071; that the quantity of material between stations 928 and 1071, for which defendant has paid plaintiff, was determined by adding 21.1 per cent to the material found in the embankment after the storm; that the character of the soil between stations 600 and 1071 was such that when treated according to the requirements of the contract, the embankment would have a smaller cubic content than the excavations from which the material had been obtained for the embankment; the court finds that under the contract between plaintiff and defendant, plaintiff was required to roll the earth along the roadbed before placing the filled material therein; that the soil was soft and in the rolling process a depression in the soil was made ranging from 3 to 5 inches, varying according to the softness of the soil.

"The Court finds that plaintiff is not entitled to payment for any greater quantity of material than by adding 21.1 per cent of material to the quantity of material actually reposing in said embankment, for which said plaintiff has been paid in full."

No objection is made to the actual measurements of excavations from station 600 easterly to station 815. The borrow pits between these points were not affected to any material extent by flood waters. Complaint is made, however, that the actual measurements of said partially filled borrow pits between stations 815 and 928 were treated as though they had not been affected by flood waters and were included as a factor in calculating the percentage of shrinkage in computing the whole distance from stations 600 to 928, upon which a general average was struck. In other words, appellant claims that upon the court's finding that the borrow pits between stations 815 and 928 had been partially filled, it should have treated said pits as partially filled by silt and débris, and not as pits of the same areas as originally constructed. From stations 815 to 928 the excavation area was smaller than the corresponding embankment measurements showed. It is accepted as an engineering fact that under compression such as is employed in highway construction the excavation measurement should be much larger than the embankment measurement in cases where the soil is of the character of that existing between stations 815 and 928. By measuring the pits between stations 600 and 928—which included the partially filled pits between 815 and 928—and the embankment between said stations 600 and 928, the shrinkage factor was estimated to be 21.1 per cent., and the embankment measurements between stations 928 and 1071 were accordingly increased by said per cent., and the resulting figure was adopted as the area of the excavations between stations 928 and 1071, as they originally existed.

It appears that the unaffected area from station 600 to station 815 showed a shrinkage factor of 52.9 per cent. From station 815 to 928 there appeared to be 19 per cent. less excavation than embankment. This variance can be accounted for only on the theory that the borrow pits in the area were in a partially filled state, rather than in their original state.

[1] The important question in the case is to ascertain as nearly as possible the normal shrinkage factor. In justice to the learned trial court, this was a matter attended with difficulties. It would seem reasonably certain, however, that the whole distance between stations 815 and 928 should not have been included as undisturbed area in an effort to ascertain the original contents of the borrow pits. It would appear that the borrow pits within the limits of station 600 to station 815 would furnish a fairer basis for estimate as to capacity than would the inclusion of station 928. It should not be extremely difficult for engineers and others familiar with local conditions to determine upon the ground approximately the point at which the disturbance of said pits or excavations began. The 21.1 shrinkage factor adopted by the learned trial judge would appear also to be 3.15 per cent. smaller than the average estimate of the four engineers who testified on the subject, one of whom was called by plaintiff and the other three by defendant. The average shrink from the figures given by said engineers establishes the shrinkage at 24¼ per cent.

[2, 3] The other point pressed by appellant has to do with approximately 12,000 cubic yards of earth placed in embankment form in excess of the quantity required to be furnished by the provisions of the contract, for which appellant received no compensation. This extra material was rejected by the commission as "unauthorized." This issue involves a question of fact as to whether the resident engineer, who is alleged to have ordered the extra material furnished, did in fact do so, and, further, if he did order said work done, was he expressly authorized to so act? The solution of this question is dependent upon evidence, the weight of which cannot be passed upon by an appellate court. Other questions of fact presented in the case are wholly questions for decision by the trial court in the exercise of a sound discretion.

Upon a full consideration of the case, we are of the view that appellant is entitled to a greater amount for his services than was produced by the application of the 21.1 per cent. shrinkage factor, and that a more satisfactory basis of compensation will be established upon a retrial of the cause.

Judgment reversed.

We concur: CURTIS, J.; PRESTON, J.

MORGAN et al. v. GOVE et al. (L. A. 9153.)★

Supreme Court of California. March 7, 1929.

Rehearing Denied April 1, 1929.

1. Municipal corporations ⚷330(1)—Sewer construction contract held void because of acts tending to suppress competitive bidding, regardless of any competition between certain contractors (Street Improvement Act of 1911).

Where city engineer and contractor, T., conspired together to prevent competitive bidding for contract to construct sewer system under Street Improvement Act of 1911 (St. 1911, p. 730), and K., who knew of said conspiracy, organized conspiracy of his own with other contractors for same purpose, and by deceiving and betraying T. succeeded in having contract awarded to one of other contractors, *held* that contract was void as being result of acts tending to suppress competitive bidding, regardless of whether bid might be said to be competitive as between the rival conspirators.

2. Municipal corporations ⚷330(1)—Only question is whether combination to suppress competitive bidding for public improvement contract has tendency to lessen competition; success being immaterial.

Whether a combination to suppress competition in bidding for public improvement contract succeeds is immaterial, but only question is whether such combination has the tendency or necessary effect of lessening in some degree the competition which should surround bidding for public work.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by William Morgan and others against Hugh Gove, J. G. Beckjord, and others. Judgment for plaintiff, and defendant last named and another defendant appeal. Affirmed.

Fredericks & Hanna, of Los Angeles, for appellants.

Hugh A. McNary, of Los Angeles, for respondents.

Schweitzer & Hutton, of Los Angeles, for respondent Joe Chutuk.

Oscar E. Winburn, of Los Angeles, for various other defendants and respondents.

Julius V. Patrosso, of Los Angeles, for amicus curiæ in support of respondents.

PRESTON, J. Action by plaintiffs, as taxpayers, to have declared void for fraud and for a violation of rules of public policy a contract awarded by the city of Watts, in Los Angeles county, to the defendant J. G. Beckjord for the construction of a sewer system for said city. Admittedly the defendant Hoffman is a joint party to said contract with the defendant Beckjord. The other defendants are the city trustees and various city officers of said town, which was a town of the sixth class, organized under the general law, but which, after the commencement of these proceedings, was absorbed by the city of Los Angeles.

Plaintiffs had full relief as against defendants Beckjord and Hoffman. The city trustees and all other defendants were exonerated from blame or culpability in the transaction except defendant A. H. Koebig, Jr., the city engineer. The judgment of the court declared said contract void and absolved the city from all liability thereunder. Defendants Beckjord and Hoffman, as bidders for the contract, have appealed. Appellants' briefs cite practically no authorities, but rest their arguments largely upon a discussion of the evidence, and, in reality, upon a discussion of the weight of admittedly contradictory evidence.

In February, 1922, this city instituted proceedings to construct a sewer system under the Street Improvement Act of 1911 (St. 1911, p. 730). In March, May, June, and July of said year bids were called for for said work, but for various reasons no contract or contracts resulted. The bids for such work ranged from $442,775 to $666,000. The only things worthy of note at this point are: That defendant Hoffman bid for said construction work as follows: In May, $545,000; in June, the same amount; in July, $544,700. That one Daley, who was the agent of one Kennedy, whose part in the transaction will hereinafter appear, bid for said work in May the sum of $490,000. Certain legal difficulties in the proceedings and certain unsatisfactory negotiations with the state board of health were the contributing causes which led to the abandonment by the city in November of said year of these first proceedings. Immediately thereafter, however, new proceedings were instituted, and said A. H. Koebig, Jr., city engineer, was required to, and did at that time, file a new set of plans and specifications for said public work. These plans and specifications as made were designed by the city engineer not only to meet the technical objections made against the old ones, but in fact altered the entire scheme in a substantial way. This fact is undenied. The amount of deep excavation, for example, was so lessened that the cost of construction was cheapened substantially and in an amount ranging from $53,000 to $100,000.

The court found upon sufficient evidence that the city trustees believed at all times that the changes in the new plans were only technical and that in all substantial particulars affecting the cost of construction they were the same as the old ones, and that they continued in this belief up to and including the time of the awarding of the contract as hereinafter noted. The court also in this connection found upon sufficient evidence that said A. H. Koebig, Jr., city engineer, intentionally and designedly kept said board of

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★Rehearing denied.

trustees in ignorance of the existence and materiality of these changes. Bids were again called for by said city trustees and were opened on December 26, 1922, in the presence of all the bidders. The record shows the bids received were as follows: J. C. Beckjord, $445,000; Fred Hoffman, $447,000; John P. Kennedy, $455,000; Charles Thompson, $483,000. The bid of said Beckjord was accepted. The contract was awarded to him, and thereafter the city engineer executed on behalf of the city a contract with him for the said work according to the said plans and specifications. Beckjord immediately sublet the entire work to one Joe Chutuk for the sum of $315,000. This contract with Beckjord is the contract assailed by the plaintiffs in this action upon the charge that the proceedings leading up to it were in violation of the rules of public policy and, in addition, that it was brought about by out and out fraudulent conduct upon the part of appellants and others.

The court was well warranted under the evidence in finding the existence of the following further facts relating to this transaction: That the said city engineer was desirous of suppressing competitive bidding for said contract for said public work; that he was in league with said bidder Thompson for the purpose of assisting Thompson in securing said contract, and to that end he was discouraging all others from bidding upon said public work, doing what he could not only to keep the city trustees in ignorance of the changes that had been made, but also to hamper prospective bidders in getting the material information upon which to fix their bids; that he further came in touch with said John P. Kennedy, a bidder who, under the name of Daley, had previously placed a bid for said work, as noted above, and recommended to said Kennedy that he get in touch with said Thompson, and the two did later meet in his (Koebig's) presence; that the result of their negotiations, consummated without the presence of Koebig, was that Thompson offered to Kennedy the sum of $5,000 to refrain from making a competitive bid, but, to the contrary, he was to make what is known as a complimentary bid, which is defined by the witnesses as a bid dictated by the real bidder at a price higher than his own, designed for the purpose of convincing the public body awarding the contract of the reasonableness of the real bidder's figures; that thereafter Kennedy secured access to these plans and specifications and observed the changes which had been made in them; that in a second conversation with Thompson his proposed bonus for said complimentary bid was increased $10,000.

But Kennedy did not stop at this point. Having previously had some relations with the defendant Hoffman, he dispatched to him at Berkeley, Cal., a wire, dated December 16, 1922, which referred to this sewer project, stated that the work had been "framed" for Thompson and asked if he was interested in the matter. Hoffman replied by telegram that he was "much interested," would arrive in Los Angeles on December 26th, and asked that he be met with "official advertisement bid blank and information." On December 20th, Kennedy wrote Hoffman at the same address, telling him of the conference with Koebig and Thompson, and stating that Thompson had said that he did not think it was fair for Kennedy to "butt into the job," as he had been put to large expense and was entitled to the contract. Kennedy, in said letter, then referred to the previous bids and charged that Thompson had double-crossed him at that time. He stated that Thompson, while walking down the street with him, inquired about him (Hoffman) and made a proposition that he (Kennedy) put in a complimentary bid, which he had agreed to do. He further stated in said letter that the job was too nice a one for Thompson and his associates to have; that there would be a profit of $175,000 in it; that it would take from $300,000 to $350,000 to finance the work; that Hoffman should have the first $50,000 profit, he the second $50,000, and the remainder should be split in equal shares between them. He explained that the reason he told Thompson he would put in a complimentary bid was in order to keep a line upon what Thompson's bid would be and that he had an idea that Thompson's bid would be ahead of the bid he and Hoffman would make by about $30,000 to $40,000. He wound up the letter by stating that Thompson, he thought, had no idea that he (Hoffman) would want to put in a bid.

Following this communication Hoffman arrived in Los Angeles on the day stated and there met with Beckjord and Kennedy. It was agreed that Kennedy should continue to "play" with Thompson in order that they might know the amount of his bid. Kennedy also made an estimate of the cost of the work, which he put at $309,000, and as a result of the conferences the three bids above set forth were made. On the 26th day of December the bidders were all present. The bids were opened and the award was made to the defendant Beckjord. It should be added that at this time Hoffman admitted that he and Beckjord were working together in the matter, but any connection with Kennedy or any knowledge of the bid of Thompson was not disclosed. Later Beckjord and Hoffman, acting together, sublet the work to said Chutuk for the sum of $315,000, as aforesaid. The time passed for taking any action in the proceeding itself, and plaintiffs, as taxpayers, resorted to this action for the purpose of having said contract declared void.

How the defendants under this state of the record can hope to succeed in their appeal is utterly beyond our comprehension. It is true that they assail Kennedy from every standpoint as unworthy of belief, but the court believed him, and the corroborating circumstances and admissions of the defendants were ample to warrant the court in so believing him, even though it may at the same time have held as despicable the conduct of said witness. Moreover, there are at least two, if not more, principles of law which forbid appellants from securing relief.

[1] First, there is evidence warranting the conclusion that Koebig and Thompson conspired together to prevent competitive bidding for said contract; that Kennedy knew of said conspiracy and organized a consipracy of his own with defendants Hoffman and Beckjord, also for the purpose of suppressing competitive bidding for said work. The two organizations, connected by Kennedy, had for their object the suppression of competition in said bidding, and while it is true that Thompson was deceived and betrayed by Kennedy, it is also true that the prime and sole object of the organization, so far as the rights of the city and the public were concerned, was to suppress competition in the bidding. To grant appellants relief upon the ground that they deceived and betrayed Thompson, and that their bid was in fact competitive as to him, would be to put a premium on their own misconduct; therefore it may truly be said that the contract was the direct and proximate result of the fraud participated in by these defendants. But even though it should be held that Thompson's bid was a competitive bid, and only Kennedy and appellants were in the combine, this in and of itself is sufficient reason for denying relief to defendants, or either of them, in this action, upon the ground that the tendency of their acts was to suppress competitive bidding and a rule of public policy requires a refusal of their claim to the contract.

[2] Whether or not a combination such as this succeeds is immaterial. The only question is whether such combination has the tendency or the necessary effect of lessening in some degree the competition which should surround the bidding for the public work. This may be illustrated by reflecting upon what the effect upon the minds of the public authorities might have been when they saw these three bids, Hoffman's, Beckjord's, and Thompson's. They would immediately have been warranted in coming to the conclusion that the figures bid were approximately correct and reasonable or else three independent minds would not have reached so nearly the same estimate. This is not a case of joint bidders where the facts are known. It is a case where a combination between the bidders was concealed and the public authorities were deceived as to the true nature of the transaction. Thompson has not appealed, but were he before the court, it would be said of him that his bid was not a competitive bid, for he thought that through Kennedy he had suppressed all the competition. Consequently his bid would represent the opposite of a competitive bid, being in fact a monopolistic bid.

The law governing this situation is well understood. As early as Swan v. Chorpenning, 20 Cal. 182, decided in 1862, this court had under review a situation where an agreement respecting government contracts to be awarded to the lowest bidder, which tended to deprive the government of the advantage of competition in the bidding, was declared "unlawful and void." Said agreement was to withdraw a bid already made and not to rebid for the contract. The court, after quoting from the Supreme Court of the state of New Jersey to the effect that any arrangement which would diminish the number of competitors, lessen the number of proposals, or induce any one or more to abandon his intention of making an offer to contract, would be in direct contravention of public policy, ended its decision with the statement that such conduct was undoubtedly injurious in its tendency, and the "policy contravened by it" could only be satisfied by declaring any contract so obtained invalid.

The same principle is found in 6 R. C. L. p. 809, § 209, and page 813, § 213, where, in the former reference, it is said: "But contracts to suppress bidding are made between buyers or contractors. It is in reference to such contracts that the rule is said to be universal that agreements which, in their necessary operation upon the action of the parties, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third persons, are against the principle of sound public policy, and are void." In the latter reference it is said: "The test of illegality is not the result in a particular case, but the tendency of the contract if recognized as valid."

This subject is exhaustively treated in the case of McMullen v. Hoffman, 174 U. S. 639, 19 S. Ct. 839, 45 L. Ed. 1117, in a situation where only two of several bidders had combined together to share the profits and losses should either obtain the contract for public work. The authorities awarded the contract in ignorance of the existence of said combination. But it later developed that the bids were made under conditions which showed that they were not competitive, but were collusive. The court declared such contract invalid and void as against public policy, and fraudulent, even though there were several other contractors whose bids were not tainted, because of said collusive agreement between the other parties, and this, too, even though some of the legitimate bids approached very closely the bid of the party to whom the contract had been awarded. See, also, to the same effect, Swan v. Chorpenning, supra; Hardison v. Reel, 154 N. C. 273, 70 S. E. 463, 34 L. R. A. (N. S.) 1098; Kuhn v. Buhl, 251 Pa. 348, 96

A. 977, Ann. Cas. 1917D, 415; see, also, note 45 A. L. R., page 549. We recognize that there is in force in England and Canada a contrary rule, but we are satisfied to adhere to the rule above set forth, in the full belief that it is a salutary one in the administration of public trusts by public bodies.

It is to be noted that the facts of this case do not bring into operation the exception to this rule, situations where two contractors openly, in good faith, and with knowledge of the authority awarding the contract, combine to accomplish an object which neither could effect acting in his individual capacity.

These conclusions render unnecessary the discussion of any assumed contradiction, claimed in the findings, for such contradiction, if admitted, would not interfere with the operation of the principles hereinabove announced. The complaints respecting rulings on the introduction of evidence are so untenable that we consider it unnecessary to refer to them in detail.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

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206 Cal. 609

MICHELL et al. v. GRASS VALLEY GOLD MINES CO. (Sac. 3985.)

Supreme Court of California. Feb. 28, 1929.

1. Licenses 🔑39—In suit to rescind agreement to convey mineral rights and cancel deed, defendant corporation held not to have practiced fraud on plaintiffs in issuing stock without permit.

In action to rescind agreement to convey mineral rights and cancel deed, in which it was shown that stock of defendant corporation was void, defendant *held* not to have practiced fraud on plaintiffs in issuing said void stock, where one plaintiff was director and directors acted under mistaken advice of attorney that corporation could issue stock without permit.

2. Corporations 🔑448(1)—Promoters' agreement for conveyance of mineral rights held binding on parties and on corporation on its lawful acceptance of benefits.

Promoters' agreement for conveyance of mineral rights *held* binding on parties thereto, sufficient as offer to corporation thereafter to be formed, and binding on corporation on its lawful acceptance of its benefits.

3. Licenses 🔑39—Plaintiff's participation in enterprise for organizing corporation held to warrant denial of rescission of agreement to convey mineral rights.

In action against corporation to rescind agreement to convey mineral rights and to cancel deed, plaintiff's participation in enterprise from its inception, including participation in acceptance by corporation of terms of promotion contract on issuance of stock unlawfully, *held* to authorize denial of relief, since he was thus placed in pari delicto with corporation.

4. Cancellation of instruments 🔑34(1)—Rescission of agreement to convey mineral rights held denied after year's delay (Civ. Code, § 1691, subd. 1).

In suit against corporation to rescind agreement to convey mineral rights and cancel deed, rescission *held* denied as inequitable, where plaintiffs waited for more than year before endeavoring to rescind, during which time rights of third parties had intervened and such third parties would be seriously prejudiced by rescission, notwithstanding Civ. Code, § 1691, subd. 1.

In Bank.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by P. W. Michell and others against the Grass Valley Gold Mines Company to rescind an agreement to convey mineral rights and cancel a deed. Judgment for plaintiffs, and defendant appeals. Reversed.

Superseding opinion in 268 P. 1095.

E. H. Armstrong and Frank R. Wehe, Jr., both of Grass Valley (Frank R. Wehe, Sr., of San Francisco, of counsel), for appellant.

Nilon & Nilon and F. T. Nilon, all of Nevada City, for respondents.

PER CURIAM. This is an appeal from the judgment for the plaintiffs in an action in rescission.

In and prior to July, 1922, the plaintiffs P. W. Michell and W. J. Michell owned the record title to 108 acres of land in Grass Valley, Nevada county. The plaintiff Nellie Michell is the wife of the plaintiff P. W. Michell, and as such joined in a deed which conveyed certain mineral rights in the real property to the defendant. These mineral rights are claimed by the plaintiffs to be very valuable. Contiguous to plaintiffs' land or with each other are nine other parcels of land varying in size from 3.60 to 43 acres, which were owned by various persons or corporations, all of which also are alleged to contain valuable mineral deposits. The total surface area of all of this mining property is about 268 acres.

During a number of years prior to July, 1922, a mining engineer by the name of Roy J. King had been interested in promoting the development of these mining properties, and at different times had purchased options on some of the parcels in an endeavor to interest capital in the enterprise. But moneyed interests did not consider any proposition attractive until King had obtained the consent of all of the owners of the ten contiguous parcels to join their mining property into one unit. Promotion negotiations were carried on by King with the ten owners, and the provisions of a promotion agreement were settled upon by the interested parties. By this agreement it was provided that a corporation to be organized in Delaware or Nevada should be formed with capital stock of 1,500,000 shares of the par value of $1 each; that the real property owners should deed to the corporation to be formed their mining rights to the land commencing downward from a plane 100 feet beneath the surface, and sufficient land in fee on which to build improvements, and a central shaft from which, by tunnels and drifts, the subsurface of the other lands would be reached and mined; that the consideration for the properties should be shares of the capital stock of the corporation to be formed in an amount fixed in accordance with values thereupon placed on the lands, the stock to be held in escrow and sold for forty cents a share. For his detailed engineering report and his services and money advanced, King was to receive 15,000 shares. A total of 343,090 shares was agreed to be issued to the property owners and King and held in escrow and sold and the proceeds of sale delivered to them. It was agreed that 300,000 additional shares should be sold at the same time at 20 cents a share to raise funds for development. Other stock was to be held for the backers and promoters and the balance as treasury stock. The share of the plaintiffs under this arrangement was to be 135,000 shares of escrowed stock, or a cash equivalent of $54,000 on sale of the stock at 40 cents. Between July 13 and 21, 1922, telegrams were exchanged between King at Grass Valley and the backers, Chas. E. Knox and Harry E. Thompson in New York, offering and accepting the proposition. The offer to give a six months' option to buy the stock to be escrowed at 40 cents a share was also accepted, and it was agreed that the local people should direct the affairs of the corporation until the stock to be escrowed should be sold.

Articles of incorporation were filed in Nevada on July 25, 1922, and on July 26th the seven directors appointed in the articles of incorporation to act as such and duly elected met at Grass Valley. The directors included the plaintiff W. J. Michell and four of the other property owners, exclusive of the other plaintiffs herein. At that meeting the above matters were narrated and copied into the minutes of the meeting in detail, and by resolution the promotion agreement of the property owners to deed their land and mineral rights in exchange for shares of the capital stock was accepted.

On July 27, 1922, the plaintiffs and the other property owners delivered deeds to the corporation, and, following the advice of the corporation's attorney that a permit of the corporation commissioner was not required, certificates purporting to represent shares of stock in the corporation were issued in Grass Valley in the names of the grantors and Roy J. King, respectively, and in the amounts provided by the promotion agreement, but without a permit from the commissioner so to do. The deeds were recorded, and on August 4, 1922, the holders of the certificates representing the 343,090 shares of stock deposited their certificates with the Nevada County Bank, together with a document of instructions signed by all the holders to the effect that for a period of six months the stock should be subject to sale for 40 cents a share to Harry E. Thompson and Chas. E. Knox. This stock was not purchased by Thompson and Knox within the period of six months nor at all. On February 13, 1923, the directors purported to grant to one M. K. Harr of Philadelphia a twelve months' option to purchase 343,090 shares of stock at 40 cents a share. Thereafter and commencing August 23, 1923, directors' meetings were held at Philadelphia. Prior to the commencement of this action the corporation sold outside of the state of California certain of its stock for the sum of $75,000, of which sum $51,000 was expended in the sinking of a 310-foot shaft and other improvements on a piece of property formerly part of the Hope Placer Mining properties, which was conveyed to the corporation in fee, and situate about 350 feet from the line of the plaintiffs' property.

On October 10, 1923, the plaintiffs discovered the mistake in the advice of the attorney that the corporation was not required to obtain a permit from the corporation commissioner in order legally to sell and issue in this state its corporate stock. On October 27, 1923, the plaintiffs notified the defendant of a rescission of the contract under which they executed and delivered to the defendant the deed conveying to the latter the mineral rights in their lands, demanded a reconveyance and offered to restore to the defendant the purported shares of stock and everything of value received by them. Upon the failure of the defendant to accede to the rescission or to comply with the demand, this action was commenced on November 3, 1923.

At or about the time the notice of rescission was given the defendant also discovered the mistake in the advice of its attorney. On December 15, 1923, the defendant filed with the commissioner of corporations an application for a permit to issue the stock contemplated by the promotion agreement to be exchanged for the real properties received by it. On February 7, 1924, all of the property owners to whom the issue of the 343,090 shares of stock was sought by the defendant to be issued, including the plaintiffs, signed and filed with the corporation commissioner a protest objecting to the issuance of the permit. The commissioner on February 14, 1923. notified the defendant that it would appear advisable that the present litigation be determined prior to any further action by him.

It therefore appears that the application for the permit and the objections thereto are still pending before the corporation commissioner.

As the basis for their notice of and action for rescission, the plaintiffs alleged fraud on the part of the defendant in issuing the stock without legal authority, alleged that the agreement of the defendant to issue valid stock to the plaintiffs was entered into without any intention of performing the same, and further alleged a total failure of consideration for their deed. The trial court found that the "defendant at said Grass Valley in the state of California, on or about the 28th day of July, 1922, wrongfully, fraudulently, and in breach and violation of its duty towards plaintiffs," caused the certificate purporting to issue 135,000 shares of the stock of said corporation to the plaintiffs. The allegation of the plaintiffs that the defendant entered into the contract for the issuance of its stock without any intention of performing the same was found to be untrue. But the court found that the plaintiffs were entitled to rescind on the ground of failure of consideration. Judgment was entered adjudging the rescission of the purported agreement resulting from the acceptance of the terms of the promotion agreement of July, 1922, ordering the cancellation of the deed from the plaintiffs to the defendant within a certain time limit, and, if not so reconveyed, that a commissioner appointed by the court execute the reconveyance. From this judgment the defendant corporation appeals.

[1] It is conceded by all parties that the purported issue in Grass Valley of the 135,000 shares of stock of the defendant corporation to the plaintiffs was void. There is, however, no foundation in the record for the finding that fraud was practiced on the plaintiffs by the defendant in issuing said void stock. At the time the certificates were issued to the plaintiffs in Grass Valley, the plaintiff W. J. Michell and four of his associated landowners, having similar contracts for the exchange of their lands for stock, were directors of the defendant. As the landowning directors constituted five out of the seven directors, it must be assumed that they controlled the corporation at that time and continued to control the corporation until the election of the Eastern directors to take their places at the stockholders' meeting held on August 20, 1923. The plaintiff W. J. Michell was re-elected as director at that meeting and continued thereafter to occupy that position. When we look through the form of the corporation and view the situation of its managing directors, it is readily seen that as five out of the seven directors, including the plaintiff W. J. Michell, were in charge of the affairs of the corporation at the time the alleged fraud was committed, and as those five directors were landowners who were vitally interested in receiving valid stock, it would be absurd to conclude that said landowners, directors of the corporation, intended to perpetrate a fraud on themselves by directing the corporation to do so. The record is entirely lacking of any evidence upon which the finding of fraud may be based. It is beyond question that all of the directors of the corporation, including W. J. Michell, one of the plaintiffs herein, were actuated by entire good faith in the transaction, acting, however, under the mistaken advice of their attorney that the corporation could lawfully sell and issue its stock in this state without a permit from the corporation commissioner.

[2] The plaintiffs further contend that they were entitled to rescind the contract with the defendant corporation for the exchange of their lands for stock on the ground of failure of consideration. As this question is approached it must be assumed that the original contract between the landowners and King was legal. It was a promoters' agreement, binding upon the parties thereto, sufficient as an offer to the corporation thereafter to be formed, and binding on the corporation upon its lawful acceptance of its benefits. Nannizzi v. Caprile, 43 Cal. App. 498, 185 P. 673. It must be further assumed that the parties to the promotion agreement contemplated that they would receive valid stock of the corporation in exchange for their lands. The defendant relies on the case of Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29, approving Hartman v. Reed, 50 Cal. 485, where it was held that upon the failure of the grantee of a deed to pay the consideration for the conveyance of the title, the grantor is not entitled to rescind, but is relegated to an action in damages, where it appears that the contract between the parties was not made on the condition that title should revest upon failure of the grantee to perform. But that decision and others to like effect proceed upon the theory that the contract whereby the deed is accepted and recorded is valid. Here the purported acceptance of the deed of the plaintiffs by the defendant corporation would seem to be so interwoven with the illegal transactions of the defendant in Grass Valley as to make the line of cases relied upon inapplicable.

[3, 4] There are, however, certain outstanding features of the case which would seem to render it inequitable to affirm the rescission and order a cancellation of said deed: First, the participation of the plaintiff W. J. Michell in the enterprise from its inception, including especially his participation in the acceptance by the corporation of the terms of the promotion contract upon the issuance of stock, unlawfully, in Grass Valley, places him in pari delicto with the corporation, under the doctrine of the case of Domengoni v. Imperial Live Stock, etc., Co., 189 Cal. 467,

209 P. 36, and no relief should be accorded him on that ground alone. Secondly, while the charge of being equally at fault may not be laid to the door of the plaintiffs P. W. Michell and his wife, nevertheless they joined with their coplaintiff in a protest against the issuance of the permit by the corporation commissioner when the defendant in good faith and with promptness after the discovery of its mistake, sought permission legally to issue its stock. Thirdly, the plaintiffs waited for more than a year before endeavoring to rescind the transaction. In the meantime the rights of third parties had intervened. The whole plan of the promotion agreement was that the landowners should unite their holdings into one mining unit to be made available to the corporation as assets and as an inducement to investors to buy the stock of the corporation. If the plan had been carried out the plaintiffs would have received $54,000 in cash for their mineral rights. It was contemplated that the stock of the corporation, except that allotted to the parties to the promotion agreement, would be sold to Eastern investors, whose interest the engineer and promoter King had enlisted or was hoping to enlist in the enterprise. The fact is that stock was actually sold to Eastern investors to the extent of approximately $75,000. Of this amount at least $51,000 was expended in very substantial development work on the mining property. It also appears that after the mineral rights in the lands of the plaintiffs had been conveyed to the defendant, numerous persons extended credit to the corporation in reliance upon the fact that the corporation owned the lands in question. Under these circumstances it would seem to be highly inequitable to restore the plaintiffs to their original position when the defendant and others, acting in good faith and in reliance upon the conduct of the plaintiffs, would be seriously prejudiced thereby. The plaintiffs say that they were not aware of their right to rescind until at or about the time the notice of rescission was served and that they are therefore within the rule laid down in subdivision 1 of section 1691 of the Civil Code. It may be conceded that as between the immediate parties to this action and under ordinary circumstances, the delay in serving their notice of rescission may not be urged by the defendant against the plaintiffs. Equally it may be said that the delay under like circumstances in the application for the permit from the corporation commissioner may not be urged against the defendant by the plaintiffs. But as between the plaintiffs and others whose rights have intervened the plaintiffs may not be heard to say that they were uninformed as to a matter of law when knowledge or the means of knowledge of the true situation was presumptively possessed by them. When the rights of others have intervened, and the circumstances have so far changed that rescission may not be decreed without injury to those parties and their rights, rescission will be denied and the complaining parties left to their action at law. Meyers v. Merillion, 118 Cal. 352, 356, 50 P. 662.

We therefore determine that the conclusion of the trial court that the plaintiffs were entitled to rescind and have said deed set aside was erroneous.

The judgment is reversed.

206 Cal. 544

SHELTON v. CITY OF LOS ANGELES et al. (L. A. 10842.)

Supreme Court of California. Feb. 25, 1929.

1. Municipal corporations 🔑864(1)—Notes issued by water commissioners, payable from water revenues loan, held not void as creating city indebtedness beyond constitutional limit (Los Angeles City Charter, § 224; Const. art. 11, § 18).

Notes issued by board of water and power commissioners to secure loan on occurrence of an emergency, under Los Angeles City Charter (St. 1925, p. 1098) § 224, made payable solely out of water revenues of the board, *held* not void, under Const. art. 11, § 18, as increasing indebtedness of city beyond constitutional limit of indebtedness, since prohibition against excessive indebtedness does not extend to board of commissioners exercising functions under city charter, and indebtedness created is not an obligation of the city, in view of Los Angeles City Charter, §§ 220, 221, and 225.

2. Municipal corporations 🔑864(1)—Requirement of council's approval of new water rates, made necessary by water commissioners' issuance of notes, held not to create liability of city within provision limiting indebtedness (Los Angeles City Charter, § 224; Const. art. 11, § 18).

Necessity of fixing water rates, so as to discharge principal and interest on short-term notes given by board of water and power commissioners on occurrence of emergency, under Los Angeles City Charter (St. 1925, p. 1098) § 224, *held* not to create additional liability on part of city in excess of constitutional limit of indebtedness, under Const. art. 11, § 18, though schedule of rates for water service fixed by board must be approved by city council by ordinance, and council would have to approve adequate water rates to safeguard city's credit, since failure of city to approve rates would not require it to disburse general city funds.

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Suit by Sophie H. Shelton against the City of Los Angeles and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Anderson & Anderson, of Los Angeles, for appellant.

Jess E. Stephens, W. B. Mathews, and George T. Warren, all of Los Angeles, for respondents.

SHENK, J. The plaintiff, as a taxpayer of the city of Los Angeles, sued to enjoin the defendants, and particularly the board of water and power commissioners of said city, from proceeding with the threatened issuance of what are denominated short-term notes of the board in the sum of $250,000 pursuant to the authority claimed by the board under section 224 of the city charter and an ordinance of the city, adopted in pursuance of the charter provision. A general demurrer to the complaint was sustained, and, following a refusal of the plaintiff to amend, judgment of dismissal of the action was entered. This is an appeal from the judgment.

Section 224 of the city charter (St. 1925, p. 1098), referring to the powers of the defendant board, provides:

"Sec. 224. The board shall also have power upon determining that an emergency exists which justifies it in so doing to borrow money upon such terms and conditions, and under such procedure, as may be prescribed by ordinance, for the purpose of acquiring, constructing, reconstructing, repairing, extending or improving works for supplying the city and its inhabitants with water or electric energy, and to issue notes, certificates or other evidences of indebtedness therefor, subject to the following provisions:

"(1) The principal and interest of any indebtedness so created shall be payable only out of the revenue fund pertaining to the municipal works for or on account of which such indebtedness was created; excepting, however, that provision may be made for the payment of any such water or power indebtedness, or any part thereof, by the authorization and sale of general municipal or district bonds in the manner elsewhere prescribed in this charter.

"(2) The whole amount of any such indebtedness shall be payable in not to exceed five years from the time of contracting the same; provided, that any such indebtedness, or part thereof, made payable after one year from the time of contracting the same shall be subject to the right of the board to pay the same with accrued interest thereon on any interest due date after said one year period.

"(3) The total outstanding indebtedness incurred under the provisions of this section for the purpose of either of such municipal works must not exceed thirty-three and one-third per cent of the gross operating revenue from such works during the preceding fiscal year.

"(4) The rates for service from the municipal works for or on account of which any such indebtedness is created shall be so fixed as to provide for payment at maturity of the principal and interest of such indebtedness in addition to all other obligations and liabilities payable from the revenue fund pertaining to such works."

On April 6, 1928, the city council of the city passed, and the mayor approved, Ordinance No. 60531, providing the terms, conditions and procedure for borrowing money under section 224 of the city charter. Section 1 of the ordinance provides as follows:

"The board of water and power commissioners, upon determining by resolution that an emergency exists which justifies it in borrowing money, in an amount to be specified in such resolution, for the purpose of acquiring, constructing, reconstructing, repairing, extending or improving works for supplying the city and it inhabitants with water or electric energy, may borrow the same in pursuance of section 224 of the charter against the revenues of the works for which such money is needed, upon the terms and conditions and under the procedure following, to-wit: * * *"

Then follow the terms and conditions upon which such indebtedness shall be created and the proposed short-term notes be issued, including the requirement, pursuant to the charter provision, that the amount of the indebtedness shall be payable from the revenue fund pertaining to the municipal works for or on account of which such proposed indebtedness is to be created, specifying the maximum rate of interest, providing that the form and denomination of said notes shall, with certain restrictions, be determined by said board, and other terms, conditions and procedure with reference to the issue, sale and redemption of the notes. Section 2 of the ordinance recites that:

"Whereas, the destruction of the St. Francis dam has caused a serious emergency by reason of the fact that it has decreased the water storage capacity and the water supply of the city of Los Angeles 38,000 acre feet; that a portion of the Los Angeles aqueduct and power house No. 2 were destroyed; that the same or other works were and now are necessary to the proper and adequate service of the city of Los Angeles with water and electric energy; that unless immediately restored, the reserve supply of water and electric energy and the peace, health and safety of the inhabitants of the city of Los Angeles, will be jeopardized. That no funds are immediately available for the construction and acquisition of the necessary works to insure an adequate supply of water and electric energy."

The ordinance was declared to be and was passed as an emergency measure.

On June 15, 1928, the defendant board of water and power commissioners passed a resolution declaring that an emergency existed by reason of the St. Francis dam disaster which justified the board in borrowing money under the authority of section 224 of the charter and of said Ordinance No. 60531, to the extent of $250,000.

It is alleged in the complaint that the board is threatening to issue its short-term notes pursuant to the authority thus granted. No objection is made to the method of the exercise of the power by the board, but it is alleged that the necessary and requisite expenditures of the city of Los Angeles and the bureau of water works and supply for the fiscal year 1928, inclusive of the obligations proposed and threatened to be incurred by the issuance and sale of the short-term notes, exceed the income and revenues provided for said city of Los Angeles and the bureau of water works and supply of said city for such fiscal year by an amount in excess of $200,000; that no election has been had or called or is contemplated for the purpose of obtaining the assent of two-thirds of the qualified electors of said city to the incurring of the indebtedness and that no provision has been made at or before the incurring of the indebtedness or at all, for the collection of any tax sufficient to pay the principal and interest on the indebtedness as required by section 18 of article 11 of the Constitution.

[1] The sole question for decision is: Do notes or other evidences of indebtedness issued under the authority of section 224 of the charter by the defendant board of water and power commissioners of the city of Los Angeles, and payable solely out of water revenues of the defendant board, create such an indebtedness as falls within the inhibition of section 18 of article 11 of the state Constitution?

The defendants take the position that the provisions of section 18 of article 11 of the Constitution have no application to indebtedness of the board of water and power commissioners incurred in the manner contemplated for the reason that the department of water and power is not mentioned nor described in that section of the Constitution, and further that the contemplated indebtedness is one payable only out of a special fund and is not an obligation of the city of Los Angeles.

We think the contentions of the defendants must be sustained. The board of water and power commissioners is, under section 225 of the present charter (Stats. 1925, p. 1099), the successor of the board of public service commissioners created by charter amendment in 1911 (Stats. 1911, p. 2051), which in turn was the successor of the board of water commissioners created by charter amendment in 1903 (Stats. 1903, p. 555). That the old board of water commissioners and its successor, the board of public service commissioners, were not subject to the inhibition of section 18 of article 11 of the Constitution, was decided in 1913 in the case of Mesmer v. Board of Public Service Com'rs of City of Los Angeles, 23 Cal. App. 578, 138 P. 935. It appeared in that case that the board of water commissioners had, in 1909, contracted for the expenditure of money in excess of its income and revenue in that year for the purchase of property on which to erect a building for the water department and that the board of public service commissioners was threatening to carry out the alleged illegal contract. A taxpayer sued to enjoin the completion of the contract of purchase. The contention was made by the defendant board of public service commissioners that the constitutional provision was inapplicable to the incurring of the indebtedness. The court said:

"Section 18 of article 11 of the Constitution, which forbids a city, etc., from incurring any indebtedness exceeding in any one year the income and revenue provided in such year without the favorable vote of two-thirds of the electors, is not applicable. The prohibition in this section provided does not extend to a board of commissioners exercising functions under the charter of a city, such as appears here. It is a sufficient answer to this contention to note that such a board is not named or described in the section of the Constitution which is invoked. See In re Madera Irrigation Dist., 92 Cal. 296, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Robertson v. Board of Library Trustees, 136 Cal. 403, 69 P. 88. Furthermore, the money used and proposed to be used in the purchase of the lot of ground and the erection of the building was not to be taken from the ordinary revenues of the city, and to that extent it may be said that the city's credit was not involved in the incurring of the indebtedness."

The present department of water and power, under the city charter, appears to have all of the power of its predecessor boards and certain additional powers, including the power, upon the determination that an emergency exists, to issue its short-term notes under section 224. As so constituted and empowered it is, like its predecessors, independent of the city council, except as to certain limitations which do not destroy its identity as an independent body. Also it must be said that the indebtedness of the board and the obligations of the department are not those of the city itself, as contemplated by the constitutional provision.

It appears from the allegations of the complaint that the budget of the bureau of waterworks and supply for the fiscal year 1928–29 was adopted by the defendant board on May 25, 1928, and that the anticipated revenues of the bureau of waterworks and supply for said year is the total sum of $11,300,000, and that provision is made in said budget for the payment of $50,000 on account of principal and $15,000 on account of interest accruing on the proposed short-term notes. Under section 220 of the charter the water revenue fund is established and the income of the bureau of waterworks and supply is required to be deposited in this special fund and is not to be commingled with other funds of the city. Section 221 of the charter provides that the water revenue fund shall be used in the following order: First, for the necessary expenses of operating and maintaining the waterworks; second, "for the payment of the principal and interest, or either, due or coming due upon outstanding notes, certificates or other evidences of indebtedness issued against revenues from such works, in pursuance of section 224. * * *"

It is clear that the charter plan for the creation of the indebtedness contemplated by section 224 is to constitute such indebtedness an obligation of the department of water and power distinct from an obligation of the city proper. The right of subordinate municipal boards to exercise similar independent powers conferred upon them by statute or charter provision and to contract for payment of moneys from their special funds has been recognized in other jurisdictions. See American Electric Co. v. City of Waseca, 102 Minn. 329, 113 N. W. 899; State ex rel. Briggs v. McIlraith, 113 Minn. 237, 129 N. W. 377; Crane v. City of Urbana, 2 Ill. App. 559; Gross v. Portsmouth, 68 N. H. 266, 33 A. 256, 73 Am. St. Rep. 586; Gunnison v. Board of Education, 176 N. Y. 11, 68 N. E. 106; Winston v. City of Spokane, 12 Wash. 524, 41 P. 888; Uhler of City of Olympia, 87 Wash. 1, 151 P. 117, 152 P. 998; Twitchell v. City of Seattle, 106 Wash. 32, 179 P. 127; Fox v. Bicknell, 193 Ind. 537, 141 N. E. 222. And the incurring of such indebtedness has been held elsewhere not to be violative of a constitutional provision such as our own section 18 of article 11. City of Bowling Green v. Kirby, 220 Ky. 839, 295 S. W. 1004; Shields v. City of Loveland, 74 Colo. 27, 218 P. 913; Brockenbrough v. Board of Water Commissioners of the City of Charlotte, 134 N. C. 1, 46 S. E. 28; State ex rel. Smith v. Mayor, etc., of City of Neosho, 203 Mo. 40, 101 S. W. 99.

The plaintiff cites no California case opposed to the rule contended for by the defendants. Her counsel concede the force of the direct and definite declarations of the District Court of Appeal in the case of Mesmer v. Board, etc., supra, particularly bearing upon the status and the functions of the city board of which the defendant board in the present action is the immediate successor. It is further conceded that one of the issues involved herein and mainly relied upon by the plaintiff, viz. the applicability of section 18 of article 11 of the Constitution to obligations incurred by the defendant board, was involved and decided in the Mesmer Case. It is true that the law laid down in that case, notwithstanding the denial of a petition for hearing in this court, is not binding here (People v. Davis, 147 Cal. 346, 81 P. 718), yet we find no good reason for declaring the contrary rule and are fully satisfied with the soundness of the doctrine announced in that case. The cases of Chester v. Carmichael, 187 Cal. 287, 201 P. 925, and In re City and County of San Francisco, 195 Cal. 426, 233 P. 965, relied upon by the plaintiff, are not in point for the reason that they involved indebtedness or obligations of the municipalities concerned in the litigation which were intended to be satisfied out of revenues derived by such cities from the exercise of the power of taxation.

[2] It is insisted by the plaintiff that, if it be held that the indebtedness sought to be incurred by the defendant board is not an indebtedness as contemplated by the constitutional provision, nevertheless there is a liability assumed by the city itself within the constitutional inhibition by reason of the charter plan for the fixing of water rates. It is argued that water rates must be so fixed as to discharge the principal and interest on the short-term notes as the same become due and that inasmuch as any schedule of rates for water service fixed by the defendant board must be approved by the council by ordinance, it would follow that the obligation to provide a sufficient revenue to discharge the principal and interest of said short-term notes would constitute a "liability" on the part of the city as contemplated by the constitutional section.

It may be conceded that, upon the incurring of the proposed indebtedness, a strong moral obligation, which the city could not well avoid, would rest upon the city council and mayor to approve a schedule of rates theretofore fixed by the board sufficient to discharge the principal and interest as the same might become due. But this obligation or "liability," as the latter term is used in the Constitution, is not a financial one, in default of which the city would be required to disburse the general funds of the city or other moneys derived from taxation. The argument that the obligation of the legislative body of the city to safeguard the credit of the city by approving adequate water rates would amount to a "liability" within the constitutional section is not persuasive.

The plaintiff finds some comfort in language used in the majority opinion in Feil v. City of Cœur D'Alene, 23 Idaho, 32, 129 P. 643, 43 L. R. A. (N. S.) 1095, wherein under a constitutional provision like our own, the Supreme Court of Idaho reversed the judgment of the trial court denying an injunction and ordered the entry of a judgment enjoining the issuance of 20-year serial bonds for the purchase of waterworks by the defendant city from a private corporation. This injunction was ordered on the ground that the bonds to be issued were direct promises of the city to pay the amounts thereof and that the statement in the body of the bonds that the same should be payable only from revenues of the waterworks system did not relieve the city of its constitutional liability to provide funds for the payment of the bonds.

In the present case the proposed short-term notes are not promises to pay on the part of the city of Los Angeles, but are acknowledgments of indebtedness on the part of the department of water and power. The city of Los Angeles, as such, is not bound thereby to do anything which may be enforced by action. Hence we find therein no liability on the part of the city in the premises. The case of Voss v. Waterloo Water Co., 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. Rep. 201, 2 Ann. Cas. 978, and State ex rel. Morgan v. Portage, 174 Wis. 588, 184 N. W. 376, also relied on by the plaintiff, are not in point, for in each case the proposed indebtedness was in terms intended to be an indebtedness or constitute a financial liability for which the municipal corporation itself would be bound and as such was in violation of the constitutional inhibition.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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206 Cal. 581

BALDWIN et al. v. RAILROAD COMMISSION OF CALIFORNIA. (S. F. 12961.)

Supreme Court of California. Feb. 27, 1929.

1. **Waters and water courses 🔑232—Privately owned canal and irrigation company held "public utility," within Public Utilities Act (Public Utilities Act, § 51(a).**

Privately owned canal and irrigation company *held* a "public utility," within Public Utilities Act (St. 1915, p. 149) § 51(a), prohibiting the transfer of the property of a public utility, or the consolidation thereof with any other public utility, without an order of the Railroad Commission.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Public Utility.]

2. **Waters and water courses 🔑224—Water storage district is public body or agency of state, over which Railroad Commission has no jurisdiction (Water Storage District Act, as amended by St. 1923, p. 941, and St. 1927, p. 1235).**

River water storage district, organized under Water Storage District Act, St. 1921, p. 1727, as amended by St. 1923, p. 941, and St. 1927, p. 1235, is a public body or agency, over which the Railroad Commission has no jurisdiction.

3. **Public service commissions 🔑11—Railroad Commission, in passing on transfer of property of public utility, need not ascertain value of property, but may do so, if deemed advisable (Public Utilities Act, §§ 47, 51(a).**

Railroad Commission, in passing on transfer of public utilities property under Public Utilities Act (St. 1915, p. 149) § 51(a), prohibiting transfer of such property without an order of the Railroad Commission, need not inquire into the value of the properties sought to be transferred, for the purpose of determining the reasonableness or adequacy of the contemplated price, but may make such investigation, if deemed advisable, especially in view of section 47.

4. **Waters and water courses 🔑232—Railroad Commission, passing on transfer of canal and irrigation company's property to water storage district, was not required to determine feasibility, practicability, and utility of project, or value of property (Water Storage District Act, § 58, and § 25, as amended by St. 1927, p. 1262, § 17; Const. art. 14, § 1; Public Utilities Act, § 51(a).**

Railroad Commission's refusal, in approving transfer, under Public Utilities Act (St. 1915, p. 149) § 51(a), of property of canal and irrigation district to water storage district, organized under Water Storage District Act (St. 1921, p. 1727), as amended by St. 1923, p. 941, and St. 1927, p. 1235, to determine feasibility, practicability, and utility of project, and to ascertain the value of the property, *held* proper, in view of Water Storage District Act, § 58, and section 25, as amended by St. 1927, p. 1262, § 17; and Const. art. 14, § 1; the commission having performed its functions in such case by safeguarding the rights of the consumers of the canal company outside the district, and providing for the service of consumers within the district, as provided in the Storage District Act.

In Bank.

Certiorari to Review and Annul Order of Railroad Commission.

Certiorari by T. L. Baldwin and others against the Railroad Commission of California, to review and annul an order of the Commission authorizing transfer of physical properties and water rights of the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, to the San Joaquin River Water Storage District. Proceedings and order of Commission affirmed.

Stephen W. Downey and Downey, Brand, Seymour & Dunn, all of Sacramento, for petitioners.

Carl I. Wheat, Reginald L. Vaughan, and Roderick B. Cassidy, all of San Francisco, for respondent.

J. E. Woolley, of San Francisco, and Sutherland & Dearing and W. A. Sutherland, all of Fresno, for San Joaquin & Kings River Canal & Irrigation Co.

Vincent J. McGovern, of San Francisco, for San Joaquin River Water Storage Dist.

PER CURIAM. This proceeding was brought to review and annul an order of the Railroad Commission, authorizing the transfer of the physical properties and water rights of the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, a privately owned public utility corporation, to the San Joaquin River Water Storage District, a public agency organized and existing under the California Water Storage District Act as amended (Stats. 1921, p. 1727; Stats. 1923, p. 941; Stats. 1927, p. 1235). That act has been held constitutional in all respects

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

bearing upon the proceeding at bar. Tarpey v. McClure, 190 Cal. 593, 213 P. 983.

On May 2, 1927, the directors of the storage district approved a contract for the purchase by the district of the physical properties, canal system, and crop land water rights of the San Joaquin & Kings River Canal & Irrigation Company for the aggregate sum of $4,400,100, and approved the purchase by the storage district of a so-called grass land water right claimed by Miller & Lux, Inc., for the sum of $1,767,300. The grass land water right grew out of an agreement made in 1878 between Miller & Lux and the predecessor of the canal company, whereby the latter was given certain rights of way and the right to appropriate about 800 second feet of water for crop purposes, and, when not required for crop purposes, the canal company agreed to serve it to the grass lands of Miller & Lux. The storage district and the canal company joined in an application to the Railroad Commission for an order authorizing the transfer and approving the contemplated contract of purchase and sale between the parties. The petitioners herein are consumers served by the canal company, acting on behalf of all the owners of lands served by the canal company included within the district, with the exception of Miller & Lux, Inc. These consumers, other than Miller & Lux, Inc., opposed the application of the canal company and the storage district for authority to transfer.

Several grounds of protest were urged in an effort to show to the commission that the terms of the transfer were highly detrimental to the consumers of the canal company. Among other grounds the protestants urged: (1) That the acquisition of the public utility by the storage district is neither necessary nor essential to the future functioning of the district; (2) that the contract valuations are grossly unreasonable and unjust; (3) that these excessive valuations would have to be absorbed by the consumers in the form of district assessments, which would result in an unbearable financial burden to the consumers and would prevent the continuance of adequate service by the vendee, the storage district, at reasonable rates; (4) that the storage district contemplated serving waters to about 300,000 acres of dry land within the district, which theretofore had not been served, thus diverting to other lands water which had been dedicated to the lands of the petitioners, and which would, under the plan of water reallocation proposed by the directors, result in a shortage of service thereto; and (5) that Miller & Lux, Inc., does not own any grass land water right, but that all water rights are owned by the public utility, and that such a division of rights is arbitrary, unjustified, and prejudicial to the consumers.

Hearings were had before or at the direction of the Railroad Commission, and evidence was introduced by the protestants in support of their opposition. On February 17, 1928, the commission rendered its decision and order authorizing the transfer from the canal company to the storage district of the former's physical properties, canal system, and water rights for the sum of $4,400,100, which was the purchase price set by the parties in their contract. In its decision the Railroad Commission stated:

"The grounds of protest direct themselves, with the exception hereinafter noted and commented upon, to the policy of the law expressed in the Water Storage District Act, and to the possibility of administration in the future by the duly constituted officers of the district to the detriment of these particular protesting consumers. Under this head may be classed all of the grounds of protest of the objecting consumers, with the exception of the protest on the ground that, by reason of its vast land holdings, Miller & Lux, Inc., dominated the election within the district, and these consumers have had no voice whatever in the affairs of the district, and that the proposed sale contract has been entered into between the corporation controlled by Miller & Lux, Inc., and directors of the water storage district, a majority of whom have been elected by Miller & Lux, Inc., and were Miller & Lux representatives on the board of the district, and therefore the contract has not received independent and fair consideration by directors uncontrolled by Miller & Lux, Inc., which it should have on behalf of the landowners within the district.

"However, it appears from the evidence that at a time when a previous report was made to the state engineer for his consideration as to whether the plan proposed in the report submitted to him for consideration was a feasible one, this same objection was there raised, and that, pursuant to said objections, all members of the board of directors of the storage district who were Miller & Lux representatives resigned from the board, and the state engineer suggested four individuals, men of unquestioned integrity and good judgment, who have the best interests of this community in mind, all of whom were appointed to membership on the board. In the membership of the district board, as the same was constituted at the time the contract, approval of which is sought, and this application were presented to it for consideration, there were no members who could have been said to be the representatives of Miller & Lux, Inc. After a consideration of the project as it is now alleged in the petition to have been formed, these directors of the district have determined to purchase the properties from the utility company upon the basis set forth in the contract. * * * Under the provisions of the Water District Act, the duty is imposed and the power conferred upon the proper officials of the district to make determination as to what properties are necessary for the proper functioning of the storage district, the amount that shall be paid therefor and the manner in which the district, after the acquiring of such properties as it deems necessary, shall be operated. The district, through its proper officers, having made this determination, it but remains for the commission to determine whether or not the utility should be permitted to sell its properties and discontinue service. The policy of the commission heretofore has been, in applications of this character, to see either that all consumers, which have theretofore been served by a public utility, when it is transferred to a governmental agency, are either included within the boundaries of the governmental agency or district, or, if not so included, that thereafter service be compelled by the district and protected to the consumer whose lands are excluded from the boundaries of the district."

In accordance with the views expressed, the commission refused to consider any of the grounds of protest and the evidence adduced in support thereof, with the exception noted by it, and held that its only concern in this case was the protection of the consumers whose lands remained outside the boundaries of the district. The commission concluded that protection was afforded outside consumers by a provision in the contract of transfer which bound the storage district to continue service to such consumers of the canal company contingent upon payment by said consumers to the district of all legal charges for such service; that the same provision in the contract bound the storage district to continue service to consumers within the district, such service to be rendered in accordance with the provisions of the Water Storage District Act and subject to the assessments for the benefits received as provided by the act; that "this provision of the contract is broad enough to protect each and all of the consumers of the canal company, who are, after the transfer, entitled to receive service from the system." It cannot be disputed that under the proposed contract of purchase the storage district binds itself to continue service to all of the consumers of the canal company. It also appears that it is not the purpose to deprive or attempt to deprive any area of land of its water rights.

The commission's decision also states: "In authorizing the transfer of this public utility property to the water storage district, it should be distinctly understood that the commission does not thereby in any manner indorse or approve or find upon the reasonableness of the value claimed or of the reasonableness of the price which the district has agreed to pay for the physical properties and water rights of this utility. As to whether or not the project is a feasible one, considered as a whole, is a matter under the Water Storage District Act delegated to the board of directors of the district, and to other public bodies, and, finally, to the landowners within the district. Neither should the authorization by this commission to make this transfer be considered as an approval by the commission of any proposed contract by the district with other bodies, under which it is sought to define the water rights and the conflicting claims of any persons thereto, but should be considered solely as an authorization by this commission to the public utility company to dispose of its properties at the price named in the petition, to wit, the sum of $4,400,100."

One of the conditions specified in the order authorizing the transfer was the following: "7. That, upon final completion of the transfer of the properties, rights, and interests of this utility in full compliance with the terms and conditions of the order herein, said San Joaquin & Kings River Canal & Irrigation Company and its said properties, rights, and interests, shall thereupon and thereby stand relieved of all public utility obligations and liabilities heretofore incurred in connection therewith."

It is contended by the petitioners that the Railroad Commission failed to exercise or exceeded its jurisdiction under section 51(a) of the Public Utilities Act (St. 1915, p. 149), in refusing to consider the claimed detriment and injuries to the consumers within the district as a result of the transfer, and in concerning itself only with an investigation of the question of the public utility aspect of the transferor, the public agency character of the transferee, and the protection to be afforded consumers of the utility who will remain without the district.

The pertinent provisions of section 51(a) of the Public Utilities Act are the following: "(a) No railroad corporation * * * or water corporation shall henceforth sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad * * * plant or system, necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, direct or indirect, merge or consolidate * * * with any other public utility, without having first secured from the commission an order authorizing it so to do. * * *"

[1, 2] It is not questioned that the canal company is such a privately owned public utility corporation as is defined in the Public Utilities Act and in the case of Water Users', etc., Ass'n v. R. R. Comm., 188 Cal. 437, 443, 205 P. 682, whose contracts for the sale or other disposition of its working capital or rights useful for public utility purposes must be reviewed pursuant to the requirement of said section 51(a), and that authority so to transfer shall first be obtained from the Railroad Commission. Nor is it questioned that the storage district is a public body or

agency of the state over which the Railroad Commission has no jurisdiction. See City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 P. 25, Water Users, etc., Ass'n v. R. R. Comm., supra.

[3] Section 51(a) of the Public Utilities Act, either read alone or with section 47 of the same act which provides that the commission shall have power to ascertain for each purpose specified in the act the value of every public utility in the state, and every fact and element of value which in its judgment may or does have any bearing on such value, does not in terms require the commission to inquire into the value of the properties sought to be transferred for the purpose of determining the reasonableness or adequacy of the contemplated purchase price. Obviously neither does it hamper the commission's investigation into any of such facts, should such an investigation be deemed necessary or advisable in a matter within its jurisdiction.

The respondent commission justifies its refusal to consider the matters urged upon it by the petitioners, on the ground that it has no jurisdiction over the storage district; that by the terms of the Storage District Act the power to determine what properties may be necessary for the proper functioning of the district is vested in the directors of the storage district; that under the law the commission could not find that the properties were not necessary to the district, nor base a denial of authority to transfer on any such finding; that under the Water Storage District Act the state engineer is required to examine into and determine the practicability, feasibility, and utility of the proposed project, and that the voters in the district have the final word as to feasibility by being given an opportunity by vote to accept or reject the plan. The commission urges that the contention that the protesting consumers may be allowed to show in opposition to the approval of the transfer possible injury to them by reason of the fact that they may be compelled to pay a higher rate for water service than they are now paying is concluded by the case of Tarpey v. McClure, supra.

In that case it was held that the Legislature, having fixed the boundaries of the district by laying down a fixed rule by which they may be determined, has declared that all lands of the described character—i. e., "already irrigated or susceptible of irrigation from the common source and by the same system of storage and irrigation works"—will be benefited, and that the claim that a benefit will not accrue to the landowner, who already has a perfected and adequate water surface, is not meritorious. The commission contends that, since the act declares that the consumers' lands are benefited, should the state engineer determine that they are lands of the described character, the fact that the landowner may be required to pay a higher rate by reason of added benefits in the nature of conservation and storage works, which will serve to increase the available supply of water within the district, is a matter between the consumer and the district, and is not, therefore, a matter with which the commission is concerned, nor a basis on which it has power to deny the application.

The commission bases its refusal to value the properties sought to be transferred, in order to determine the reasonableness or otherwise of the purchase price thereof on the fact that section 25 of the Water Storage District Act gives the board of directors of the district the power to determine what properties it shall acquire, and what price shall be paid for property voluntarily transferred to the district, and that section 51a of the Public Utilities Act, pursuant to which the commission is required to give or withhold its authority on this application, does not contain any provision which states that the commission *must* value the properties of a public utility which are to be voluntarily transferred. Without stating the further arguments on this point, or the cases cited, attention is directed to the fact that the Legislature in 1927 amended section 25 of the Water Storage District Act (Stat. 1927, p. 1235), so as to provide that "before any purchase of property located in the district at a price exceeding five hundred thousand dollars, the price shall be approved by the state engineer, who shall give his approval if he finds the price not excessive, and otherwise refuse it."

The Railroad Commission concedes and contends that a transfer of public utilities does not put an end to all obligations of service, but states that its only intention by its order, especially referring to condition 7 above set forth, was to approve the provision of the contract that service to consumers within the district shall be carried on under the district plan; that its regulatory functions are not concerned with what will be the relative rights and obligations of the protesting consumers and the storage district, which are matters cognizable by the courts; that its only concern is to determine whether some adequate continued service will be made to these consumers; that when it is shown that service will be continued in accordance with the provisions of the Water Storage District Act which the Legislature has enacted in the exercise of the power to regulate and control the public use of water vested in it by section 1 of article 14 of the Constitution, it is concluded by section 58 of the Water Storage District Act as to the benefits to be received by consumers within the district and therefore by the provisions of the act itself as to the future service to be received by the consumers. Section 58 of that act is as follows:

"It is hereby declared that the state of California has a paramount interest in the storage, conservation and diversion of water, the prevention of floods, the irrigation, drainage, and reclamation of land and the production of electric energy; and that such storage, conservation, diversion, irrigation, prevention of floods, reclamation, drainage, and production of electric energy will make productive vast quantities of land that are comparatively unproductive and will increase production, property valuations, and population in the state, make profitable the cultivation of small tracts and promote subdivision of larger tracts, and will promote the welfare and prosperity of all the people. The powers herein conferred upon the state engineer and board of directors are hereby declared to be police and regulatory powers and are necessary to the accomplishment of a purpose that is indispensable to the public interests, and the water storage districts hereunder provided to be formed are districts of the nature of irrigation, reclamation, or drainage districts in respect to all matters contemplated in the provisions of the Constitution of the state of California relating to irrigation, reclamation, or drainage. The use of all water required for the irrigation of the lands of any district formed under the provisions of this act and for domestic and other incidental and beneficial uses within such district, together with the rights of way for canals and ditches, sites for reservoirs and all other property required in fully carrying out the provisions of this act is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law."

[4] In view of the foregoing and other provisions of the Water Storage District Act, we think the position taken by the Railroad Commission is sound. It is thereby precluded from determining that a transfer to the district would not be beneficial to the consumers included within the district. That question is left to the determination of other state agencies. When the commission has safeguarded, as it has in its order authorizing the transfer, the rights of consumers of the canal company outside the district, and has provided that the consumers within the district shall be served as provided in the Storage District Act, it is clear that the commission has properly performed its functions. With other questions it has no concern. Hanlon v. Eshleman, 169 Cal. 200, 203, 146 P. 656.

The Railroad Commission will have no regulatory powers over the service of water which will be made to these protesting consumers, when completion of the proposed project is voted favorably by the electors in the district. That the lands "already irrigated or susceptible of irrigation from a common source and by the same system of storage and irrigation works" will be benefited by their inclusion within a district formed under the act is a question concluded by the Legislature. Whether the lands are of the character properly to be included in such a district is not a question for the determination of the Railroad Commission. Whatever water rights and properties are necessary to be acquired by purchase, condemnation, or otherwise are matters which the directors of the district, the state engineer, and the landowners within the district must decide. In the case of acquisition by purchase, where the price is more than $500,000, the state engineer must determine whether the price is excessive, and approve or disapprove the transfer in accordance with his finding. The feasibility, practicability, and utility of the project are also questions which by the terms of the act must be heard and determined by the state engineer before the plan is submitted to the voters for their acceptance or rejection. All of the questions which the petitioners seek to have determined by the commission have been concluded by the Legislature in the enactment of the Water Storage District Act. By that act the jurisdiction to determine those questions has been vested in other and different governmental agencies, in conjunction with the landowners in the district.

Petitioners complain that, if none of these matters needs to be determined by the Railroad Commission, then its authority in this case under section 51(a) of the Public Utilities Act becomes nothing more than a "rubber stamp" approval. This is not true. The commission must determine whether and to what extent, under the showing made by the applicant for authority to transfer the public utility properties, the canal company may be properly relieved of its public utility obligations.

We therefore conclude that the Railroad Commission, in the proceeding before it, has regularly exercised its jurisdiction. The contentions of the petitioners have been carefully noted and specific reference to all of them is deemed unnecessary. The fact that the order of the commission specifies the price at which the properties may be transferred of course cannot affect the powers under the Water Storage District Act of the state engineer, whose functions have been transferred to the department of public works (Stats. 1927, p. 462), nor does such fact disturb the effectiveness of the order authorizing the transfer.

The proceedings and order of the Railroad Commission are affirmed.

206 Cal. 571

OGDEN v. UNITED BANK & TRUST CO. et al. (Sac. 4111.) ★

Supreme Court of California. Feb. 26, 1929.

Rehearing Denied March 28, 1929.

1. Contracts 🔑54(1)—Plaintiff's continuance of work in reliance on bank's agreement to pay compensation constituted sufficient consideration for bank's undertaking to pay.

Where bank was lessor of property on which plaintiff agreed to do work necessary to place it in condition for planting sugar beets, plaintiff's continuance of work in reliance on bank's agreement to assume responsibility for compensation, when plaintiff had present right to refuse performance, *held* to constitute sufficient consideration for bank's undertaking to pay.

2. Frauds, statute of 🔑23(4)—Lessor's agreement to pay plaintiff for work on land held not invalid because not in writing (Civ. Code, § 2794, subd. 3).

Where bank was lessor of property on which plaintiff agreed to do work necessary to place it in condition for planting sugar beets, bank's agreement to assume responsibility for plaintiff's compensation *held* not invalid, because not in writing under Civ. Code, § 2794, subd. 3, where lessor was entitled to receive portion of crop as rental.

3. Pleading 🔑398—In action against lessor bank for services on leased land, variance which did not mislead defendants relative to hiring of plaintiff was immaterial (Code Civ. Proc. §§ 469, 470).

Where bank as lessor of property on which plaintiff had agreed to do work, agreed to assume responsibility for plaintiff's compensation, any variance between complaint against bank and its vice president, alleging that defendants hired plaintiff, and proof showing contract of hiring was with lessees, and contract by bank to pay compensation, did not mislead defendants to their prejudice, and therefore cannot be held to be material, under Code Civ. Proc. §§ 469, 470.

4. Trial 🔑165—On motion for nonsuit, all inferences and conflicts of evidence must be resolved in favor of plaintiff.

In passing on motions for nonsuit, all conflicts of evidence must be resolved in favor of plaintiff, and all inferences which may fairly be indulged in favor of plaintiff must be given effect.

5. Banks and banking 🔑57—Bank vice president acting solely on behalf of bank held not liable for services of plaintiff in preparing land leased by bank for sugar beets.

Vice president of bank, who did not agree to become personally liable for charges of plaintiff in preparing land leased by bank for sugar beets, but who acted solely as an official of the bank and on behalf of the bank *held* not liable for compensation to plaintiff.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by H. L. Ogden against the United Bank & Trust Company and another. From judgment dismissing the action, plaintiff appeals. Reversed as to named defendant; affirmed as to defendant E. C. Peck.

Huston, Huston & Huston, of Woodland, for appellant.

Butler, Van Dyke & Desmond, of Sacramento, for respondents.

SEAWELL, J. Plaintiff, H. L. Ogden, appeals from a judgment dismissing his action against the United Bank & Trust Company and E. C. Peck, vice president of said bank, upon the granting of a motion for a nonsuit made by defendants at the close of plaintiff's case.

On March 10, 1925, plaintiff entered into an oral contract with Mastick & Friel, a copartnership, whereby he agreed to do the plowing, leveling, harrowing, disking, and other work necessary to place a ranch situate in the county of Sacramento leased by said copartnership from the defendant bank in condition for the planting of sugar beets. Plaintiff's compensation was to be estimated on a "cost plus" basis. He was to be reimbursed for the amount paid out by him for wages, upkeep of tools and implements, stock hire, and other expenses, and to receive as profit 10 per cent. of the total amount of all costs and expenses.

The defendant bank was not a party to said agreement, nor did it participate in the negotiations therefor between Mastick & Friel and plaintiff. Plaintiff testified that, at the time he made the contract with Mastick & Friel, he asked Mr. Friel if the bank was putting up the money for the work, and Friel told him it was; that he knew from what Mr. Friel said at that time that Mastick & Friel were not able to pay for the work. Plaintiff commenced work on March 14. On March 26 he and William Ragsdale, foreman of the ranch for Mastick & Friel, called at defendant bank. According to plaintiff, he went to the bank to verify the statement made by Friel that the bank was putting up the money for the work, and to see if his money was safe, and if he would be paid.

Ragsdale testified that he had told Mr. Ogden to see Mr. Peck at the bank, as Mastick & Friel were "broke." Plaintiff exhibited a bill of more than $1,300 for 12 days' work done by him and his employees to Mr. Peck, an officer of the bank, who stated that he knew nothing about the bill; that the bank had nothing to do with it and was not responsible. A second conference was held on the following day, at which plaintiff, Ragsdale, Mastick, Friel, Peck, the manager, and Kendall, another officer of the bank, discussed the matter. Plaintiff there stated, as did Ragsdale, that unless the bank would order the work done, and would be paymaster, he was through and would do no further work.

★Rehearing denied.

Peck then told plaintiff and Ragsdale to go ahead and do the work. At the close of the conference at the bank, Mastick paid plaintiff $1,000 on account. Plaintiff continued working until late in May, when the ranch was abandoned, because blight bugs attacked the beets and rendered further cultivation unprofitable. No further payments had been made to plaintiff by Mastick & Friel or by the bank. After failure of the crop, plaintiff demanded payment of the bank, and was informed by Peck that the bank could not put up any money, because the crops were not there. He thereupon brought this action to recover $4,626.

[1] Peck's direction to plaintiff to go ahead and do the work, given after both plaintiff and Ragsdale had declared their intention to quit unless the bank would be paymaster, may well be considered as an acceptance of liability on behalf of the bank for the amount due or to become due plaintiff under the terms of his contract for services already performed and thereafter to be performed. We think the contention of respondent bank that the court properly granted the nonsuit on the ground that the agreement upon the part of the bank was not binding upon it because made without consideration. cannot be sustained.

Plaintiff testified that no definite time for the payment of his charges was agreed upon between himself and Mastick & Friel, and no evidence was introduced as to the existence of a custom to make payments as the work progressed, rather than upon full completion thereof, with reference to which the contract was made. The payment of $1,000 to plaintiff by Mastick & Friel on March 27, 13 days after plaintiff commenced work, furnishes some evidence of an understanding that plaintiff was to be paid as the work progressed, in which event Mastick & Friel may have been in default in paying plaintiff at the time he called at the bank. But even assuming that Mastick & Friel had committed no breach of their obligation to pay plaintiff according to the scale agreed upon, in considering the propriety of the nonsuit herein, it must be held that a judgment for plaintiff would find support in the evidence.

We are of the view that the evidence, as the record now stands, will sustain the conclusion that plaintiff made the oral contract to work upon said ranch and began work in the belief, induced by representations of Mastick & Friel, cropping lessees of said bank, that they had arranged with the bank to finance them in operating the ranch, and without such financing they would not be able to pay plaintiff. When it developed at the first conference with Peck at the bank that no arrangements had been made which would insure payment to plaintiff, he was not thereafter bound to complete his contract, especially in view of the fact that Ragsdale, the foreman who accompanied plaintiff to the bank, had told him that Mastick & Friel were "broke." His continuance of work in reliance upon the agreement of the bank to assume responsibility for his compensation, according to the terms of his contract with Mastick & Friel, when he had a present right to refuse further performance under said contract, constituted a sufficient consideration for the undertaking of the bank.

[2] Nor is the agreement of the bank invalid because not in writing. By the terms of section 2794, subd. 3, Civil Code, a promise to answer for the antecedent obligation of another is deemed an original obligation of the promisor and not required to be in writing where made "upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person." Fuller v. Towne, 184 Cal. 89, 193 P. 88. There can be no doubt that the continuance of work by plaintiff inured to the benefit of the bank, which as lessor of the property was entitled to receive a portion of the crop as rental.

[3] Respondent bank also contends in support of the nonsuit that there is a variance between the agreement pleaded in the complaint and the agreement proved, in that it is alleged in the complaint that defendants entered into an agreement hiring plaintiff to do work upon said ranch, whereas the only contract proved was the agreement between Mastick & Friel and plaintiff. The proof establishes a valid contract on the part of the bank to pay plaintiff according to the scale set forth in the complaint. Although, strictly speaking, it may be inaccurate to aver that defendant bank hired plaintiff to do that portion of the work which he had already completed when the bank promised to pay him therefor, nevertheless any variance did not mislead defendants to their prejudice and hence cannot be held to be material. Sections 469, 470, Code Civ. Proc.

[4, 5] The case is before us upon the evidence adduced by the plaintiff only. In passing upon motions for nonsuit, all conflicts of evidence must be resolved in favor of the plaintiff and all inferences which may fairly be indulged in favor of the plaintiff must be given effect. Applying this rule to the case, we are of the view that the motion should have been denied as to defendant bank. As to defendant Peck the nonsuit must be sustained. Peck did not agree to become personally liable for plaintiff's charges, but acted solely as an official of the bank and on behalf of the bank.

As to Peck the judgment is affirmed, and as to defendant bank it is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.

206 Cal. 532

ENTERPRISE FOUNDRY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 12966.)★

Supreme Court of California. Feb. 26, 1929.

Rehearing Denied March 28, 1929.

1. Master and servant 🔑403—Applicant for compensation must show injury arose out of and in course of employment (Workmen's Compensation Act, § 6).

To authorize an award of compensation under Workmen's Compensation Act (Deering's Gen. Laws 1923, Act 4749) § 6, applicant has burden of showing not only that injury arose out of, but also that it occurred within, course of employment.

2. Master and servant 🔑375(1, 2)—Injuries received by employee while going to or returning from place of employment, or while on errand personal to employee, are not compensable.

Generally, where person injured is employed to perform service at or in particular plant, or on particular premises, and injury claimed to be compensable is inflicted while employee is going to or returning from his place of employment, or where he has left place of employment on an errand personal to himself, injury inflicted under such circumstances is not compensable.

3. Master and servant 🔑375(1, 2)—Facts peculiar to particular case determine whether injuries received by employee in going to and from employment, or while on personal errand, are compensable.

Whether injuries received by employee while going to or returning from place of employment, or while on errand personal to employee, are compensable, must be determined by facts peculiar to particular case.

4. Master and servant 🔑375(2)—Injury suffered by foreman shot by strikers while on way to work and not engaged in service of employer held not compensable (Workmen's Compensation Act, § 6).

Where foreman in open shop of foundry was shot by strikers while walking to work at time when he was not engaged in any service for employer or any service incidental to or in course of employment, and employer was not engaged in industrial warfare with strikers and labor union, injury resulting in death was not compensable, under Workmen's Compensation Act (Deering's Gen. Laws 1923, Act 4749) § 6.

Shenk and Richards, JJ., dissenting.

In Bank.

Proceeding under the Workmen's Compensation Act by Rose Mary Goytan and others, claimants for the death of John Goytan, husband and father, opposed by the Enterprise Foundry Company, employer, and the California Casualty Indemnity Exchange, insurance carrier. From an award of the Industrial Commission allowing claimants death benefit and burial expenses, the employer and insurance carrier bring certiorari. Award annulled.

Rehearing denied; RICHARDS and SHENK, JJ., dissenting.

Daniel W. Burbank, of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondent Commission.

Thos. W. Slaven, of San Francisco, for respondents Goytan interests.

PRESTON, J. This matter is before us upon a writ to review an award made by the Industrial Accident Commission against petitioner California Casualty Indemnity Exchange, the insurance carrier for petitioner Enterprise Foundry Company, and in favor of respondent Rose Mary Goytan, allowing her death benefit and burial expenses following the death of her husband, John Goytan, an employee of said Enterprise Foundry Company.

The sole question presented is whether the finding of the commission that said John Goytan, deceased, sustained a fatal injury by a gunshot wound "occurring in the course of and arising out of his employment," is sustained by the evidence in the record and will support the said award. Or the question may be stated another way: Under the facts shown, does liability for compensation exist against said employer because of the killing of said employee on his way to work by a striker?

[1] That the injury arose or grew out of decedent's employment may be conceded; whether at the time of the injury he was, in fact, "performing service * * * incidental to" and was "acting within the course of his employment" (Workmen's Comp. Act, [Deering's Gen. Laws 1923, Act 4749, p. 1714] § 6), is the real point at issue. It is essential to the power to make an award, and the burden is upon an applicant for compensation to show not only that the injury arose out of, but also that it occurred within, the course of the employee's employment. 27 Cal. Jur. § 59, p. 341, and many cases there cited; Larson v. Industrial Accident Commission, 193 Cal. 406, 224 P. 744; London Guaranty & Accident Co. v. Industrial Accident Commission, 190 Cal. 587, 213 P. 977; California Casualty Indemnity Exch. v. Industrial Accident Commission, 190 Cal. 433, 213 P. 257.

The facts, virtually undisputed, follow: In 1924 said decedent, John Goytan, who had entered the employ of the Enterprise Foundry a number of years before as an apprentice, and who had later become a journeyman molder and member of the Molders' Union, was advanced to the position of foreman, being in entire charge of his department. He also became a stockholder in said company. At the time of his promotion to said position of foreman, and because of it, the Molders' Union gave him an honorary card of withdrawal from membership therein.

About the year 1922 employers in and about San Francisco adopted the American

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★Rehearing denied.

plan or "open shop" and the labor unions became involved with them in an industrial warfare, which lasted for some four or five years. Illegal methods were used by the strike sympathizers and many open shop employees were assaulted. From 1922 to January 1, 1925, said Enterprise Foundry operated a union shop, but on or about said date it started to operate the plant as an open shop and the Molders' Union immediately called a strike on it, whereupon strike-breaking laborers were hired to take the place of the strikers.

Said John Goytan continued undisturbed with his regular work as foreman. Between January and August, 1925, three employees of the plant were assaulted. Thereafter for 11 months, from August, 1925, to July, 1926, no assaults occurred. During part of the year 1925 transportation for the purpose of protection to and from work for the strike breakers employed at the foundry was furnished; after November, 1925, no transportation whatsoever was furnished. Decedent, however, never availed himself of this special transportation. Apparently he was not at all apprehensive of personal danger from the union, for at all times he pursued his custom of walking the 12 blocks between his home and place of work. During the year 1925 he received two letters asking him to stop work and join the union and in June, 1926, two union officers called at his home and repeated that request, to which he refused to accede.

Decedent's hours of employment were from 8 a. m. to 4:30 p. m., and in addition thereto he sometimes outlined his work for the following day while sitting at home after supper. On the morning of July 8, 1926, he left home about 7:30 a. m., evidently headed for his place of work. When but 2½ blocks from it, he was shot in the leg by some unknown party, who drove away in an automobile. The injury resulted in his death two days later. He left surviving him his wife and two minor children, respondents herein. The commission found that said injury was sustained in the course of and arising out of decedent's employment and made the aforesaid award in favor of his widow, which award petitioners here seek to have annulled. Petitioners do not concede that said injury was inflicted by strikers. There was ample and sufficient evidence, however, to warrant the commission in believing that it was so inflicted and for the purposes of this opinion such may be assumed to have been the fact.

[2, 3] The general rule, sometimes designated the "going and coming rule," which has been considered and applied by this court in numerous cases, is that, where the person injured is employed to perform service at or in a particular plant or upon particular premises, and where the injury claimed to be compensable is inflicted while he is going to or returning from his place of employment, or where he has left the place of employment on an errand personal to himself, said injury inflicted under such circumstances is not compensable. This rule, however, is subject to many exceptions and each case must be adjudged by the facts which are peculiarly its own. Makins v. Industrial Accident Commission, 198 Cal. 698, 703, 247 P. 202 (49 A. L. R. 411); California Casualty Indemnity Exchange v. Industrial Accident Commission, supra; London Guar. & Acc. Co. v. Industrial Accident Commission, supra.

Respondents contend that under the facts of this case the exception, and not the rule, is controlling. To support their position they urge that prior to January 1, 1925, said Enterprise Foundry was engaged solely in the business of production in its plant, but that upon said date it declared for the open shop as aforesaid and thereby then and there became engaged in and made it its business to fight the unions, which business of waging warfare it carried on in addition to its said regular prior business of production in its said plant; that it pledged to the purpose of this fight its every resource, money as well as employees, and that its employees then and there entered into its service and became entitled to its protection in opposing the labor union; therefore the injury received by decedent in the course of the strike was incidental to his employment and was compensable.

[4] We are not inclined to the above view. There is no evidence that said employer attempted to wage industrial warfare or entered into that business or any new business whatsoever; on the contrary, it endeavored to carry on its business through the usual channels, replacing shop laborers when necessary. No men were hired especially to wage the warfare, nor was any effort whatsoever being made to afford protection to its employees at the time of the injury to decedent. Decedent pursued his usual work in just the way he had been doing it for years. The strike, so far as the record shows, caused not even a ripple on the surface of his customary orderly procedure. His method of going to and returning from work, which was of his own choosing and was separate and apart from his employment, remained as it had always been, uncontrolled and uninfluenced by his employer. It must be remembered also that this is not the case of injury to an employee hired as a strike breaker; that element does not enter into this situation. It is true that the strike took place during the time of decedent's employment by said foundry, but his work and position therein were in nowise affected by that circumstance. We may therefore eliminate the element of existence of said strike, which has no true connection with or bearing upon the services decedent was performing for said foundry at the

time of his injury, and it can then scarcely be denied that this case comes within the general rule above announced, and we so hold. In other words, said injury having been received while the employee was walking to his work, prior to entry of his employer's premises, and at a time when he was not engaged in any service whatsoever for his employer, or any service incidental to or in the course of his employment, it is not compensable.

Many cases are found touching upon this point, but, as above stated, each case must be adjudged upon the facts peculiarly its own. The authorities cited by respondents we find are not in conflict with the above determination, for in each of them wherein a contrary holding is announced there appear particular facts and circumstances which distinguish it from the instant case and compel a different conclusion from the one herein reached.

We have studied carefully the case of Lampert v. Siemons, 203 App. Div. 264, 197 N. Y. S. 25, where, after consideration of the usual rule that injuries received while going to and from work do not arise in the course of the employment, the court held as an exception to said rule the case of a faithful employee, a department head, who remained on duty during a strike of the employees and was assaulted by a striker on his way to work, the injury so received being deemed one arising "out of and in course of the employment." We agree with and adopt as authority for our ruling here made the reasoning of the New York appellate court in reversing said decision (Lampert v. Siemons, 235 N. Y. 311, 313, 139 N. E. 278–280), which is in part as follows:

"The claimant has been awarded compensation as the state industrial board and the Appellate Division were of the opinion that these injuries arose out of and in the course of Lampert's employment. That they arose out of his employment is conceded; whether they were received in the course of his employment is the point in question.

"Had there been no strike, Lampert's employment would have ended when he left the factory at 134 West Thirty-Ninth street. His work was indoor work as foreman of the operating room. There was no work for Lampert to do for his employer after he left the factory at night and before he reached there in the morning. Therefore, all the authorities agree that while going to and from his work Lampert, if injured, would not come under the Workmen's Compensation Law as such injury would not have arisen in the course of his employment [citing cases]. * * *

"There is a line of cases which hold that an employee injured while on the streets or in a conveyance may recover compensation. These are cases where the nature of the claimant's work took him to and in the place where he was injured, and where at the time he was actually engaged in doing that for which he was paid; * * * also compensation has been allowed where the employee was injured while traveling to and from his work in a conveyance furnished by the employer under the contract of employment and the necessities of the situation. * * * In this case, however, Lampert was not doing work for his employer while going to and from his home, neither was he being transported in a conveyance furnished by and under the control of his master.

"The application of the rule which has been made by the court below would carry us very far afield. If under ordinary circumstances and within the authorities first above cited, Lampert was not carrying on any work for which he was employed while going home or coming to the factory, what was there in the strike which could possibly change this fact? The strike could not extend the field of his employment or the limits of his occupation unless he were employed to do something in connection with the strike which of course is not this case. That he was in danger on the streets because of the strike is beyond question, but the danger existed at all times and not necessarily while Lampert was going to and from his work. He could have been assaulted by a striker on the streets while he was going from his home to do an errand or while going to the theatre or to a dance or other place of amusement. If the limits of his employment can be extended under such circumstances to cover the distance between his home and the factory, why cannot those limits also be extended to reach any place and any activity in which the workman may be after working hours? The danger may exist in one place as well as another. The fact that the employer may have offered or ordered protection from strikers to the employee while he was upon the street and after the hours of his work would not or could not change the nature of his work or the time of its commencement and completion. The statute says that an employee must be injured while in the course of his employment. In this case Lampert's employment ceased when he left the factory.

"The views which we here express have been the ruling in other jurisdictions where a similar state of facts has presented the same question. (Poulton v. Kelsall, L. R. 2 K. B. [1912] 131; Rourke's Case, 237 Mass. 360 [129 N. E. 603, 13 A. L. R. 546].) In both these cases, there was an agreement to protect the employee from strike violence. The order of the Appellate Division should be reversed and the award of the state industrial board set aside and the claim dismissed, with costs to the appellants."

The award of the Industrial Accident Commission is annulled.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

SHENK, J. I dissent. The majority opinion properly concedes that the gunshot wound which resulted in the death of the deceased employee, Goytan, arose out of the employment. But the going and coming rule is applied and it is held that the injury was not received by the decedent while "performing service * * * incidental to" the employment and that he was not "acting within the course of his employment," as contemplated by the Workmen's Compensation Act. This holding is contrary to the finding of the Industrial Accident Commission and, in my opinion, is based upon the erroneous conclusion that the evidence does not support the finding. It is an undisputed fact that an industrial warfare was in progress in which the employer was involved. The decedent had been visited by strikers and had been warned to quit work or suffer the consequence. He continued in service with the knowledge and consent and impliedly at the instance of the employer. The majority opinion further concedes that there was ample evidence that the injury was inflicted by strikers. Under these circumstances I cannot escape the conclusion that the assault and the attendant death were incidental to the employment without which the injury would not have happened. Except for the employment there would have been no incentive on the part of the strikers to punish him for remaining in the service of his employer and to cripple his employer by injuring him. Under the circumstances existing at the time the street became for the decedent a special zone of danger solely because of the employment. In going and coming from his work the decedent assumed a risk for the benefit of his employer, reasonably to be contemplated, special and temporary in character, and not shared by the commonalty in the use of the streets. These considerations, which seem to me to be incontrovertible, would sustain the finding of the commission. See San Diego, etc., Co. v. Industrial Acc. Com., 193 Cal. 341, 223 P. 972; Globe Indem. Co. v. Industrial Acc. Com., 193 Cal. 470, 225 P. 273. The case of Lampert v. Siemons, 235 N. Y. 311, 139 N. E. 278, mainly relied upon by the majority, runs counter to the liberal construction enjoined upon the courts of this state by the Workmen's Compensation Act and as actually applied by this court. The reasoning and conclusions of the Appellate Division of the Supreme Court of New York in the same case (Lampert v. Siemons, 203 App. Div. 264, 197 N. Y. S. 25) are more in harmony with the administration of the law in this state. This court, on June 2, 1927, in the case of Fidelity & Casualty Co. v. Industrial Accident Commission (L. A. No. 9884), denied without opinion a petition for a writ of review and denied a rehearing in the same matter on July 2, 1927. In that case the finding of the commission was that the deceased employee was performing service growing out of and incidental to his employment at a time when he was playing pool for his own amusement in a public pool hall and was stabbed by a discharged and disgruntled fellow employee. The injured employee had been instructed by his superior to notify the other employee of the latter's discharge from service. The injured employee went out to hunt for the other. The discharged employee heard of his fellow employee's mission, saw him in the pool hall, and stabbed him. We concluded that the employment exposed the injured employee to a special risk arising out of and in the course of his employment wherever he might be. I entertain no doubt of the correctness of our conclusion in that case, and the same theory of the law should be applied to the facts in the present case. It is freely admitted by the majority opinion that the going and coming rule is properly subject to exceptions, depending on the facts in each particular case. In my opinion the present case presents a well-defined exception to the general rule.

I concur: RICHARDS, J.

206 Cal. 556

WELSBACH CO. v. STATE et al.★
(S. F. 13239.)

Supreme Court of California. Feb. 26, 1929.

Rehearing Denied March 28, 1929.

1. States ⟹191(1)—Action by foreign corporation to recover taxes paid under protest pursuant to unconstitutional law was maintainable against state; "claims on contract" (Corporation License Act 1915, § 3, as amended; St. 1893, p. 57; Civ. Code, §§ 1619–1621).

Action by foreign corporation to recover license taxes paid under protest pursuant to requirement of Corporation License Act 1915, § 3, as amended (Deering's Gen. Laws 1923, No. 1743), subsequently held unconstitutional, was maintainable against the state, under St. 1893, p. 57, as being, in form at least, an action on an implied contract; the phrase "claims on contract," as used therein, referring to causes of action on contract, express or implied, in accordance with meaning under Civ. Code, §§ 1619–1621.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Claim on Contract.]

2. States ⟹197—Foreign corporation could maintain action to recover license taxes paid under protest pursuant to unconstitutional law without first presenting claim to board of control (Corporation License Act 1915, § 3, as amended; St. 1893, p. 57).

Foreign corporation had right to maintain action against state to recover license taxes paid under protest, pursuant to Corporation License Act 1915, § 3, as amended (Deering's Gen. Laws 1923, No. 1743), subsequently held unconstitutional, without having first presented the same for allowance or disallowance to the board of control, there being no express provision in St. 1893, p. 57, authorizing such an action, that as a prerequisite thereto the claim must first have been presented to and have been passed on by any subordinate board or officer of the state.

3. States ⟹78—Neither secretary of state nor state treasurer were liable in official capacity for money collected and received under unconstitutional law (Corporation License Act 1915, § 3, as amended).

Secretary of state and state treasurer were not suable for recovery of money which had been collected and received by them, or either of them, in their official capacity, under the terms of Corporation License Act 1915, § 3, as amended (Deering's Gen. Laws 1923, No. 1743), subsequently declared unconstitutional.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Welsbach Company against the State and others. Judgment of dismissal, and plaintiff appeals. Affirmed in part, and in part reversed, with directions.

Superseding opinion in 270 P. 690.

A. A. Sanderson, of San Francisco, for appellant.

Gaylord & Smith, Willard P. Smith, and David Livingston, all of San Francisco, amici curiæ in behalf of appellant.

U. S. Webb, Atty. Gen., Frank L. Guerena, Deputy Atty. Gen., for respondents.

RICHARDS, J. This was an action instituted by the plaintiff, a foreign corporation, against the state of California and the secretary of state and state treasurer thereof, to recover certain license taxes paid by plaintiff to the state under protest during the years 1926 and 1927, pursuant to the requirement of section 3 of the Corporation License Act of 1915 (Stats. 1915, p. 422, as amended [Deering's Gen. Laws 1923, No. 1743]), and which section of said act was subsequently held to be unconstitutional by the decision of this court in the case of Perkins Mfg. Co. v. Jordan, 200 Cal. 667, 254 P. 551. The respondents, through the Attorney General, demurred to the complaint upon the ground of a lack of jurisdiction in the court over the defendants or the subject of the action; the Attorney General contending that as to the state there existed no law which permitted it to be sued upon the cause of action set forth in the complaint, and that as to the other two defendants they were not liable upon said cause of action, either in their official or individual capacity. The trial court sustained the demurrer, with leave to the plaintiff to amend, and upon the failure of the plaintiff so to do judgment was entered in the defendants' favor. It is from such judgment that this appeal has been taken.

[1] It is the contention of the appellant that the trial court was in error in sustaining the demurrer and in entering the judgment appealed from, for the reason that, as to the state of California, statutory authority exists which would entitle the plaintiff to maintain this action. In making this contention appellant relies upon the act of the Legislature approved February 28, 1893 (Stats. 1893, p. 57), and entitled "An act to authorize suits against the State, and regulating the procedure therein." Section 1 of the act provides as follows: "All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided."

It must be conceded that the action which the plaintiff has instituted is an action, in form at least, upon an implied contract. It is one of that class of actions which has long been recognized in this state as being main-

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★Rehearing denied.

tainable under the form of the common-law action in assumpsit, under which one who has come into the possession of the money of another, to which in law he is not entitled, may be required to restore such money to the rightful owner thereof. In order to effect such restoration, the courts at common law and in many states have recognized the fiction of an implied contract and have permitted recovery thereon under the form of the common-law action. Prior to the year 1893 such actions or causes of actions, while existing as recognized forms of recovery in that class of actions between individuals, had not been permitted to be maintained against the state itself, with the result that persons having just and equitable rights to receive back from the state moneys which they had paid into its treasury under the compulsion of laws which were thereafter found to be invalid were without remedy other than by way of appeal for relief through special act of the Legislature. Prior, also, to 1893, persons having causes of action against the state for injuries arising by reason of the negligence of its officials or employees were not permitted a recovery against the state in the courts, but were relegated to the uncertain mercies of the Legislature for relief. It was doubtless for the purpose of a definite departure from the long-held rule of law that the sovereign could not be made a party to actions of any sort against it without its consent, that the Legislature of California, in its wisdom, saw fit to adopt the act of 1893, above referred to. The title of said act, as we have seen, is general and remedial, and indicated the purpose of the Legislature to so far work a departure from the old hard rule of nonliability as to permit those classes of actions to be maintained against the state which are expressly referred to in the section of the act above quoted.

When we turn to the body of the act, and of said section thereof, we find that its language is also broadly general and inclusive. It provides that "all persons who have, or shall hereafter have, claims on contract or for negligence against the state * * * are hereby authorized * * * to bring suit thereon against the state." It would seem from the foregoing language that it was the intent of the Legislature to embrace within the permissive terms of said statute those two great divisions or forms of actions which are included within the phrases "ex contractu" and "ex delicto," and which embrace, generally speaking, all those forms of actions through which remedies between individuals are sought in courts of justice. The phrase in said statute "claims on contract" has been quite generally held to mean and to refer to "causes of actions upon contract" (Gray v. Palmer, 9 Cal. 616, 636; Northwestern Bank v. State, 18 Wash. 76, 50 P. 586, 42 L. R. A. 33; Riddock v. State, 68 Wash. 329, 123 P. 450, 42 L. R. A. [N. S.] 251 Ann. Cas. 1913E, 1033), while in Lewis' Sutherland on Stat. Const. (2d Ed.) § 400, it is stated that "all demands against the state for the payment of money are claims, whether express or implied." The word "contract," used in said section of the statute, must, according to the ordinary rules of interpretation, be held to bear the same meaning which is given to the word generally in the codes and statutes of the state. By the terms of section 1619 of the Civil Code, "a contract is either express or implied." By section 1620 thereof it is stated that "an express contract is one the terms of which are stated in words," while in section 1621 thereof it is set forth that "an implied contract is one the existence and terms of which are manifested by conduct."

In the light of the foregoing definitions and decisions, we are constrained to hold that the Legislature in the use of the phrase "claims upon contract" intended to mean and to refer to "causes of actions upon contract, express or implied." If our foregoing interpretation of the aforesaid clause in said statute is correct, we find direct authority for the application thereof to actions of the character of this one in the case of State of Indiana v. Mutual Life Ins. Co. etc., 175 Ind. 59, 93 N. E. 213, 42 L. R. A. (N. S) 256, which was an action instituted by the respondent in that case against the state of Indiana for the recovery of a sum of money paid into the state treasury under the compulsion of a statute held to be illegal, and for the recovery of which action was brought against the state under the authority of an act of the Legislature of the state of Indiana, adopted in 1895. and by the terms of which it was provided that such an action might be maintained against the state upon "a money demand * * * arising at law * * * out of contract express or implied." (Laws 1895, c. 112). The Supreme Court of Indiana went fully into the question as to the application of the language of said statute to demands in the form of actions of assumpsit against the state to recover money which the state had received, but which it had no legal or equitable right to retain, for the reason that the statute under the compulsion of which such money had been paid had been found to be invalid. We are satisfied with the reasoning of that case and deem it to have direct application to the facts of the case at bar.

The respondent state of California herein, however, places its main reliance upon the case of McClellan v. State of California, 35 Cal. App. 605, 170 P. 662, wherein, according to the insistence of the respondent, the contrary rule has been laid down. We have examined that case, and while it is true that the action therein was similar in its nature to that of the case at bar, and while it is also true that the act of 1893 was incidentally referred to during the course of the presentation of that case upon appeal, it is also true that the main reliance of the appellant therein was upon the proposition that, regardless of any permissive act, the old rule as to the nonliability of the king or of the state had become obsolete to the extent of permitting him to maintain his action for the recovery of money illegally paid into the state treasury, regardless of the existence or nonexistence of the statute permitting him so to do. The case was evidently decided upon the theory that the foregoing was the only question involved in the case and any reference therein to the statute of 1893 was given but scant consideration. We do not, therefore, regard the decision in that case as binding upon this court. Neither do we consider the dictum in the case of County of San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174, as in any degree controlling upon our present view as to the effect to be given to the broad language of the statute of 1893. It is our conclusion that it was the intention of the Legislature to give to persons, as against the state, the same right to sue and recover taxes which had been illegally imposed and paid under protest which that same class of litigants had long enjoyed and exercised for the recovery of taxes illegally imposed by counties and municipalities and for the recovery of which actions had always been held maintainable under the form of indebitatus assumpsit.

[2] There is another question presented in this case which requires but brief consideration. It is that of the right of the plaintiff to maintain this action against the state upon his claim directly and without having first presented the same for allowance or disallowance to the board of control. It is sufficient to say that the statute of 1893, which first gave permission to persons having claims of this character to bring suit thereon against the state, contains no express provision that as a prerequisite to the institution of the action the claim must first have been presented to and have been passed upon by any subordinate board or officer of the state. It is true that in the section of the act above referred to it is provided that the claims which may by its permissive force be sued upon are those which have been "not allowed by the state board of examiners," but the act nowhere else provides for the prior presentation of the claim to the state board of examiners, but, on the contrary, provides in section 7 thereof that after judgment has been rendered upon said claim "it shall be the duty of the controller to draw his warrant for the payment of any such judgment, without any presentation to or approval of such claim by the state board of examiners, whenever a sufficient appropriation for such payment shall have been made by the Legislature."

[3] As to the defendants and respondents herein, other than the state of California, to wit, Frank C. Jordan, as secretary of state, and Charles G. Johnson, as treasurer of the state, who are sued herein solely in their official capacity, it will suffice to say that in the case of Hartford Fire Ins. Co. v. Jordan, 168 Cal. 276, 142 P. 839, it was definitely held that the secretary of state and state treasurer were not suable for the recovery of money which had been collected and received by them, or either of them, in their official capacity under the terms of acts of the Legislature which were subsequently declared to be void.

We conclude, for the foregoing reasons, that as to the demurrer presented to the complaint of the plaintiff on behalf of the defendant state of California the same was improperly sustained by the trial court, but that as to the defendants Frank C. Jordan, as secretary of state, and Charles G. Johnson, as state treasurer, the demurrer presented on their behalf was properly sustained.

The judgment as to the last-named defendants is therefore affirmed, but as to the defendant state of California the judgment is reversed, with direction to the trial court to overrule its demurrer to the complaint herein.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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206 Cal. 552

WHYTE v. JORDAN. (S. F. 12866.)★

Supreme Court of California. Feb. 26, 1929.

Rehearing Denied March 28, 1929.

States ⚷78—Secretary of state was not subject to action in individual capacity for recovery of taxes paid pursuant to unconstitutional law (Corporation License Act 1915, as amended; St. 1893, p. 57).

Secretary of state was not subject to an action in his individual capacity for recovery of taxes paid by foreign corporations under the compulsion of Corporation License Act 1915, as amended (Deering's Gen. Laws 1923, No. 1743), which was subsequently declared unconstitutional, particularly in view of fact that St. 1893, p. 57, relating to actions against state, affords a complete remedy.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by W. R. Whyte against Frank C. Jordan. Judgment for defendant, and plaintiff appeals. Affirmed.

Willard P. Smith and Gaylord & Smith, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondent.

RICHARDS, J. The plaintiff, as the assignee of the claims of several foreign corporations which in the year 1926 had paid to the defendant in his official capacity as secretary of state certain license taxes, under the

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★Rehearing denied.

compulsion of the Corporation License Act of the year 1915 (Stats. 1915, p. 422, and the acts amendatory thereof [Deering's Gen. Laws 1923, No. 1743]), and which act had been subsequently declared unconstitutional by this court in the case of Perkins Mfg. Co. v. Jordan, 200 Cal. 667, 254 P. 551, has brought this action to recover license taxes, alleged to have been thus illegally collected, against the defendant Frank C. Jordan individually, and not as secretary of state of California. The defendant demurred to the plaintiff's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, with leave to the plaintiff to amend, and upon his failure or refusal so to do entered its judgment in the defendant's favor. From such judgment the plaintiff has prosecuted this appeal.

In support of the judgment the respondent places practically his entire reliance upon the former adjudication of this court in the case of Hartford Fire Ins. Co. v. Jordan, 168 Cal. 270, 142 P. 839, wherein the defendant herein, in his capacity of secretary of state and also individually, was made defendant in an action in all essential respects identical to that of the case at bar, and wherein this court, after a very full consideration of the question presented upon that appeal, decided that the defendant therein could not be made the subject of an action in either his official or individual capacity for the recovery of taxes or licenses collected and received by him under a void statute, which taxes had been paid by him into the state treasury prior to the institution of such action. The appellant herein seeks to have us in this case overrule said decision, and urges in support of his contention in that regard that the rule of the nonliability of a state official, in either his official or individual capacity, for taxes or licenses which have been paid to him under a statute subsequently declared to be void, is contrary to the main current of authorities throughout the country, and particularly to the recent decisions of the supreme Court of the United States in certain specified cases.

The decision of the latter court, upon which the appellant mainly relies, is that of Poindexter v. Greenhow, 114 U. S. 270, 330, 5 S. Ct. 903, 962, 29 L. Ed. 185, 207, wherein it was held that a tax collector, who had compelled the payment of certain delinquent taxes through the seizure of the property of the delinquent, was individually liable for the return of such taxes paid to him under the foregoing compulsion when the statute of the Virginia Legislature, under which he had acted, had been by the federal courts declared void. The court, however, in that case was sharply divided over the question as to the right of the federal courts to exercise jurisdiction over the purely local and internal affairs of a sovereign state, and four justices of the Supreme Court of the United States united in an exhaustive dissenting opinion, stating their views in that regard. That case, however, has been followed by the federal courts in a number of later decisions to which the appellant refers, but in practically all of said cases to which we have been cited the record discloses some aggressive action or exaction on the part of the state or federal officials against whom an individual recovery was sought. In some of these cases, also, the collected taxes were still in the hands of the collecting officer and the direct action was upon that ground upheld.

In a goodly number of the cases, both federal and state, upon which the appellant places reliance herein, it was made to appear that the plaintiff in each of such cases would be entirely remediless, unless through a recovery individually from the official collecting the taxes. In a number of instances the courts which have placed their decisions upon this ground, or which in certain cases have denied recovery, have referred to the fact that under the federal statutes, as well as under the statutes of a number of the states, provision has been made for the reimbursement of the state official who has thus been required to respond individually to an action for the recovery of a void tax. It may also be generally stated that in a number of the jurisdictions, wherein the right of an individual recovery against the state official has been denied, such denial has been placed upon the ground that the state has in each instance provided for the institution of actions directly against itself for the recovery of taxes paid under protest to state officials under the compulsion of statutes thereafter held to be void.

Under the foregoing state of the law in this and other jurisdictions we are constrained to uphold our former decision in Hartford Fire Ins. Co. v. Jordan, supra, as conclusive of the rights of the parties in the instant case. We, however, find support for our conclusion in the further fact that in the case of Welsbach v. State of California et al., 275 P. 438, this day decided, we have held that persons seeking a recovery for taxes alleged to have been illegally collected under statutes thereafter declared to be void have been afforded a complete remedy in the form of actions brought directly against the state under the terms of the statute of 1893 (Stats. 1893, p. 57), and for this latter reason also we are of the opinion that the demurrer of the defendant was properly sustained.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

206 Cal. 526

McMAHON et al. v. GRIMES et al.
(Sac. 4115.)

Supreme Court of California. Feb. 23, 1929.

1. Vendor and purchaser 🔑44—Evidence held to show that misrepresentations of both character of soil and availability of land to produce peaches profitably induced purchase.

In suit to cancel note and trust deed, evidence *held* to show that defendant's false representations that land was of deep alluvial soil, well drained, and free from hardpan and clay, together with those regarding its availability to produce peaches profitably, induced plaintiffs to contract for purchase thereof.

2. Vendor and purchaser 🔑37(4)—Fraudulent representations of character of soil are statements of fact, justifying rescission of sale of land.

Representations regarding character and nature of soil of land sold are statements of fact, justifying rescission of sale when fraudulently made.

3. Vendor and purchaser 🔑37(4)—That false statements to purchasers of land as to character of soil, examination of which would have disclosed facts, were honestly made, will not defeat rescission (Civ. Code, § 1572).

That false statements regarding character of soil and adaptability of land for growing peaches were honestly made by vendors' agent, as shown by latter's purchase of similar land in same tract at same price, will not defeat purchasers' claim for rescission and recovery of amounts paid, in view of Civ. Code, § 1572, where examination of land by such agent would have disclosed true character of soil.

4. Fraud 🔑13(2, 3)—Misrepresentation of material fact, with knowledge of falsity or without knowing whether it is true or false, constitutes "fraud."

Whether party misrepresenting a material fact knew it to be false, or made assertion without knowing whether it was true or false, is immaterial on question of "fraud."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Fraud.]

5. Vendor and purchaser 🔑119—Purchasers held not barred by laches from rescinding contract, because of presence on land during two visits without discovering that soil was not as represented.

Purchasers of land *held* not guilty of laches, barring rescission for fraudulent representations as to character of soil, etc., because of presence of one of them and her son on land during two visits, in absence of claim that either discovered or had notice of any fact putting them on inquiry as to falsity of such representations during such visits; there being no duty imposed on them to make such investigation as would disclose facts.

6. Vendor and purchaser 🔑37(1)—Purchaser justifiably relying on false representations may sue for rescission, though means of knowledge were open to him.

Where purchaser is justified in relying, and does rely, on false representations, his right of action to rescind contract and recover amounts paid is not destroyed because means of knowledge were open to him.

7. Vendor and purchaser 🔑119—Purchaser, investigating immediately after warning that land was misrepresented and writing to vendor following month, held not guilty of laches in not formally demanding rescission until three months later, after trying to adjust differences.

Purchaser, making investigations through farm adviser, horticultural commission, and others in vicinity as to condition of land and its adaptability to fruit culture, immediately after being warned by neighbors that it was not adapted to growing of fruit trees, as vendors' agent represented, writing two letters to vendor in following month, offering to reconvey on receipt of money paid, and consulting attorney when she received no reply, *held* not guilty of laches, precluding rescission of contract, though they did not serve formal demand for rescission and institute suit therefor until three months later, where most of intervening time was spent in effort to adjust differences.

8. Cancellation of instruments 🔑34(3)—Bill for cancellation of contract, filed within reasonable time after failure of negotiations for peaceful settlement, is not barred by laches.

Where party protests promptly on discovering that he has been defrauded in making contract, and then enters into negotiations for a peaceful settlement, which fail, a bill for cancellation of contract, filed within reasonable time thereafter, is not barred by laches.

9. Appeal and error 🔑1010(1)—Laches is largely for trial court, whose conclusion, reasonably supported by evidence, will not be disturbed.

The question of laches is, in first instance, largely for determination of trial court, whose conclusion will not be set aside by appellate court, if reasonably supported by evidence.

Department 1.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Annie McMahon and husband against Lucinda R. Grimes and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Orrick, Palmer & Dahlquist, R. W. Palmer, Eells & Orrick, and Goodfellow, Eells & Orrick, all of San Francisco, and Richard Belcher, of Marysville, for appellants.

Desmond Winship, of Berkeley, and W. P. Rich, of Marysville, for respondents.

CURTIS, J. The defendant the San Francisco Bank was at the times mentioned herein the owner of a tract of land situated near Marysville in the county of Yuba. The tract had been subdivided into lots under the name of the "Hallwood tract," and a plat made thereof and recorded in the office of the county recorder of said county. The defendant Lucinda R. Grimes, with her husband, resides upon a portion of said tract, and the latter was caring for said land for the owner thereof. Both the defendant Grimes and her husband were farmers, and were perfectly familiar with said tract, and had lived in its vicinity for some 10 years prior to the year 1921. In June of that year Mrs. Grimes made a trip to Massachusetts, and there visited her relatives residing in that state. Among the latter were the plaintiffs in this action. The plaintiffs are husband and wife. William G. McMahon is a brother of Mrs. Grimes. Other relatives visited by her on the occasion of this trip were Harold C. Millar and his wife, Hazel G. Millar; the latter being a daughter of the plaintiffs herein. Mrs. Grimes, prior to making her trip to Massachusetts, had been told by the defendant the San Francisco Bank that it would pay her a commission of 5 per cent. upon sales of land in said tract that she might make. On her trip Mrs. Grimes took with her a blueprint of the plat of said tract of land. This she showed to her relatives, including the plaintiffs herein, and to the said Hazel G. Millar and her husband, Harold C. Millar. She informed them that the bank had taken over this large tract of land and that it intended to divide the same into lots; that she intended to buy a lot, and wanted Mr. and Mrs. McMahon and Mrs. Millar each to purchase one. She picked out the three most desirable lots in the tract, and informed her relatives that, if they did not buy right away, they would be gone. She represented that said tract of land, and particularly that portion thereof including the lots afterwards sold to the plaintiffs and to Mr. and Mrs. Millar, respectively, was deep alluvial soil, well drained, free from hardpan and clay, and particularly adapted to the raising of peach trees, prune trees, and grape vines, and that if plaintiffs would purchase the lots therein, which they afterwards did purchase, and plant them to any of the above kind of trees or vines, that within a period of three years after planting said fruit and vines they would be producing fruit in paying quantities.

Relying upon these representations made by Mrs. Grimes, the plaintiffs, after Mrs. Grimes returned to California, opened negotiations direct with the defendant bank for the purchase of land in said tract, with the result that on the 26th day of October, 1924, they purchased from the defendant bank a portion of two lots in said tract, containing something over 27 acres, for which they agreed to pay the sum of $3,388.-75. Of this purchase price, on the date of purchase they paid the sum of $625, and executed their promissory note for the balance, secured by a deed of trust as a first lien against the land purchased. Neither of the plaintiffs had even seen said land before they purchased the same from said bank, nor had either of them been in the state of California prior to making said purchase. The plaintiff William G. McMahon was an accountant, and neither he nor his wife knew anything about farming or the growing of fruit trees, either in the state of California or elsewhere. Among other representations made by Mrs. Grimes to her relatives on the occasion of her visit to them was that, if any of them should purchase any of said tract, her husband would care for the same and, if desired by the purchasers, set the same to trees. Relying upon this representation, plaintiffs sent to Grimes and his wife money for the development of the said land, and part of the same was planted to peaches. In May, 1925, plaintiff Annie McMahon and her son came to California and visited Mr. and Mrs. Grimes at their home, situated upon an adjacent lot from those purchased by plaintiffs. They remained there some weeks, and after visiting another son of Mrs. McMahon at Covelo, Cal., returned to the Grimes home for a week in September of that year, and then departed for Massachusetts. During the time they had occasion to observe the peach trees which had been planted on the plaintiffs' land, and also observed melons and vegetables growing on the Grimes property, but there was no evidence that they learned anything about the character of the land purchased by plaintiffs, and it appears that they returned home ignorant of its true quality.

In 1926 Mrs. McMahon sent her son Harold to California for the purpose and in order that he might learn how to farm. He knew nothing about farming before coming to California. He arrived in April, 1926, and went immediately to the Grimes' home. He worked on the property purchased by his parents from April to October of that year, cultivating the peach trees, leveling the land, and making additions to the home which was situated thereon. During this time his mother sent him $500 to apply on the promissory note given in part payment of the purchase price of the land. This payment was made by him in accordance with his mother's directions. In October, 1926, Mrs. McMahon and her daughter, Mrs. Millar, who with her husband had also bought land in said tract from the defendant bank, broke up their homes in Boston, sold their furniture at a loss, and came to California. They joined Harold McMahon on the McMahon property and made their home in the house located thereon. Soon after their arrival they were informed by their neighbors that the land purchased by them was not as represented to them by Mrs. Grimes, and that they were wasting their time in endeavoring to raise fruit upon such land. This was in the latter part of October, 1926. They immediately communicated with the farm adviser and the horticultural commission of Yuba county, and others acquainted with the character of said land, and were informed by them that the land was worthless for fruit raising, due to lack of drainage and unfit condition of the soil. Mrs. McMahon and her son Harold went to San Francisco and attempted to see the president of the bank, but they were unable to obtain a hearing with him.

On November 1, 1926, Mrs. McMahon wrote to the defendant bank regarding the misrepresentations that had been made to her and her daughter, Mrs. Millar, regarding the character of the land purchased by them from the bank, and asked for the return of the money she and her daughter had paid on the land. She received no reply to her letter. On November 22, 1926, she wrote again to the bank regarding the matter, and asked for an adjustment of the claims of herself and daughter. After waiting for some time for a reply to this letter, and receiving none, Mrs. McMahon and her daughter consulted an attorney and laid the facts of their cases before him. They were advised by him that they could rescind their contracts on account of the misrepresentations made by Mrs. Grimes as to the character of the land, and they thereupon, and on or about the 21st day of February, 1927, served a written tender to the bank of the property purchased by them, and demanded the return of the money which each had paid on the purchase of their respective pieces of land, and a cancellation of the notes and trust deeds given as security for the balance due on the purchase price of each respective purchase. This demand was refused, and the plaintiffs on March 2, 1927, instituted this action to recover the amounts claimed to be due them from said defendants on account of said misrepresentations, and to cancel the promissory note and trust deed given at the time of said purchase.

Upon the trial of the action the court found that the representations were made by Mrs. Grimes as alleged by plaintiffs; that they were false and fraudulent, and defendant Grimes knew of their falsity at the time they were made, and that she made the same for the purpose of inducing plaintiffs to purchase said land; that plaintiffs believed that said representations were true, and relied upon them in the purchase of said land, and would not have made said purchase, nor have entered into said contract of purchase, had they not believed in the truth of said representations. The court also found that the plaintiffs promptly rescinded said contract of purchase upon learning of the untruth and falsity of said representations, and demanded the repayment to them of the money paid by them on said contract and the cancellation of their promissory note and trust deed.

From a judgment against them the defendants have appealed. They base their right to a reversal of the judgment upon two grounds. First, that the alleged misrepresentations claimed to have been made by defendant Grimes were mere statements of opinion honestly given, and were not such representations as would entitle plaintiffs to a rescission of the contract; second, plaintiffs did not promptly rescind their contract upon discovering the facts which they claimed entitled them to a rescission.

[1] Defendants do not seriously contend that the findings of the trial court that Mrs. Grimes made said representations as alleged, and that they were false, do not find substantial support in the evidence. They do claim, however, that the evidence of the plaintiffs shows that the only representations made by Mrs. Grimes, which were deemed of importance by the plaintiffs, were those in which Mrs. Grimes represented to the plaintiffs that the land was good peach land, and that, if purchased by plaintiffs, they could make a profit by raising peaches and grapes thereon. While there is evidence in the record that the plaintiffs were interested in purchasing the land largely by reason of Mrs. Grimes' statements to them that peaches and grapes could be grown profitably thereon, there is nothing to indicate in the least degree that they did not attach importance also to the statements of Mrs. Grimes that the land was of a deep alluvial soil, well drained, and free from hardpan and clay. The court found, and in our opinion the evidence shows beyond any serious doubt, that these representations regarding the character of the soil, with those regarding the availability of the land to produce peaches profitably, together operated upon the minds of the plaintiffs and induced them to contract for the purchase of the land.

It is true that plaintiffs were mainly interested in procuring land upon which peaches could be profitably grown, and, had the defendant Grimes confined her statements simply to the merits of the land in this respect, the claim which the defendants now make might find some reasonable basis of support. But her representations went further, and included those regarding the character of the soil of the land she proposed to sell to plaintiffs. In passing we might say that the evidence shows that, had the representations regarding the soil of said land been true, then the land would have been of such a character that peaches could have been profitably grown thereon. The defendants state in their brief, and no doubt this statement finds ample support in the evidence, that the Hallwood tract is located in the midst of one of the best peach-growing sections of this state, and that the land comprising this tract has a well-established and adequate water supply. It would appear from this statement that the only element which was lacking in the land, in order that it might produce peaches profitably, was a soil adapted to that purpose.

As to the nature of the soil, the court found that the land was "thin, shallow land, commonly known as red land, and, instead of said land being well drained, it was and is lower than surrounding land, and during the rainy season the water from the surrounding land drains upon lots Nos. 1 and 2 (the land purchased by plaintiffs being a portion of said lots), so that a large portion of it is covered with water, and that, instead of said land being free from hardpan and clay, it is what is commonly called hardpan land and pothole land, and hardpan and clay is found thereon a few inches below the surface of the ground." We think the representations of the defendant Grimes as to the character and nature of the soil were not only material representations, but that plaintiffs so considered them, and that they, with the further representations of Mrs. Grimes that land of this character would produce peaches profitably, were relied upon by plaintiffs, and that plaintiffs by reason of these representations were induced to enter into the contract which they now ask to have annulled.

[2] That representations regarding the character and nature of the soil of land sold are statements of a fact, and when fraudulently made will justify a rescission of the sale, is supported by an unbroken line of authorities in this state. Particularly is this so when the trial court, as it has in the present action, found that such representations were statements of fact, and not the expression of an opinion. Groppengiesser v. Lake, 103 Cal. 37, 36 P. 1036; French v. Freeman, 191 Cal. 579, 217 P. 515; Delta Land, etc., Co., v. Perry, 57 Cal. App. 314, 207 P. 393; Stone v. McCarty, 64 Cal. App. 158, 220 P. 690; Dickey v. Dunn, 80 Cal. App. 724, 252 P. 770; Powell v. Oak Ridge Orchards Co., 84 Cal. App. 714, 258 P. 636. In this last-named case the representations which were claimed to be false were that the land was productive and free from hardpan. The trial court found that said statements were false and gave judgment in favor of plaintiffs rescinding the sale by reason of the falsity of said representations. The District Court of Appeal affirmed the judgment, and referring to these representations said: "The statements as to the character of the soil and as to the water supply were clearly misrepresentations of fact."

[3] It is contended by the defendants that the statements regarding the character of the soil and the adaptability of the land for the growing of peaches by Mrs. Grimes were honestly made and in proof of this contention defendants cite the fact that, as shown by the evidence, Mrs. Grimes and her husband, about the time the plaintiffs made their purchase, also bought land of the defendant bank in the same tract, and that the land bought by Mr. and Mrs. Grimes was similar in quality and character to that purchased by plaintiffs, and the price paid therefor per acre was the same as plaintiffs paid for their land. This circumstance will not avail the defendants in their effort to defeat plaintiffs' claim. The court expressly found that Mrs. Grimes stated to the plaintiffs that the land was of "a deep alluvial soil, well drained and free from hardpan and clay," and that this statement was not true.

Construing the evidence in the light most favorably to the defendants, these findings bring the statements of Mrs. Grimes clearly within the provisions of section 1572 of the Civil Code defining actual fraud which is defined to include "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Muller v. Palmer, 144 Cal. 305, 77 P. 954. Conceding that Mrs. Grimes honestly thought her statements as to the character of the land were true, she was not justified in making them to the plaintiffs, in order to induce the latter to purchase the land through her, for the reason that she had not, and could not have had, any competent information that they were true. Had she made an examination of the land for the purpose of ascertaining the depth of its alluvial soil, and the presence or absence of hardpan and clay thereon, she would have discovered its true character, and as such an examination would have revealed the presence of hardpan and clay, and but a thin layer of alluvial soil, she could not have thereafter truthfully made said statements relative to the character of said soil. If she made such statements without this information, or some other of equal merit, then she was guilty of fraud even if she believed they were true.

[4] As was said in Muller v. Palmer, supra, quoting from the early case of Alvarez v. Brannan, 7 Cal. 504, 68 Am. Dec. 274, "But it is equally true that 'whether a party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial.' If a party asserts that

as true which he does not know to be true, it is a false representation. If he intends simply to state his belief upon information, then he should state it in that precise form, so as to apprise the other party of the true grounds upon which his statement is made. A party will always be held to make good his statement in the form in which he makes it. If he states a thing as true in general terms without qualification, then he is presumed to do so upon his own knowledge or at his own peril, and must make good his assertion."

In our opinion there can be no escape from the conclusion that the representations made by Mrs. Grimes regarding the nature and character of the soil of the land sold and of its adaptability to the profitable growing of peaches thereon were statements of material fact, that these statements were false and fraudulently made, and that by reason thereof the plaintiffs were entitled to rescind the sale which they were induced to enter into by said false and fraudulent representations.

[5] Defendants further contend, even if the plaintiffs originally were entitled to rescind their contract by reason of the false and fraudulent representations made to them by Mrs. Grimes, that they did not act promptly upon the discovery of the falsity of said representations. Therefore they were guilty of laches, and their right to rescind was barred at the time the notice of rescission was served. We have already set out substantially all of the evidence bearing upon this phase of the action. It is claimed by the defendants in the first place that the plaintiff Annie McMahon, at the time of her visit to the land in the summer of 1925 with her son, Harold, and the latter during this visit, and the subsequent visit made by him in the following year, at which time he worked upon the land purchased by plaintiffs as their representative and agent, had ample opportunity to discover the true character of the land. It is not claimed that either Mrs. McMahon or her son Harold, during the occasions just mentioned, discovered that the land was not as represented by Mrs. Grimes, or that either of them had notice during either of these two visits of any fact or circumstance which would put them as prudent and intelligent persons on inquiry as to the truth or falsity of the representations made by Mrs. Grimes.

The broad claim is made, however, that as Mrs. McMahon and her son were upon the land during some two months in the year 1925, and the son for a longer period of time in 1926, it was their duty to make such investigations as would disclose the facts concerning the property purchased by plaintiffs. The law placed no such obligation upon the plaintiffs. This question was recently before this court and answered adversely to the contention of defendants. French v. Freeman, 191 Cal. 579, 586, 217 P. 515. Quoting from this case, we find the law on this subject stated as follows:

"Plaintiff testified that he relied on these representations, and we do not believe that he was under any obligations to investigate and to verify their truth. In Teague v. Hall, 171 Cal. 668, at 670, 154 P. 851, 852, it is said: 'We think it must be held that the court erred in directing the jury, as it did in effect, that a party who has relied upon a misrepresentation made by another and has suffered injury thereby is precluded from recovering, if he had an opportunity, and did not avail himself thereof, to test the truth of the representations by independent investigation. Some of the earlier cases state the rule in this broad way, but, as Mr. Bigelow says in his work on Fraud, volume 1, page 523, "the proposition has now become very widely accepted, at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him." * * *'"

Similarly in Pomeroy's Equity Jurisprudence, § 896 [895], it is said that: "Whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The mere *existence of opportunities* for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact."

[6] Defendants have cited a number of authorities which they claim support their contention as made above, but it is apparent that upon a close study of them they are inapplicable to the facts in the present action. One of the authorities thus cited is the case of Greene v. Locke-Paddon Co., 36 Cal. App. 372, 172 P. 168, where the court says: "The land was at all times open and accessible to inspection, *and although often warned*, as shown by his own testimony, concerning the nature of the soil, he took no steps to assert his rights, but, on the contrary, farmed and rented and tried to sell the land, and during a period of about two years continued to make the periodical payments provided for in his contract of purchase." The words in this excerpt italicized, which we have supplied,

show that the plaintiff in that action had received definite warning that the land was not as represented, and the court held that after such warning it was his duty to make investigation as to the character of the land, and, failing to do so, the court held "that the plaintiff had lost his right to rescind the contract by his delay in pursuing with reasonable diligence a proper inquiry into the character of the land bought by him, after having been, as we conceive he was, put upon inquiry, and by his delay in asserting his right after obtaining the knowledge which his tardy investigation led to."

This case is typical of defendants' authorities upon this question. They do not apply to the facts in this case, for the reason that there is no evidence that either of the plaintiffs, by themselves or through their son Harold, or by or through any other means, received any warning or intimation whatever prior to the time Mrs. McMahon, in October, 1926, moved onto the land that the land was not as represented to them. They were not, therefore, required to make during these times any investigation of the land for the purpose of determining whether the representations made regarding it were true. They had the right to rely upon the representations made to them as to the character of the land, and "where a purchaser is justified in relying, and in fact does rely, on false representations, his right of action is not destroyed because means of knowledge were open to him." Dickey v. Dunn, 80 Cal. App. 724, 252 P. 770; Powell v. Oak Ridge Orchards Co., 84 Cal. App. 714, 258 P. 636; Teague v. Hall, 171 Cal. 668, 154 P. 851. It is true that in Lee v. McClelland, 120 Cal. 147, 52 P. 300, cited by defendants, the court held that "means and opportunity of acquiring knowledge in such a case are the equivalent of knowledge." This principle of law might be applicable to particular sets of facts, like those in that case, but it does not govern all cases where fraud is charged, as will appear from a reading of Teague v. Hall, supra, and French v. Freeman, supra, and others cited herein.

[7] As we view the evidence, the plaintiffs received no warning or intimation from any source whatever that the land was not as represented until the plaintiff Annie McMahon visited the land in October, 1926, for the purpose of making her home thereon. The neighbors then informed her that the land was not adapted to the growing of fruit trees, and the evidence shows that promptly on receiving such warning she instituted an investigation of the land which revealed to her its true character. Defendants contend, however, that even after receiving this warning Mrs. McMahon did not act promptly to rescind her contract. With this contention we cannot agree. Upon being warned by her neighbors, as mentioned above, she immediately made investigations through the farm adviser, the horticultural commission, and others in the vicinity where the land was located, as to the condition of the land, its soil and its adaptability to fruit culture. On November 1st she wrote the bank, briefly stating the result of her investigation and virtually agreeing to reconvey the land upon receipt of the money paid on the land. She received no answer to this letter, nor to a second letter written on the 22d day of that month. She consulted an attorney, who advised her that she could legally rescind the sale. On February 21st following, plaintiff served a formal demand for a rescission prepared by their attorney upon the defendant bank, which demand was rejected and the present action was instituted less than two weeks thereafter.

Defendants assert that the plaintiffs delayed from the month of October to the following February before giving notice of rescission, after they learned that the land was not as represented to them. This assertion is not in entire accord with the facts which show that plaintiffs on November 1st wrote the bank, asking for a return of their money. While this notice was in the form of a letter and was prepared by the plaintiff Annie McMahon, probably without legal assistance, yet we think that the reasonable import of its terms was that Mrs. McMahon wanted to rescind the sale. It is true that she later served a more formal demand for the return of her money and offer to reconvey the land. Defendants insist that this formal notice was the only legal notice of rescission given by the plaintiffs. Conceding that to be so, yet the greater part of the time intervening between the time when plaintiffs first learned that the land had been falsely represented to them and the giving of this notice was spent by the plaintiffs in an effort to have the defendant bank adjust their differences.

[8] These facts bring the present action within a well-established rule, announced by 2 Black on Rescission and Cancellation, § 544, as follows: "And where a party protests promptly on discovering that he has been defrauded in making a contract, and then enters into negotiations for a peaceful settlement, which fail, a bill for cancellation of the contract, filed within a reasonable time after such failure, is not barred by laches." This rule was followed by the court in the case of Powell v. Oak Ridge Orchards Co., 84 Cal. App. 714, 258 P. 636, where a state of facts, quite similar to those in the present action, were considered by the court, and the above rule was applied thereto. We think this rule is sustained both by reason and authority, and we have no hesitancy in giving it our unqualified approval.

[9] In addition to the foregoing reasons why the plaintiffs were not guilty of laches, which would defeat their action, they have called to our attention the further principle

of law that the question of laches is, in the first instance, largely one for the determination of the trial court, and that its conclusion will not be set aside by an appellate court if it finds reasonable support in the evidence. A number of authorities are cited in plaintiff's brief in support of this statement of law. Among them is the case of Suhr v. Lauterbach, 164 Cal. 591, on page 594, 130 P. 2, 4, where the court has passed upon the question in the following language: "The plaintiff is not to be held barred from his remedy for the wrong alleged to have been done him, on the ground that he has been guilty of laches, unless his delay in bringing action has been of such length and under such circumstances that it would be inequitable to enter into an inquiry as to the validity of his claim or to allow such remedy. Whether such is the situation is a question in the first instance for the trial court, and, if its conclusion thereon can reasonably be held to find sufficient support in the evidence, an appellate court should not interfere therewith."

We find similar enunciations of this principle in the following cases from the appellate courts of this state: Chapman v. Bank of California, 97 Cal. 155, 158, 31 P. 896; Wilder v. Beede, 119 Cal. 646, 651, 51 P. 1083; Stevenson v. Boyd, 153 Cal. 630, 96 P. 284, 19 L. R. A. (N. S.) 525; Davis v. Butler, 154 Cal. 623, 98 P. 1047; French v. Freeman, 191 Cal. 579, 217 P. 515; Del Vecchio v. Savelli, 10 Cal. App. 79, 82, 101 P. 32; Dickey v. Dunn, 80 Cal. App. 724, 729, 252 P. 770; Powell v. Oak Ridge Orchards Co., supra.

From what we have already said, it is evident that the finding of the trial court that plaintiffs were not guilty of laches finds ample support in the evidence. Following the rule established and approved by the foregoing authorities, we would not be justified in disturbing the finding of the trial court to the effect that the plaintiffs promptly rescinded the transaction upon learning of the untruth and falsity of said representations.

In our opinion, the judgment of the trial court should be affirmed; and it is so ordered.

We concur: PRESTON, J.; SEAWELL, J.

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206 Cal. 798

Hazel G. MILLAR and Harold C. Millar, Plaintiffs and Respondents, v. Lucinda R. GRIMES et al., Defendants and Appellants. (Sac. 4114.)

Supreme Court of California. Feb. 23, 1929.

Department 1.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Orrick, Palmer & Dahlquist, R. W. Palmer, Eells & Orrick, and Goodfellow, Eells & Orrick, all of San Francisco, and Richard Belcher, of Marysville, for appellants.

Desmond Winship, of Berkeley, and W. P. Rich, of Marysville, for respondents.

PER CURIAM. This is a companion action to McMahon v. Grimes (Sac. No. 4115) 275 P. 440, this day decided by this court. The plaintiffs in the present action, as stated in the opinion filed in action No. 4115, purchased a lot in the Hallwood tract from the defendant bank, through and by reason of representations made to them by defendant Grimes. These representations were the same representations upon which the McMahons relied in making their purchase; said representations having been made to the plaintiffs in each action under the same conditions and circumstances. They were found to be false and fraudulent as to the plaintiffs in each action. The same defenses were interposed in each action, and upon this appeal the defendants make the same contentions for a reversal of the judgment in this action as were made and considered in the action already decided.

For the reasons stated in said opinion, and upon the authority of McMahon v. Grimes, the judgment in the present action is affirmed.

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97 Cal. App. 235

GOTTLIEB et al. v. TAIT'S INC.★ (Civ. 6478.)

District Court of Appeal, First District, Division 1, California. Feb. 26, 1929.

Rehearing Denied March 28, 1929. Hearing Denied by Supreme Court April 25, 1929.

1. Sales ⚿181(12)—In action for price of garbage incinerator, evidence justified findings for plaintiff as to whether defects in construction caused condition making further use hazardous.

In action to recover agreed price of garbage incinerator, evidence *held* to support findings for plaintiff on issue whether defects in construction or manner of use caused cracks to appear in incinerator, and top thereof to become warped, making its further use hazardous.

2. Evidence ⚿445(2)—Parol evidence held admissible to show substitution of new agreement for erection of new chimney for incinerator, notwithstanding that original contract was in writing (Civ. Code, § 1698).

Where original contract for sale of garbage incinerator was in writing, substitution of new agreement whereby, in consideration of erection of new chimney, defendant promised to pay cost of new chimney, and also unpaid balance of price of incinerator and first chimney, may be shown by parol evidence, notwithstanding Civ. Code, § 1698.

★Rehearing denied. Hearing denied by Supreme Court.

3. Sales ⚷89—Evidence held to establish new contract to be substituted for contract for sale of incinerator.

In action to recover agreed price of garbage incinerator, evidence *held* sufficient to establish new contract, supported by adequate consideration, for construction of new chimney, under which defendant promised to pay cost of new chimney and unpaid balance of price of incinerator and first chimney, and that parties intended that new contract should be substituted for original contract, to extent that latter remained unperformed.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by J. A. Gottlieb and another, a copartnership doing business under the firm name and style of Gottlieb & Bockfinger, against Tait's Incorporated, to recover the agreed price of a garbage incinerator. Judgment for plaintiffs, and defendant appeals. Affirmed.

Brownstone & Goodman, of San Francisco, for appellant.

Hugh K. McKevitt, of San Francisco, for respondents.

PER CURIAM. An appeal by the defendant corporation from a judgment entered for the plaintiffs in an action to recover the balance of the agreed price of a garbage incinerator and chimney purchased by the defendant and erected at its place of business in Oakland, Cal., together with the cost of erecting a second chimney in connection with the same incinerator. On April 22, 1927, the plaintiffs agreed in writing to install the incinerator mentioned for $1,080, and in connection therewith to erect a 12-inch brick chimney, lined with fire brick, for $500, a total cost of $1,580, which the defendant agreed to pay in installments as follows: $500 upon completion and $100 per month thereafter until paid.

According to the plaintiffs the conditions found to exist at defendant's place of business after the contract was made were thought to render impracticable the erection of a chimney of the kind or at the place therein previously contemplated by the parties. It was therefore agreed that the location of the incinerator should be changed, and a chimney of a different type from that described in the contract erected, which was accordingly done. The chimney erected was of brick from the basement to the first floor of the building, and from thence to the roof a patent chimney, with asbestos filling and terra cotta lining was used, from the top of which projected a 12-inch galvanized pipe extension; this chimney being some 60 feet higher than the one originally planned. Some time during the following July a fire, which caused considerable damage, originated from the chimney at a point on the third floor of the building It was then determined that a new chimney should be erected.

According to the plaintiffs, they agreed, in consideration of the present payment of the whole of the balance unpaid under the contract and the cost of the new chimney, to erect the same, and, the defendant having accepted this proposal, the work was accordingly done. The defendant claimed that the old chimney was defective, and that the new one was to have been erected free of cost to it; that the plaintiffs warranted the incinerator and the chimney originally erected to be properly constructed and fit for burning the garbage and refuse from defendant's restaurant, but that the same were wholly unfit for such use; that defects in the first chimney caused the fire; and that the incinerator, due to faulty construction, finally collapsed. Defendant sought to recover the amount paid thereon, together with damages for the alleged breach of warranty. The court found for the plaintiffs and against the above allegations of the defendant's answer and counterclaim.

[1] Plaintiffs contended that the fire was due to the operation of the incinerator with the dampers open, contrary to instructions; this causing an excessive amount of heat in the chimney. It appears from testimony adduced by defendant that the incinerator was used until January 1, 1928; that a few months before that date cracks appeared in the incinerator, and the top of the same became warped, making its further use hazardous. Whether this condition was caused by defects in construction, or the manner of use, different conclusions might be drawn, and we cannot say that those of the trial court were unreasonable.

[2, 3] The defendant contends that parol evidence of the second agreement which the plaintiffs claim was made between the parties was incompetent. While the original contract, which was in writing, could only be altered by an agreement in writing or an executed oral agreement (Civ. Code, § 1698), here the evidence shows the substitution of a new agreement whereby, in consideration of the erection of a new chimney—which, according to the contention of the plaintiffs, they were not obligated under the original agreement or otherwise to erect—the defendant promised to pay the cost of the new chimney, and also the balance unpaid of the price of the incinerator and the patent chimney. Under such circumstances the evidence was admissible, and was sufficient to establish a new contract, supported by an adequate consideration, which the parties intended should be substituted for their original contract to the extent that the latter remained unperformed. Pearsall v. Henry, 153 Cal. 314, 95 P. 154, 159;

Credit Clearance Bureau v. George A. Hochbann, etc., Co., 25 Cal. App. 546, 144 P. 315.

No error is shown which would justify a reversal of the judgment, nor can we say from the evidence that the findings are unsupported.

The judgment is affirmed.

97 Cal. App. 30

SCHWARTZ v. BRANDON et ux.
(Civ. 6540.)

District Court of Appeal, First District, Division 1. California. Feb. 18, 1929.

1. Evidence 🔑65—Employer held presumed to know that bank account could be touched for damages for employee's injuries only by levy of execution after compensation award.

Under rule that one is presumed to know the law, employer as owner of bank account, *held* presumed to know that it could not be touched by attachment in matter of damages to employee for personal injuries, but only by levy of an execution after award of damages by Industrial Accident Commission.

2. Evidence 🔑68—Men are presumed to know reasonable consequences of acts, and to intend that such results shall follow therefrom.

Men are presumed to know what the reasonable consequences of their acts may be and to intend that such results shall follow from their acts.

3. Fraudulent conveyances 🔑264—Complaint in injured employee's action to determine validity of conveyance by employer to wife, alleging issuance of execution returned wholly unsatisfied for compensation awarded, held to state cause of action.

Complaint in action to determine whether conveyance of property by defendant was made for the purpose of hindering, delaying, and defrauding injured employee from recovering compensation from defendant employer, alleging issuance of execution and its return wholly unsatisfied for damages awarded by the Industrial Accident Commission, *held* to state facts sufficient to constitute cause of action.

4. Witnesses 🔑219(2)—Husband and wife, filing joint answer setting up deed by husband to wife claiming it bona fide, waived privilege not to testify for or against each other (Code Civ. Proc. § 1881).

Where defendants, as husband and wife, in action to determine whether conveyance by defendant husband to his wife was void as having been made for purpose of hindering, delaying, and defrauding injured employee of husband from recovering damages awarded him by the Industrial Accident Commission, filed joint answer setting up deed, claiming that it was bona fide and a valid transfer, the privilege of Code Civ. Proc. § 1881, relating to testimony of husband and wife, was expressly waived.

5. Witnesses 🔑219(2)—Cross-examining husband, who had testified for wife before making motion to strike out, waived privilege of not testifying (Code Civ. Proc. § 1881).

Cross-examining defendant husband, who with wife filed joint answer setting up deed and declaring it bona fide in action to determine whether it was made to hinder, delay, and defraud creditor, before making motions to strike out evidence by defendant husband, was express waiver of privilege provided for by Code Civ. Proc. § 1881, relating to testimony by husband or wife for or against either.

6. Witnesses 🔑219(2)—Recalling husband in own behalf when he reiterated testimony given in favor of wife, without objection, waived privilege not to testify (Code Civ. Proc. § 1881).

Recalling husband in his own behalf, when he virtually only reiterated testimony given when called as witness for plaintiff in favor of his codefendant, who was his wife, and without objection by her, waived his privilege not to testify for or against wife, as provided by Code Civ. Proc. § 1881.

7. Appeal and error 🔑1012(1)—That plaintiff recovering judgment had not made out case by preponderance of evidence held not reviewable on appeal.

Objection that case for plaintiff recovering judgment had not been made out by preponderance of the evidence is not reviewable on appeal.

8. Appeal and error 🔑945—Trial judge's discretion and judgment may not be disturbed except when it clearly appears discretion was abused.

Discretion and judgment of trial judge may not be disturbed except in instance where it clearly appears that the judge's discretion has been abused.

9. Appeal and error 🔑1010(1)—Transcript showing that defendant husband exercised control over property after transferring it to wife justified conclusion that plaintiff suing to determine validity of conveyance made out case.

Where transcript showed unmistakably that defendant husband, who had conveyed property to wife, continued to exercise dominion over property after transfer, and where husband testified that he was acting as agent of his wife, in making payment of certain mortgage with funds realized from sale by wife of property transferred to wife, but neither letter to bank, to whom money was sent for payment, nor indorsements on check, were made as agent, trial judge did not abuse discretion in determining that injured employee of defendant husband, in action to determine whether conveyance was made to hinder, delay, and defraud plaintiff in recovering his award of damages by Industrial Commission, made out case by preponderance of evidence.

10. Mortgages 🔑273—Wife, as grantee, not assuming debt in deed, left grantor husband debtor until discharged by payment.

Wife, as grantee in deed from husband, not assuming debt in deed, *held* to leave grantor husband as debtor until discharged by payment; futurity of payment not changing fact of existence of debt from moment of incurring it.

11. Fraudulent conveyances ⟹215—Injured employee held employer's creditor from date of accident so as to render void employer's subsequent conveyance making recovery of damages impossible.

Employee injured during course of employment was creditor of employer from date of accident, notwithstanding he did not file claim nor complaint for damages until later and conveyance by employer to wife of property after injury, but before filing of claim, was void as having been made to hinder, delay, and defraud injured employee in recovering the damages awarded.

12. Master and servant ⟹385(1)—That compensation awarded injured employee was made payable in installments in no way affected sum awarded as whole.

Mere fact that compensation awarded injured employee by the Industrial Accident Commission was made payable in installments for the convenience of the debtor employer *held* to in no way affect the sum awarded as a whole.

13. Fraudulent conveyances ⟹272—Grantor, setting up voluntary conveyance knowing of pre-existing creditors, must prove that he could satisfy creditors disregarding value of transferred property.

Grantor, who sets up a voluntary conveyance knowing that he had pre-existing creditors, is required to prove that he had means to satisfy the creditors at the time of the transfer, over and above the value of the transferred property.

14. Fraudulent conveyances ⟹297—Evidence that, when employee was injured, employer was worth $15,000, but could not pay compensation award, showed conveyance to wife was fraudulent.

In action by injured employee to set aside deed of gift by defendant employer to his wife, also named as defendant, as in fraud of creditors, proof that at time of injury employer was worth between $15,000, and $20,000, and that six months thereafter, as result of known act in giving away property to wife, he could not pay aggregate of few hundred dollars, *held* sufficient to show that deed was in fraud of employee's right to recover award of compensation.

15. Fraudulent conveyances ⟹104(1)—Where employer admitted debt due employee for injuries, conveyance by employer to wife making payment for injuries impossible should be closely scrutinized.

Any evasion of an award of compensation made under the provisions of the Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 831, as amended), for damage done to human body of workman, should be closely scrutinized, more particularly conveyance by employer who after injury to employee transferred property to wife where employer admitted debt due.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Jonas Schwartz against J. F. S. Brandon and wife, wherein C. S. Schwartz, as executor of the estate of Jonas Schwartz, deceased, was substituted as plaintiff; the original plaintiff having died since instituting action. Judgment for plaintiff, and defendants appeal. Affirmed.

C. W. White, of Hayward, and J. J. Rose, Jr., of Oakland, for appellants.

E. H. Christian, of Oakland, for respondent.

WARD, Justice pro tem. Since the filing of the transcript in this case C. S. Schwartz, the executor of the estate of Jonas Schwartz, was substituted as plaintiff and respondent in the place and stead of Jonas Schwartz, deceased.

The point in this case is: Was a conveyance of property, described in the complaint, made by the appellant J. F. S. Brandon to his wife (his codefendant), Thereza S. Brandon, while he was insolvent, or did such conveyance make him an insolvent, and was such transfer made for the purpose of hindering, delaying, and defrauding the original plaintiff, and for the prevention of his opportunity to realize upon any recovery he might make as against the defendant J. F. S. Brandon, for injuries received by him, as an employee in the course of his employment, within the provisions of the Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 831)?

A chronological epitome of the case is enlightening. In March, 1926, Jonas Schwartz was injured, so also was the defendant J. F. S. Brandon. On April 22d following Brandon conveyed the lands described in the complaint to his wife, his codefendant herein, for love and affection. Approximately three months thereafter, ten acres of the property thereby conveyed was sold, and a mortgage of $6,000 to one Mattos, which had been given by J. F. S. Brandon, was paid out of the proceeds. On July 21, 1926, a letter of instruction was delivered to a bank in Alameda county, signed by J. F. S. Brandon, inclosing a deed of himself and wife to certain lots, being part of property conveyed by gift deed to the wife, and containing the words, "upon payment for my account of the sum of $4,950.00 you are authorized to deliver this deed," etc. Five days thereafter a check on the bank made payable to the order of Brandon and his wife was indorsed by Brandon as to his own name and as to that of his wife. On the same date a deed for said lots was delivered to J. J. Rose, Jr. On the following date, July 27, 1926, Jonas Schwartz was awarded $3,341.10, payable in installments of $20.83. Three hundred and twelve dollars and forty-five cents was noted as installments for fifteen weeks past due (which brought it to within one week of the accident). Two hundred and seventy-four dollars and eighty cents was the cost of hospital, drugs, and nursing expenses. Medical attendance was to be determined later. On October 6, 1926, a certified copy of the award of the Industrial Accident Commission was filed with the clerk of the superior court of Alameda county, and judgment entered in accordance therewith. Four days thereafter execution was duly issued and delivered to the sheriff of Alameda county and returned wholly unsatisfied, and the judgment at the time of trial was unpaid and unsatisfied. On October 13, 1926, the present action to set aside the deed of gift was instituted.

There are many interesting bits of evidence appearing in the transcript. The twenty-acre piece of land had been held by J. F. S. Brandon in his own name for a period of approximately twenty years, and the other properties had been held by J. F. S. Brandon for a long period of time. The value of the property conveyed was about $20,000, and two small pieces of real property which were retained in his name were of a value of about $500. His deposits on the date of the deed of gift aggregated $1,380.61. At the time of trial he had $200 assets in the form of moneys due him. J. F. S. Brandon was ill at the date of making the gift deed, and so remained for several months without earning capacity, and during the period of the trial was "getting started again." Throughout his illness his expenses and the expenses of his family were paid from his personal funds. There is some evidence that he owns some property in the Azores Islands. This may be dismissed from consideration, as no court would be heard to say that a workmen's compensation for industrial injury shall go to a foreign country for liquidation while the debtor gives away his California property for the reasons of love and affection, thus putting it presumptively beyond his power to respond in damages. The primary purpose of the Workmen's Compensation Act was to give a speedy remedy, without protracted litigation and expense. Relegating a creditor to the Azores would defeat the recovery.

[1, 2] Appellant contends that the deeding of his property to his wife was during his sickness and done for the protection of his wife and family. These are laudable objects, as put forth by appellant at page 30 of his brief: "If any presumption is to be at all indulged in, it should be the presumption of innocence, and that the act of Brandon in making the deed was prompted by his realization while so sick in bed that life was uncertain, and the laudable impulse to give his property as set forth in the deed to his wife for her protection and livelihood and thus avoid as to her the expense and delay in administration of his estate." Would not his estate, in the event of his death, be required to be administered for the other small bits of property here, and for the property in the Azores, would it not be required to be administered both here and in the Azores? Would not the best protection of his wife require that she have ready cash wherewith to pay household expenses and the expenses of Brandon's illness and possible death—if he were considering the "uncertainties of life" as meaning the span of life, and not the uncertainty of the outcome of a tort committed by himself? During all this time he did not transfer to his wife that very needful thing, the cash. Certainly his acts and omission to act are inconsistent with the theory of appellant's attorneys. It is argued on behalf of appellant that "a debtor being desirous of avoiding payment of his debts would in the very nature of events, in order to hinder, delay, and defraud his creditors, dispose of all his property and particularly such property as is easily reached by execution, as bank accounts." This is answered by what is within the common knowledge of all, a levy on the two small parcels would be certainly expensive; it was testified that one piece was bought at a tax sale for $27.50 or thereabouts, and a suit to quiet title was pending on it at the time of the gift deed, and the other was represented at that time by a deposit which had been paid on account of its purchase, the consummation of its purchase being dependent apparently upon an impending sale, which later was accomplished, and which fixed his equity in the property at $300. Brandon is presumed to have known the law and to have known that his bank account could not be touched by attachment in the matter of this damage, but only by the levy of an execution, after the award which was on July 27, 1926. We do not find any evidence to show just when this money was drawn out, but Brandon knew as a matter of fact, that as a commercial account it was drawable instantly at the first scent of danger, because the execution could not be issued until after the award was filed and judgment had in the superior court upon it. In October, 1926, the sheriff could find nothing wherewith to satisfy the judgment. If the property conveyed by the deed of gift had remained in the hands of Brandon, the sheriff could have levied upon it and made the satisfaction of judgment, no part of which has been paid since the award. What caused the hindrance and the prevention in the collection of the award? Unquestionably, this deed to a total of $20,000 worth of real property. Men are presumed to know what the reasonable consequences of their acts may be, and to intend that such results shall flow therefrom. In this instance, those results are absolutely self-evident, namely, that the plaintiff could not realize upon his award.

[3] In answer to appellant's contention that the complaint does not state facts sufficient to constitute a cause of action, and that the demurrer should have been sustained upon

the ground that the complaint does not show that defendant J. F. S. Brandon did not have other property from which judgment could be made or that it does not show that he made himself insolvent by the deed of gift, and intimating that proceedings supplemental to execution were necessary, if these allegations could be avoided, it must be borne in mind that the complaint alleges the issuance of execution and its return wholly unsatisfied. Benson v. Harriman et al., 55 Cal. App. 483, 204 P. 255, holds this as a prima facie showing.

[4-6] Supplemental proceedings, so far as they would be directed to J. F. S. Brandon, individually, would have brought the plaintiff to an empasse, if appellant's counsel is correct in his argument that any evidence that Brandon gave would be for or against his wife, and that he could not testify without her consent. However, we cannot hold with that contention of appellant's as applicable to this case. Brandon and his wife appeared by filing a joint answer, setting up the deed, claiming that it was bona fide and a valid transfer. Placing the deed itself in issue constituted an express waiver of the privilege of section 1881, Code of Civil Procedure. Cross-examining Brandon before making the motion to strike out again waived the point, and recalling him in his own behalf, when he virtually only reiterated the testimony he gave when called as a witness by plaintiff, constituted another waiver; his testimony being in favor of his codefendant, his wife, and without objection by her. Of these various kinds of waivers, the cases, respectively, of Tobias v. Adams, 201 Cal. 689, 258 P. 588, Johnston v. St. Sure, 50 Cal. App. 735, 195 P. 947, and King v. Haney, 46 Cal. 561, 13 Am. Rep. 217, are of interest. Quoting from the latest decision upon subdivision 1, § 1881, Code of Civil Procedure (Tobias v. Adams, supra) in which the court said: "It would be monstrous if husband and wife might between themselves conspire to defraud the creditors of the one or the other and to conceal their act produce a written instrument which is immune from all inquiries and which must be accepted by the defrauded party as final. The freedom of contract between husband and wife and the power to transmute community property into separate property or vice versa by agreement between themselves renders it imperative that when such an agreement is relied upon by their joint answer, thereby the whole subject-matter of said agreement is open to inquiry which may include communications from one to the other." Our attention has been called to Marple v. Jackson, 184 Cal. 412, 193 P. 940, a case similar in many respects to the instant case, but this deed was dated ten years prior to the judgment, though it was not recorded until about two months prior thereto and almost fifteen months before execution. In the Marple Case, the court, after hearing the evidence of the wife, found that the premises were her separate property, and the Supreme Court held that "we are not prepared to hold the court was not justified in finding that appellants had not overcome the presumption in favor of delivery." In the instant case the deed was dated April 22, 1926, and recorded less than three months before the award was actually made. In First National Bank of Haskell v. Ranger, 49 Cal. App. 451, 193 P. 790, the court upholds the doctrine contended for by appellant, but points out "as between husband and wife, the declared policy of the law is to encourage confidence and preserve it inviolate, and, hence, the broad provision of the statute quoted, subject, however, to exceptions within which the case is not included." Perhaps one of the exceptions that the court had in mind was just such a case as this, when the bona fides of the transaction is placed in issue.

[7-9] The objection that plaintiff's case has not been made out by a preponderance of the evidence is not reviewable upon appeal. Goodwin v. Franich, 37 Cal. App. 493, 174 P. 83. The discretion and judgment of the trial judge may not be disturbed save in the instance where it clearly appears that such discretion has been abused. Careaga v. Moore, 70 Cal. App. 621, 234 P. 121. No such abuse of discretion appears; on the contrary, the trial judge seems to have been well fortified in his findings. A perusal of the transcript shows unmistakably J. F. S. Brandon's dominion over the property after transfer. He testified that he was acting as the agent of his wife, but neither the letter to the bank nor the indorsements on the check were made as agent.

[10] The contention is made by Brandon that his debt to Mattos of $6,000 must not be considered as a debt owing by him, because it was secured by the mortgage of the property. It was his note, and it was not assumed by the terms of the deed by the grantee, his wife. Consequently, if the security were waived, or, for any cause arising thereafter, the amount could not be made from the property, the burden of payment would be Brandon's. Not assuming a debt in the deed, the grantee leaves the grantor as he was, a debtor until discharged by payment. The futurity of a payment does not change the fact of the existence of a debt from the moment of incurring it. Independent of the property conveyed to his wife, it is apparent that he could not have met this obligation.

[11] Our Code provides that all personal injuries must be brought within one year from the date of the injury, and, if not so brought, the statute of limitations may be invoked to prevent recovery. This simply means that the date of the inception of the liability is the date of the injury. It possibly may not be merged into a judgment for a

fixed amount until after the expiration of the year, but it must be predicated upon an event before that time. Appellant contends that defendant Brandon was not indebted to plaintiff on the date of the deed to his wife. It is not reasonable to conclude that responsibility begins upon the filing of a claim or complaint or upon the entry of judgment or the making of an award because such action would be based upon prior acts and occurrences. The award or judgment is only the legal affirmance of a responsibility or debt theretofore existing. See Freeman on Executions (4th Ed.) § 137a, in which he says: "One having a claim for a tort is a creditor before the commencement of an action thereon." See, also, Chalmers v. Sheehy, 132 Cal. 459, 64 P. 709, 84 Am. St. Rep. 62, and Melvin v. State, 121 Cal. 16, 53 P. 416, wherein it was held that the word "debt" should be given "its modern legal significance, as including any sort of obligation to pay money." It is true that the debt was an increasing one under the plan worked out by the "Workmen's Compensation and Insurance Act of 1917"—that is, that Schwartz could not recover immediately the full amount of $3,541.10, and that only $312.45 had accrued up to July, 1926—nevertheless it was an obligation to pay when due. "A creditor, * * * is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money" (section 3430, Civ. Code), and "A debtor, * * * is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent." Civ. Code, § 3429. We must conclude from the foregoing that the injured party was a creditor from the date of the accident. The instant of the accident and injury, Brandon knew as a matter of law that plaintiff had a cause of damage against him. It was an impending liability, the amount of which was indefinite until award, except approximately in accordance with the Workmen's Compensation Act. To this extent Schwartz was the creditor and Brandon the debtor.

[12, 13] Considerable stress is laid upon the fact that these were weekly payments, outside of the lump of award for hospitalization, etc., but the award itself was for $3,541.10, and the mere fact that it was made payable in installments for the convenience of the debtor in no way affects the sum awarded as a whole. Over $500 was due on July 27, 1926, and every week thereafter added its toll up to the time of the levy of execution. Knowing this, Brandon knew also that the transfer he was making to his wife would render him unable to meet that obligation, and that the transfer had that effect is apparent and is not refuted. A grantor who sets up a voluntary conveyance, knowing that he has pre-existing creditors, is required to prove that he had means to satisfy the creditors, at the time of the transfer, over and above the value of the transferred property. Bump on Fraudulent Conveyances, §§ 254, 255, and also in Swartz v. Hazlett, 8 Cal. 118, it was said: "It may be safely assumed, that when a person makes a gift of such a proportion of his property, as, considering the amount of his existing debts, a prudent and just man would not make, this circumstance is conclusive evidence of fraud. If, at the time the gift is made, there is a reasonable ground for the fear that existing creditors will not be paid, and it should afterwards turn out that the other property of the donor is insufficient, the gift should be set aside. * * * It cannot be supposed that our statute intended to protect the donee against anything, except those unexpected events that prudence and integrity could not foresee."

[14] In this case the evidence proves that at the instant of the injury Brandon was worth at least $15,000 and more likely $20,000, and that six months thereafter, as a result of his own act in giving away his property, he was reduced to a condition where he could not pay an aggregate of a few hundred dollars. The later conduct of the defendant proved that he made this conveyance with full knowledge that he was hindering and delaying, by the conveyance in fraud, Schwartz's right to recover his award.

[15] We have reviewed the cases cited by counsel for plaintiff and by counsel for defendant, and we consider our position in affirming the judgment of the lower court in consonance with the best thought therein. Any evasion of an award made under the provision of the Workmen's Compensation Act, such award being for damage done to the human body of a workman, is absolutely repellant to a sense of justice and fair dealing, and should be closely scrutinized, and most particularly where, as in this case, the admission is made of the debt due.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

97 Cal. App. 138

In re BARNETT'S ESTATE. (Civ. 6555.)★

District Court of Appeal, First District, Division 2, California. Feb. 21, 1929.

Rehearing Denied March 22, 1929. Hearing Denied by Supreme Court April 22, 1929.

1. Trusts 🔑169(3)—Probate court is without jurisdiction to determine protests of beneficiaries to statutory substitution as trustee of bank purchasing assets of original trustee, provided statute is valid, but objections must be asserted in equity (State Bank Act [St. 1909, p. 87, and amendments thereto] and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16).

Under State Bank Act (St. 1909, p. 87, and amendments thereto) and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16, providing for transfer of business of banking corporations and succession of purchasing bank to trust relationships by operation of law, court sitting in probate is bound to recognize bank purchasing business of original trustee as the new trustee and has no jurisdiction to determine protests on part of beneficiaries to statutory substitution, provided statute is valid, and any other objections to substitution on part of beneficiaries must be asserted in court of equity.

2. Statutes 🔑114(1)—Title relative to regulation of banking business sufficiently expresses provision of statute for transfer of trusteeships on transfer of bank's business (State Bank Act [St. 1909, p. 87, and amendments thereto] and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16).

State Bank Act (St. 1909, p. 87, and amendments thereto), as to transfer of trusteeships on transfer of business of banks, provided for by section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16, is sufficiently expressed in title defining act as one "to regulate the business of banking."

3. Constitutional law 🔑205(1), 240(1)—Provisions for transfer of trusteeships on transfer of bank's business do not offend special privileges or equal protection clauses, as class legislation (State Bank Act [St. 1909, p. 87, and amendments thereto] and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16).

State Bank Act (St. 1909, p. 87, and amendments thereto) *held* not void as class legislation in violation of special privileges and equal protection clauses of Constitution, as to section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16, providing for transfer of trusteeships on transfer of business of banking corporations.

4. Banks and banking 🔑311—Constitutional law 🔑56—Provision for transfer of trusteeships on transfer of business of banking corporations held not void as depriving courts of equity jurisdiction (State Bank Act [St. 1909, p. 87, and amendments thereto] and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16; Const. art. 6, § 5).

State Bank Act (St. 1909, p. 87, and amendments thereto) *held* not to violate Const. art. 6, § 5, giving superior court original jurisdiction of all equity cases, on account of provisions of State Bank Act, § 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16, providing for transfer of trusteeships on transfer of business of banking corporations by sale, consolidation or merger, since jurisdiction of equity is not altered by statutory changes creating new rights or withdrawing certain rights which formerly existed.

5. Courts 🔑202(5)—Court on appeal from decision settling account of national bank as substitute trustee could not determine propriety of application of statute to national banks (State Bank Act [St. 1909, p. 87, and amendments thereto] and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16).

Reviewing court on appeal from decision of probate court settling final account of national bank as substitute trustee had no jurisdiction to determine applicability of State Bank Act (St. 1909, p. 87, and amendments thereto), section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16, providing for transfer of trusteeships on transfer of business of banking corporations by sale, consolidation or merger, to national banks, on ground that such application would deprive state courts of jurisdiction over testamentary trusts.

6. Courts 🔑198, 202(5)—Probate court had no jurisdiction, on account by national bank as substitute trustee, to determine whether substitution injured estate or beneficiaries, and jurisdiction of that question was therefore not conferred by appeal to District Court of Appeal (State Bank Act [St. 1909, p. 87, and amendments thereto] and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16).

District Court of Appeal, on appeal from orders settling account of national bank as substitute trustee under State Bank Act (St. 1909, p. 87, and amendments thereto) § 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16, had no jurisdiction to determine whether substitution was detrimental to interest of trust estate or beneficiaries, since probate court had no jurisdiction over that question.

★Rehearing denied. Hearing denied by Supreme Court.

7. Statutes 🔑174, 175—Statutes must be construed reasonably.

Judicial construction or interpretation of statute must be reasonable.

8. Statutes 🔑186—Court may not read into statute matters omitted by Legislature.

Court may not, under the guise of interpretation, read into statute matters which have been omitted by the Legislature, particularly where it appears that the omission might have been intentional.

9. Trusts 🔑169(1)—Substitution of national bank as trustee on succession to business of original trustee held effective without consent of beneficiaries (State Bank Act [St. 1909, p. 87, and amendments thereto] and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16).

Substitution of national bank as trustee on its succeeding to business of original trustee under State Bank Act (St. 1909, p. 87, and amendments thereto) and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16, was effective without necessity of approval or consent of beneficiaries, since section 31 makes sale subject "to the rights of trustors and beneficiaries after such transfer to nominate another and succeeding trustee."

10. Wills 🔑1—Right to make testamentary disposition of property depends on legislative consent.

Right to make testamentary disposition of property is not inherent right but one which depends entirely on consent of Legislature.

11. Wills 🔑435—Testator is deemed to intend results of statutory rules governing disposition of estate.

Where Legislature has prescribed rules and conditions for disposition and administration of estates, testator is deemed to intend result which such rules produce to the same extent as though statutory provisions were embodied in will.

12. Wills 🔑681(1)—Statutory scheme for substitution of trustee on transfer of business of banks is deemed to have been adopted by testator designating bank as trustee (State Bank Act [St. 1909, p. 87, and amendments thereto] and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16).

Where State Bank Act (St. 1909, p. 87, and amendments thereto) and section 31, as amended by St. 1921, p. 1373, § 15, and section 31a, as amended by St. 1921, p. 181, and section 31b, as added by St. 1921, p. 1375, § 16, thereof, providing for transfer of trusteeships by banking corporations on transfer of business of banks, was in effect at date of will creating trust and making bank trustee, testator is deemed to have adopted and included within declaration of trust scheme for substitution of trustees prescribed by the act, and consent of all parties is considered to have been given.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Annual account of the Bank of Italy National Trust & Savings Association as trustee under the will of Melancton Barnett, opposed by Edna M. Barnett and others, beneficiaries under the will. From orders settling the account, the beneficiaries appeal. Affirmed.

H. W. Brunk and Geo. R. Knowles, both of Berkeley, for appellants.

Louis Ferrari, Adolph B. Canelo, Jr., and Edmund Nelson, all of San Francisco, and Donahue, Hynes & Hamlin, of Oakland, for respondent.

Rohe & Freston, Herbert Freston, and James A. McLaughlin, all of Los Angeles, amici curiæ on behalf of respondent.

NOURSE, J. Two appeals are taken jointly from orders of the superior court sitting in probate in the matter of the settlement of the annual account of the trustee under the will of Melancton Barnett.

The appellants are beneficiaries under the trust who objected to the settlement of the account upon the ground that a new trustee was substituted for the one named by the testator without their approval or consent. The respondent is a national banking association which, by numerous conveyances, has succeeded to all the business of the original trustee. These sales were all made with the approval of the state superintendent of banks and were in strict compliance with the California State Bank Act. No objection was made by the beneficiaries to any item of the account, but they urged that the settlement be denied and that the account be stricken from the files upon the theory that the provisions of the State Bank Act (Stats. 1909, p. 87, and amendments thereto) relating to such transfers are void.

[1] Sections 31 (as amended by St. 1921, p. 1373, § 15), 31a (as amended by St. 1921, p. 181), and 31b (added by St. 1921, p. 1375, § 16), of this act provide for the transfer of the business of banking corporations by sale, by consolidation, and by merger. Each section makes special provision for the transfer of trusteeships by such corporations, the provisions of section 31 relating to a sale reading, in part, as follows: "Upon the approval by the superintendent of banks * * * the purchasing bank shall, ipso facto and by operation of law and without further transfer, substitution, act or deed, and in all courts and places, be deemed and held to have succeeded * * * to all rights, obligations, * * * court and private trusts and other relations to any * * * principal or beneficiary of any court or private trust."

With this statute before it, it became the duty of the court sitting in probate to recognize the respondent as the new trustee and that court was without jurisdiction to hear or determine any protest on the part of the beneficiaries to the statutory substitution of the trustee, unless the statute is void as offending some constitutional provision. Otherwise if any rights are reserved to the appellants to object to the substitution these may be asserted in a court of equity. More v. More, 133 Cal. 489, 494, 65 P. 1044, 66 P. 76.

[2] In this attack upon these provisions of the Bank Act the appellants advance three points: That they are not within the title of the act; that they are class legislation; and that they transgress upon the jurisdiction of the superior courts sitting in equity. The title of the act is "to regulate the business of banking." It is argued that this is not broad enough to include regulations concerning banks while acting as a trustee. The precise point has been decided adversely to appellants' contention in Estate of Wellings, 192 Cal. 506, 519, 221 P. 628.

[3] The argument that these provisions are class legislation might with equal force be extended to the entire Bank Act regulating the banking business in this state. The "class" here involved is not the testamentary trustee; it is the banking corporation doing business as a testamentary trustee. The legislation has uniform operation on this entire class, and when this is true, and when the classification is not unreasonable, such legislation does not offend the "special privileges" or "equal protection" sections of the Constitution. Provident Institution for Savings in Town of Boston v. Malone, 221 U. S. 660, 666, 31 S. Ct. 661 [55 L. Ed. 899, 34 L. R. A. (N. S.) 1129]; In re Girard, 186 Cal. 718, 722, 200 P. 593.

[4] The argument is advanced, with apparent lack of confidence in the point, that this legislation offends the provisions of section 5 of article 6 of the Constitution, reading: "The superior court shall have original jurisdiction in all cases in equity." Cases are cited to the rule that the Legislature cannot take away the equity jurisdiction conferred on the courts by the Constitution. We cannot perceive how this legislation has that effect. This section of the Constitution does not confer any rights on the parties; it merely designates the courts where such rights as they may have in equity shall be enforced. The legislation does not alter the jurisdiction of the courts of equity; it merely defines what rights the parties have under it. "Statutory changes are almost perpetual. New rights are created under which new equities arise. These make new cases in equity, of which the courts at once take cognizance. The jurisdiction of courts of equity is not thereby enlarged. Neither is it diminished when by statutory changes some rights cease to exist and certain cases which courts of equity once entertained can no longer arise." Spreckels v. Hawaiian Com., etc., Co., 117 Cal. 377, 381, 49 P. 353, 354. See, also, Wright v. Superior Court, 139 Cal. 469, 473, 73 P. 145; Reclamation Dist. v. Superior Court, 171 Cal 672, 681, 154 P. 845.

[5, 6] Aside from their constitutional objections to the legislation, counsel for appellants argue that it should not apply to a transfer to a national banking corporation because such corporations are governed by the federal Congress and, because of diversity of citizenship, could deprive the state courts of jurisdiction over testamentary trusts. The point is not properly before us on this appeal. It is one that goes to the policy of the legislation, a question which the Legislature alone may determine. We are informed that an action in equity is pending seeking to remove the respondent herein as trustee. If, in that proceeding, it should appear that the substitution of a national banking corporation as trustee was detrimental to the interests of the trust estate or of the beneficiaries thereunder the court of equity would have jurisdiction to hear and determine the question, but as the court in probate would not have had jurisdiction to determine it we should not consider it on these appeals.

[7-9] Without conceding that the legislation is constitutional, appellants argue that the probate court was in error in applying it to a testamentary trust without the approval or consent of the beneficiaries. In this connection they cite the portion of section 31 of the Bank Act providing for the sale of the business of banking corporations, and reading: "Subject, however, to the rights of trustors *and* beneficiaries, after such transfer, to nominate another and succeeding trustee of the trust so transferred." The argument is that because the trustor of a testamentary trust who is deceased has lost this right the section should be interpreted as conferring upon the beneficiaries of such a trust the sole right to nominate another trustee. It is true, as argued by appellants, that the courts have frequently substituted the word "or" for "and," and vice versa, when necessary to arrive at the evident intent of the Legislature. 23 Cal. Jur. 736. But the judicial construction or interpretation of a statute must be reasonable. Tujague v. Superior Court, 69 Cal. App. 35, 37, 230 P. 198. It would not be a reasonable interpretation of this statute if we should hold that the Legislature intended to use the word "or" for "and" and thus enable any beneficiary to nominate a new trustee even where the trustor was still living. It may be that the Legislature overlooked a situation such as has arisen here, but it is just as probable that it had such a situation in mind and purposely failed to authorize the beneficiary alone to nominate in such a case. Be this as it may, judicial interpretation should never be judicial legislation. We may not, therefore, under the guise of interpretation, read into a statute matters which have been omitted by the Legislature particularly

where it appears that the omission might have been intentional. Here the Legislature had before it similar statutes relating to the transfer of trusteeships when banking corporations merged or consolidated. It had judicial interpretations of these statutes ruling that legislation of this character was free from constitutional objection and that "the changing of the trustee as a result of the consolidation" or merger, "as has been stated and as is obvious, is the act of the law authorizing the consolidation." Mercantile Trust Co. v. San Joaquin Agr. Corp. (Cal. App.) 265 P. 583, 589, citing Chicago T. & T. Co. v. Zinser, 264 Ill. 31, 35, 105 N. E. 718 (Ann. Cas. 1915D, 931); In re Bergdorf's Will, 206 N. Y. 309, 99 N. E. 714; McElwain Co. v. Primavera, 180 App. Div. 288, 167 N. Y. S. 815; Id., 181 App. Div. 929. 930, 168 N. Y. S. 1134, and directing attention to the fact that the statutes of Illinois and of New York, which were interpreted by the cited cases, were similar to the provisions of the California Bank Act.

[10-12] But, to our minds, there is one principle which controls a situation of this kind and that is the principle of consent of the parties. The Legislature, as we have stated, having the power to enact the legislation, and the trust having been created in contemplation of it, the consent of all parties to the legislative method of substitution of trustees must be deemed to have been given. Mr. Justice Hart, in the Mercantile Trust Case, expressed the same thought in this language: "The statute authorizing the consolidation or merger of banking corporations, in so far as it prescribes a scheme for the transfer of their properties, * * * enters into and becomes a part of every agreement or obligation * * * and of this the defendant [the trustor], its directors, and bondholders are presumed to have known before and at the time of the execution of the trust deed * * * and * * * to have impliedly assented to the exercise of the legal right of said bank to merge * * * with all the consequences following such merger or consolidation as are prescribed by the law." The right of the trustor to provide a method of filling vacancies and for appointment of successors in the trust is not disputed. 26 R. C. L. p. 1278. But when a trustor, in full contemplation of the provisions of the Bank Act relating to the sale, consolidation, or merger of banking corporations, voluntarily designates such a corporation as trustee he must be deemed to have adopted and included within his declaration of trust the full scheme for substitution of trustees prescribed in that act. No more forceful application of this principle could be made than in a case such as we have here of a testamentary trust, because the right to make a testamentary disposition of property is not an inherent right, but one which depends entirely upon the consent of the Legislature. Thus, when the Legislature has prescribed the rules and conditions under which the disposition and administration of estates may be had, the testator is deemed to intend the result which such rules produce and "they affect the testamentary disposition and provisions as though embodied in the will." Matter of Will of Bergdorf, supra.

We have refrained from discussing the question of which, if either, of the orders appealed from are appealable orders under our Code, because the parties have urged a decision of the cause upon the merits. Therefore, without assuming anything in this respect, our judgment is that the orders are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

DOUGHERTY v. ELLINGSON et al.

(Civ. 6584.) ★

District Court of Appeal, First District, Division 2. California. Feb. 20, 1929.

Rehearing Denied March 22, 1929. Hearing Denied by Supreme Court April 18, 1929.

1. Appeal and error ⚿930(1)—Trial ⚿140 (1), 143—It is for jury on conflicting evidence to judge credibility of witnesses and weight, effect, and probative force of their testimony, and appellate court must construe evidence to support verdict if reasonably possible.

Where evidence is conflicting, it is for jury to judge credibility of witnesses and weight, effect, and probative force to be given to their testimony, and it is reviewing court's duty on appeal to construe the evidence so as to support verdict if it may be done reasonably.

2. Automobiles ⚿245(50, 64)—Whether negligence of either driver proximately caused automobile collision, and whether negligence of each concurred, held fact questions for jury under evidence.

In action for injury received in automobile collision by guest against owner of automobile in which she was riding and against driver of colliding automobile and his parents, whether negligence of either driver was proximate cause of collision and resultant injuries, and whether negligence of each concurred with that of other *held* questions of fact to be decided by jury under evidence.

3. Trial ⚿296(3)—Instruction that failure to perform legal duty constitutes negligence held not erroneous for omitting question of proximate cause covered by another instruction.

In action for injuries sustained in automobile collision, instruction that failure of any person to perform duty imposed on him by statute, or other legal authority, of itself constitutes negligence, *held* not erroneous because it omitted question of proximate cause, where court was merely defining negligence and was not at-

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★Rehearing denied. Hearing denied by Supreme Court.

tempting to define actionable negligence correctly defined in another instruction.

4. Automobiles 🔑246(22)—Instruction for automobile guest, if colliding automobiles were operated in violation of statute and injury resulted "by reason thereof," held not to omit proximate cause element.

Instruction to find for plaintiff without further proof of negligence on part of defendants, if either or both automobiles involved in collision were operated in violation of Motor Vehicle Act and "by reason thereof" plaintiff sustained injury, *held* not objectionable as omitting element of proximate cause; words "by reason thereof" being equivalent thereto.

5. Automobiles 🔑246(20)—Instruction held not erroneous as omitting element that restriction of speed at intersection is limited to places where view is obstructed (Motor Vehicle Act, § 113(a) and (b), subds. 1, 2).

Instruction to find for plaintiff guest in colliding automobile if defendant traversed intersection at greater speed than 15 miles an hour and was negligent in so doing, and such negligence proximately caused injury, which was in words of Motor Vehicle Act, § 113 (a) and (b), subds. 1, 2 (St. 1923, p. 553), *held* not erroneous in omitting element that such restriction of speed is limited to places where driver's view is obstructed, but left question whether such speed was negligence and proximate cause of injury to jury.

6. Automobiles 🔑245(40)—Whether particular speed is negligence is fact question for jury, irrespective of statute (Motor Vehicle Act).

Irrespective of limitation imposed by Motor Vehicle Act (St. 1923, p. 517, as amended) on automobiles, whether a particular speed at particular time and place is or is not negligence is a question of fact for jury to decide from all the evidence.

7. Appeal and error 🔑1066—Instruction, respecting automobile speed in excess of 15 miles per hour at intersection, not requiring view to be obstructed, held harmless, where evidence showed view was obstructed (Motor Vehicle Act, § 113 (b), subd. 2).

Even if instruction was erroneous in authorizing verdict for plaintiff injured in automobile collision on finding of speed in excess of 15 miles an hour without finding that such limitation was applicable because of the obstructed view as provided by Motor Vehicle Act (St. 1923, p. 553, § 113 (b), subd. 2), plaintiff was not injured thereby where uncontradicted testimony showed view was obstructed.

8. Automobiles 🔑246(1)—Instruction on joint liability where drivers of colliding automobiles were negligent, causing guest's injury, held not erroneous; "proximately contributing to any injury;" "proximate cause."

In action by guest in automobile against operators and owners of both colliding automobiles, instruction that, if both drivers were negligent and their negligence proximately contributed to injury, jury should not compare their negligence or determine which was more negligent, since both would be then jointly and severally liable, *held* not erroneous because of omission of qualifying words "if any" after words "their negligence," and because phrase "negligence proximately contributed to any injury" does not require negligence to be "a proximate cause" of injury, being equivalent thereto.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Proximate Cause.]

9. Trial 🔑191(11)—Instruction on damages held not objectionable as assuming defendants' negligence, in view of words, "if your verdict be in favor of the plaintiff."

Instruction as to measure of damages commencing with introductory words, "if your verdict be in favor of the plaintiff," *held* not objectionable as charging that defendants were negligent, since quoted words negatived any assumption of negligence.

10. Trial 🔑252(20)—Instruction to allow damages for future suffering held not objectionable as permitting damages on speculation.

Instruction authorizing jury to consider any pain or suffering or disability that may be reasonably certain to be endured by plaintiff in future, if any, from injury sustained, *held* not objectionable as authorizing jury to consider future pain and suffering on mere speculation, in view of another instruction that instructions as to damages were inapplicable if defendants' liability were not established.

11. Trial 🔑260(1)—Refusal of requested instructions substantially covered by instructions given was not error.

Refusal of requested instructions substantially incorporated in instructions given was not error.

12. Automobiles 🔑246(39)—Refusal of requested instruction as to duty of automobile driver suddenly confronted with danger held not error under evidence.

In action growing out of automobile collision, refusal of requested instruction as to duty of driver suddenly confronted with danger *held* not error, where evidence showed that driver saw other automobile in ample time to have prevented collision and was not suddenly confronted with peril, and because instruction did not contain qualification that driver was not himself negligent.

13. Appeal and error 🔑882(14)—Any error in directing verdict for cross-defendant on cross-complaint instead of dismissing cross-complaint held invited by cross-complainants and not chargeable to court or plaintiff.

Where defendants, without any motion, merely stated they dismissed their cross-complaint, and court charged jury that there was no evidence on issues raised by cross-complaint and answer thereto, and that it should return verdict for cross-defendant thereon, *held* that any error misleading jury was invited by cross-complainants through their failure to act and acquiescence not chargeable either to court or plaintiff.

14. Trial ⚷108½—Questioning prospective jurors as to interest or employment in automobile liability insurance companies held proper in automobile negligence case.

In action for injury arising out of automobile collision, questioning of each prospective juror on his voir dire examination as to whether he owned any stock or bonds in any insurance company insuring drivers of automobiles against liability and whether any of his family were officers or employees of such company *held* proper.

15. Appeal and error ⚷1060(4)—Questioning prospective juror as to knowledge that defendants' attorney represented insurance companies held not prejudicial in view of verdict.

In action for injuries arising out of automobile collision, question asked prospective juror on voir dire examination as to whether he knew that counsel who had just examined him represented any insurance companies in which he might be interested, though improperly insinuating to jury that defendant was insured, *held* not prejudicial, where verdict was not excessive nor question of defendant's liability close.

16. Trial ⚷46(2)—Sustaining objection to question whether driver of colliding automobile and passengers were intoxicated held not error without showing of materiality.

In action for injuries in automobile collision sustaining plaintiff's objection to question of one defendant as to intoxication of driver and passengers in other automobile at time of collision *held* not error, where there was nothing in the statement made by counsel at the time nor in the question to indicate that facts sought to be proved were material.

17. Appeal and error ⚷205—Offer on appeal to show materiality of rejected testimony held too late.

Proof of facts tending to show materiality of excluded testimony, offered for first time on appeal, *held* too late.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Mary A. Dougherty against Elling Ellingson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Chas. W. Haswell and Albert Jacoby, both of San Francisco, for appellants.

Vincent W. Hallinan, of San Francisco, for respondent.

GRAY, Justice pro tem. Defendant Nan Ross, who drove the automobile in which plaintiff was riding as her guest, and defendants Elling Ellingson and Nanna Ellingson, his wife, who, as parents, signed the application of Edward Ellingson for an operator's license, and Edward Ellingson, who drove the other colliding automobile, each appeal (the last three defendants jointly) from a judgment recovered by plaintiff for injuries received as a result of the collision of the two automobiles in the intersection of Portola and Terrace drives in the city and county of San Francisco.

A summary of the salient testimony will test the merits of the contentions of the respective parties—that of each appellant that the respondent failed to establish any negligence on the part of such appellant, and that of the respondent that the negligence of each appellant proximately contributed to the collision and the resulting injuries. Edward Ellingson testified that, as he was traveling northerly on the right or east side of Portola drive at a speed of between 12 and 15 miles per hour, and, when he had reached a point 15 or 20 feet south of the intersection, he first saw Nan Ross traveling westerly at twice his speed 3 or 4 feet north of the south curb of Terrace drive and 20 to 25 feet easterly of the eastern curb of Portola drive; that he then swerved to the left to pass in front of her and went 40 feet to point of collision; that he applied his brakes when he started to swerve, that, when going 15 miles per hour, he could stop within 15 feet; that his view into Terrace drive was obstructed by house and shrubbery on the corner; that he reached the intersection first; and that a collision was inevitable if both machines continued their respective original courses. Two of his three passengers, called by him, corroborated him, except that one fixed the speed of the Ross automobile at 15 miles per hour and the other at 20 miles per hour in crossing the intersection, and both, in addition, stated that Nan Ross "cut the corner"—i. e., she failed to pass to the right of the center of the intersection—in turning south onto Portola drive. Nan Ross testified that, as she was turning the corner southerly, closer to the north curb of Terrace drive, at a rate of between 10 and 12 miles per hour, she saw Ellingson traveling at a rate of 20 miles per hour in the center of Portola drive about one-half a block away; that when he was a quarter of a block away, he swerved to the left without decreasing his speed; that she blew her horn thrice and was stopped at the time of collision; and that her view into Portola drive was obstructed at the corner. A police officer, on her behalf, testified to skid marks made by the Ellingson automobile extending 15 feet to the point of collision and also to the position of the Ross automobile after the collision, north of the center line of the intersection. Another witness for Nan Ross, who had been traveling behind Ellingson, testified that Nan Ross reached the intersection first; that, when he was 115 feet south of Terrace drive, he saw Nan Ross traveling between 12 and 16 miles per hour on the right side of Terrace drive; that Ellingson was traveling between 14 and 16 miles per hour and skidded for 20 feet; and that the collision occurred halfway between the center and southern curb of Terrace drive, and 8 feet east of the eastern curb of Portola drive when both machines were nearly stopped.

[1, 2] It is apparent from the evidence hereinabove set forth that a substantial conflict exists between the testimony of the two appellants and the two passengers in the Ellingson automobile—the only eyewitnesses to the accident—as to the speeds of the two automobiles, as to which reached the intersection first, and as to the manner in which Nan Ross turned in the intersection. "Where such conflict exists it is for the jury to judge the credibility of the witnesses, and the weight, effect, and probative force to be given their testimony (Hanton v. Pacific Electric Ry. Co., 178 Cal. 616, 174 P. 61), the duty of the reviewing court on appeal being to construe the evidence so as to support the verdict, if it may be done so reasonably; that is to say, to accept as true such evidence as tending to sustain the verdict, unless it be inherently incredible, and to reject as untrue those portions which conflict therewith (Neher v. Kauffman, 197 Cal. 674, 242 P. 713)." Truitner v. Knight, 83 Cal. App. 655, 660, 257 P. 447, 449. The testimony of Edward Ellingson and his two passengers amply supports the jury's finding implied by its verdict, that Nan Ross was negligent per se in turning at the intersection in violation of section 129 of the California Vehicle Act (St. 1923, p. 558). Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010. The testimony of Nan Ross warrants the finding that Ellingson was negligent per se in failing to yield the right of way as provided by section 131 (a) of the same act (as amended by St. 1925, p. 412). Grillich v. Weinshenk, 64 Cal. App. 474, 222 P. 160. The evidence given by Nan Ross as to Ellingson's speed and the evidence as to his skid marks warranted the jury's conclusion that Ellingson violated section 113 (b-2) of the same act in traversing the intersection at a speed in excess of 15 miles per hour when his view was obstructed. Truitner v. Knight, supra. His own testimony, that he could have averted the collision if he had applied his brakes to make a full stop when he first saw that a collision was inevitable if he continued his course, also supports the jury's finding that he was negligent. Shaver v. United Parcel Service (Cal. App.) 266 P. 606. Whether or not the negligence of either driver was a proximate cause of the collision and resultant injuries, and whether or not the negligence of each concurred with that of the other, is a question of fact to be decided by the jury, and, under the evidence in this case, their determination cannot be disturbed. Newman v. E. E. Overholtzer Sons' Co., 182 Cal. 778, 190 P. 175; Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077.

[3] Appellant Nan Ross complains that instruction XIV, charging "that the failure of any person to perform a duty imposed upon him by statute or other legal authority of itself constitutes negligence" is erroneous because it omits a specific element, to wit, the question of proximate cause. "The failure of any person to perform a duty imposed by law is sufficient evidence of negligence. But no action for damages may be founded upon such negligence unless it directly contributed to the injury." Fresno T. Co. v. Atchison, etc., R. Co., 175 Cal. 358, 360, 165 P. 1013, 1014. The court in this instruction was merely defining negligence and was not attempting to define actionable negligence. Instruction IX correctly defined actionable negligence as follows: "The violation of a statute is negligence in itself, for which, if injury is proximately caused thereby, an action for damages will lie."

[4] Instruction XV, reading as follows: "If you believe from the evidence that either or both of the two automobiles involved in this collision were driven or operated in violation of any express provision of the Motor Vehicle Act of the State of California, and that *by reason thereof* (italics ours) the plaintiff sustained injury and that she was herself free from contributory negligence, then your verdict shall be in favor of said plaintiff and against the defendant or defendants, guilty of such violation, without further proof of negligence on the part of such defendant or defendants"—is criticized by appellant Ross because of an alleged omission of the element of proximate cause. This objection is untenable, for the italicized phrase included in the instruction such element, and required a finding that the violation be a proximate cause of the collision and injury before the jury could find a liability therefor. "The use of the words 'by reason of,' instead of 'as the direct and proximate result of,' by the court below in paragraph 5 of its charge, was not misleading to the jury, as the words first quoted were the equivalent of those last quoted; and, perhaps, would have been more easily understood by the average jury." Houston & T. C. R. Co. v. Anglin, 45 Tex. Civ. App. 41, 99 S. W. 897. Similar phrases in analogous instructions have been held to sufficiently include the element of proximate cause. Fenn v. Clark, 11 Cal. App. 79, 103 P. 944; Eaton v. Southern Pac. Co., 22 Cal. App. 461, 134 P. 801; Weaver v. Carter, 28 Cal. App. 241, 152 P. 323; Aubel v. Sosso, 72 Cal. App. 57, 236 P. 319; Wirthman v. Isenstein, 182 Cal. 108, 187 P. 12; Lawrence v. Southern Pac. Co., 189 Cal. 434, 208 P. 966.

[5-7] The same appellant also claims that instruction XX is erroneous in that it omits the important element that the restriction of speed at the intersection to 15 miles an hour is limited to places where the driver's view is obstructed. This instruction reads: "If you believe from the evidence that the defendant Nan Ross, in driving her said automobile was traversing the intersection of Terrace drive and Portola drive at a greater rate of

speed than 15 miles an hour, and that she was negligent in so doing, and that such negligence was the proximate cause of injury to the plaintiff, and that plaintiff was free from contributory negligence, then your verdict shall be in favor of the plaintiff and against the defendant Nan Ross, without further proof of negligence on her part." The court did not here charge the jury that a speed of 15 miles an hour at the intersection was negligence without the limitation as to obstruction of the driver's view as appellant contends, but left the question as to whether such speed at the intersection was negligence and the proximate cause of injury to the jury. Irrespective of the limitation imposed by the California Vehicle Act, whether or not a particular speed at a particular time and place is or is not negligence is a question of fact to be decided by the jury from all the evidence. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125. Even adopting appellant's construction that the instruction authorized a verdict for plaintiff upon a finding of a speed in excess of 15 miles an hour without any finding that such limitation was applicable because of the obstructed view, she is not injured because the testimony without conflict clearly shows that the view was obstructed. Collom v. Bloch, 70 Cal. App. 33, 232 P. 486. Furthermore, instruction XII was given in the exact language of section 113 (a) and (b), subds. 1 and 2, of the California Vehicle Act. In the case of Wiley v. Cole, 67 Cal. App. 762, 228 P. 550, cited by appellant to show the error in this instruction, the court held that, if the collision had occurred in an intersection, an instruction less full and more uncertain would have been sufficient.

[8] Instruction XXVIII, reading: "If you find that both parties were negligent, as alleged in plaintiff's complaint and that their negligence proximately contributed to any injury sustained by plaintiff, then you are not to compare their negligence or determine which was more negligent or which contributed most to the injury, since both would be then jointly and severally liable and the plaintiff may recover against either or both of them, provided of course she was free from contributory negligence; and in these circumstances, if you so find, it will be your duty in this case to render your verdict in favor of the plaintiff and against all of the defendants"—this appellant claims is erroneous (1) because of the omission of qualifying clause "if any" after phrase, "their negligence," and (2) because of the phrase "negligence proximately contributed to any injury" does not require that the negligence be "a proximate cause" of the injury. To the first objection, it is sufficient to say that the introductory phrase, "if you find that both parties were negligent," negatives any assumption of negligence, and the addition of the phrase "if any" would have been but a repetition of the same idea. To the second objection, it is unnecessary to say more than that the phrase "as alleged in the complaint" sufficiently advised the jury that such negligence must be a proximate cause of the injury (Wirthman v. Isenstein, supra), and that the phrase "proximately contributed to any injury" is equivalent under the facts to the phrase "a proximate cause." Dowd v. Atlas Taxicab, etc., Co., 69 Cal. App. 9, 15, 230 P. 958; Athens Mining Co. v. Carnduff, 123 Ill. App. 178.

[9-11] Complaint is made by appellant Ross that instruction XXX, as to the measure of damages, charged the jury that the defendants were negligent, and that it might consider future pain and suffering irrespective of whether or not such pain produced damage. The introductory hypothesis, "if your verdict be in favor of the plaintiff," clearly negatives any assumption of negligence. St Louis, etc., R. Co. v. Daley, 53 Ill. App. 614; Young v. Webb City, 150 Mo. 333, 51 S. W. 709. Any doubt on the matter is removed by reading the next preceding instruction, which stated that the instructions as to damages were inapplicable if the liability of the defendants were not established. The criticized instruction did not permit the jury to allow damages for future suffering upon speculation, but properly allowed it to consider "any pain or suffering or disability that may be reasonably certain to be endured by her in the future, if any from the injury so sustained." Ryan v. Oakland Gas, etc., Co., 21 Cal. App. 14, 22, 130 P. 693; Du Val v. Boos Bros. Cafeteria Co., 45 Cal. App. 377, 380, 187 P. 767. Even if the jury were misled by this instruction, which is highly improbable, it could not have speculated on this issue in view of the next instruction, which plainly told it not to indulge in conjecture but to "award only such damages as she has proved she has sustained together with what she is reasonably certain to suffer in the future." Equally futile is the attempt by the same appellant to predicate error upon the refusal to give twelve instructions requested by her, for a comparison of such instructions with those given clearly shows that the former were substantially incorporated in the latter, and hence their refusal was not error. 24 Cal. Juris. 806.

[12] Appellants Ellingson assigned as error the court's refusal of their proposed instruction as to the duty of a driver when suddenly confronted with danger. The testimony of Edward Ellingson, above set forth, shows that he saw the other automobile in ample time to have prevented the collision, and was not suddenly confronted with peril. The instruction further was erroneous because it did not contain the qualification that such driver was not himself negligent. Power v. Crown Stage Co., 82 Cal. App. 660, 672, 256 P. 457. Without pointing out any reason

thereof, these appellants briefly assert that eleven instructions given as to the duties of a driver entering an intersection are each erroneous. Unassisted by an idea as to why counsel claims them to be erroneous, we have carefully reviewed them in the light of the law and the evidence in this case, and find them to have been warranted by the evidence and to contain a correct statement of the law applicable to the case.

[13] A cross-complaint was filed by appellants Ellingson against the other appellant, and the latter had filed an answer thereto. Upon the conclusion of the testimony, there having been offered no evidence on the issues framed by these pleadings, appellant Ross, in the absence of the jury, asked the court for a directed verdict for costs against the other appellants. Respondent then suggested that so doing might confuse the jury, and the court suggested a dismissal. Appellants Ellingson, without any motion, merely stated they dismissed their cross-complaint. Appellant Ross, objecting thereto, appellants Ellingson then requested a directed verdict (to what effect does not appear), which was denied. Upon the return of the jury, in its first instruction, the court advised the jury that there was no evidence on the issues raised by the cross-complaint and the answer thereto, and as to such issues it should return a verdict for cross-defendant Ross. It then limited the subsequent instructions to issues formed by the other pleadings and the evidence. Appellants Ellingson now claim that the submission of the directed verdict confused the jury and caused it to return a verdict in favor of plaintiff and against them. How the jury could have been confused by the court's clear instruction, these appellants do not point out, nor have we been able to see. The court and respondent both suggested a dismissal, but, due possibly to objections of the other appellant, no motion of dismissal was made for the court to act upon. The error, if any, was invited by these appellants through their failure to act and their acquiescence, and was not chargeable in the slightest degree either to court or respondent. 2 Cal. Juris. 846.

[14, 15] On voir dire, respondent's counsel interrogated each prospective juror as to whether he owned any stock or bonds in any insurance company insuring drivers of automobiles against liability and whether any of his family were officers or employees of such company. In view of the large number of decisions, we must hold that it is the settled law of this state that the questions are proper. Arnold v. California Portland C. Co., 41 Cal. App. 420, 183 P. 171; Baldarachi v. Leach, 44 Cal. App. 603, 186 P. 1060; Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646; Murphy v. Shaffer, 58 Cal. App. 453, 208 P. 1003; Eldridge v. Clark & Henery Const. Co., 75 Cal. App. 516, 243 P. 43; Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739; Sharkey v. Sheets (Cal. App.) 261 P. 1049; Reneau v. Hirsch (Cal. App.) 262 P. 1100.

Counsel for appellants Ellingson asked this question: "Now Mr. Haswell, who just examined you * * * his firm of Haswell and Martin, do you know whether they represent any of the insurance companies you may be interested in?" This question improperly insinuated to the jury that appellant Ross was insured, but it was not prejudicial, as neither is the verdict excessive nor the question of defendant's liability close. Arnold v. California Portland C. Co., supra; Eldridge v. Clark & Henery Const. Co., supra. The question having been asked by one appellant, the other cannot urge it against the respondent, particularly as the complaining appellant made no objection to the question and requested no admonition to the jury to disregard it.

[16, 17] Upon reading the entire testimony of Police Officer Herbert, we find that his cross-examination by counsel for respondent and appellants Ellingson, respectively, as to his acquaintance with appellant Ross and his interest in the case, if any, was well within the rights accorded by law to such examiners. Appellant Ross complains that the court erroneously excluded testimony tending to impeach appellant Edward Ellingson and his two passengers as to their intoxication at the time of the collision. The court sustained respondent's objection that it was an attempt to impeach upon a collateral matter. Counsel for Nan Ross did not at the time make any offer of proof (that is, any statement as to what the evidence would show), and now for the first time in his reply brief claims that the evidence was admissible as bearing upon the credibility of the witness. "Appellant contends that this ruling was error. There is nothing in the question or in the statement made by counsel for defendant to indicate that the facts sought to be proved were in any respect material. Counsel for appellant states in the opening brief that he intended to follow up the question asked with proof of facts which he claims would have been material. His explanation of his purpose comes too late. It should have been made to the trial court to enable that court to determine whether such facts were material." Merz v. Poole, 82 Cal. App. 12, 15, 254 P. 914, 915.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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PEOPLE v. LOCURTO. (Cr. 1524.)★

District Court of Appeal, First District, Division 2, California. Feb. 25, 1929.

Rehearing Denied March 12, 1929. Hearing Denied by Supreme Court March 25, 1929.

1. Intoxicating liquors 🔑213—Information held sufficient to charge offense of maintaining common nuisance by maintaining place where intoxicating liquor was sold (Volstead Act, tit. 2, § 21 [27 USCA § 33]; Wright Act).

The offense of maintaining a common nuisance by maintaining a place where intoxicating liquor was sold, denounced by Volstead Act, tit. 2, § 21 (27 USCA § 33), as adopted by Wright Act (St. 1921, p. 79), *held* charged by information.

2. Indictment and information 🔑71 — It is enough for criminal pleading to be direct and certain, and allege all acts and facts which statute says shall constitute the offense.

No more is required of a criminal pleading than that it be direct and certain, and allege all the acts and facts which the Legislature has said shall constitute the offense charged.

3. Intoxicating liquors 🔑213—Information charging that defendant on earlier date maintained place where intoxicating liquor "was" sold held sufficient against general demurrer.

Information for maintaining liquor nuisance, charging that on the earlier date of the offense defendant maintained a place where intoxicating liquor "was" sold, is sufficient against general demurrer; it being a matter for special demurrer if uncertain because of it not appearing whether the liquor was sold on the date that defendant was charged with offense.

4. Intoxicating liquors 🔑213—Information for liquor nuisance need not charge liquor was kept for sale or that place was maintained for purpose of keeping and selling liquor (Volstead Act, tit. 2, § 21 [27 USCA § 33]; Wright Act).

Information for maintaining nuisance by maintaining place where intoxicating liquor was sold need not allege that the liquor was "kept for sale" on the premises or that the place was maintained "for the purpose" of keeping and selling liquor; selling and keeping liquor in violation of the statute being distinct offenses under Volstead Act, tit. 2, § 21 (27 USCA § 33), as adopted by Wright Act (St. 1921, p. 79), and it nowhere being made an element of the offense of nuisance that the place must be maintained for the "purpose" of either selling or keeping.

5. Intoxicating liquors 🔑213—Information for maintaining liquor nuisance is sufficient, though not alleging more than one sale was made.

Information for maintaining nuisance by maintaining a place where intoxicating liquor was sold is sufficient, though not charging that more than one sale was made, as, under circumstances to be proved at the trial, evidence of one sale may be sufficient to constitute the offense.

6. Indictment and information 🔑110(31)—Liquor nuisance information substantially in language of statute is sufficient (Pen. Code, § 950, subd. 2).

Information for maintaining liquor nuisance, being substantially in the language of the statute, and containing a statement of the acts constituting the offense, so as to enable a person of common understanding to know what is intended as provided in Pen. Code, § 950, subd. 2, is sufficient.

7. Intoxicating liquors 🔑236(9)—Evidence held sufficient for conviction for maintaining liquor nuisance.

Evidence *held* sufficient to sustain conviction for maintaining nuisance by maintaining place where liquor was sold.

8. Criminal law 🔑742(1)—Credibility of witnesses is for determination of jurors.

The matter of the credibility of witnesses is for the jurors, who have the witnesses before them.

9. Criminal law 🔑409—"Corpus delicti" being proven, admissions by defendant are admissible.

"Corpus delicti" is established, by showing the commission of the crime by some one, and admissions of defendant are then admissible.

10. Criminal law 🔑772(4)—Instruction to acquit if evidence proved another maintained alleged liquor nuisance, not being limited to date charged in information, was properly refused.

Defendant's requested instruction on prosecution for maintaining a liquor nuisance, that defendant should be acquitted if the evidence proved that a certain other person maintained the place, was properly refused, as the other person may have maintained the place before or after the time charged in the information, and this would not have absolved defendant of charge of then maintaining it.

11. Criminal law 🔑783½—Requested instruction that record in abatement proceedings be not considered in prosecution for maintaining liquor nuisance held erroneous.

Record in abatement proceeding being evidence tending to impeach testimony of defendant and his witnesses in prosecution for maintaining liquor nuisance, his requested instruction that it should not be considered as evidence for any purpose was properly denied.

12. Criminal law 🔑763, 764(14)—Requested instruction for acquittal if testimony introduced by defendant raised a reasonable doubt of his presence, held properly rejected.

Requested instruction for acquittal that, if the testimony introduced by the defense raises a reasonable doubt whether or not defendant was present at the time and place charged, it is sufficient, was properly rejected; the jury not being limited to the testimony introduced by defendant on alibi or any other issue.

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

John Locurto was convicted of maintaining a common nuisance and he appeals. Affirmed.

W. E. Foley, of San Jose, and A. Andreucetti, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried before a jury upon an information charging a misdemeanor in the maintenance of a common nuisance. Upon the verdict of guilty he was sentenced to one year's imprisonment and to pay a fine of $1,000. From the judgment and from the order denying his motion for a new trial the defendant has appealed upon typewritten transcripts.

The facts are fairly stated in respondent's brief, from which we quote:

"On the evening of July 19, 1928, two federal prohibition agents drove into the yard of the premises situated at the corner of San Salvador and Race Streets in the City of San Jose. The defendant John Locurto was at that time coming out of the back door of the house, and told the agents that they were on the wrong side of the fence. The defendant then got into his machine and drove out into the street and then turned into the yard next door. The agents followed shortly after.

"When the agents entered the house the defendant was standing at the bar, and one of the agents laid a dollar on the bar, and asked the defendant to drink with them. The defendant, who was playing one of the slot machines, turned around and had a drink of whisky. The agent paid 75¢ for this round of three drinks, and received his change.

"The defendant then told the bartender to serve another round of drinks. No one paid for these drinks. The agent then purchased another round of drinks for the three present, and the defendant next ordered a round of drinks, but tendered no money in payment for the same.

"Another round of drinks was served, and the agent tendered a $20.00 bill in payment to the bartender for the same. The bartender told the defendant that he was short of change, and defendant took some money out of his pocket and $6.00 he had won in the slot machine, making about $10.00 in all and laid it upon the bar. This the bartender put in the till and returned no money or receipt to the defendant.

"It was also proved that the agent purchased liquor prior to the date in question, and at various times had seen others purchase liquor there.

"In addition to the defendant's acts of proprietorship, as evidenced by the ordering of drinks without payment for the same and the furnishing of change to the bartender, it was proved that in a conversation with the agents the defendant said: 'No, I am not going to move so long as they let me alone here.'

"By People's Exhibit B introduced into evidence it was proved that the defendant John Locurto had been one of two or three defendants named as owners of the business conducted on the premises in question, and that a decree enjoining the defendant and others and abating the basement of the house where the agents purchased the liquor had been filed and entered on January 31, 1928.

"In the cross-examination of the defendant John Locurto the defendant designated the house in which the liquor was sold on July 19th to the agents at 420 Race Street, and denied ever having owned or claiming to have owned the same. Whereupon People's Exhibit C was introduced into evidence. This was an affidavit for justification of bail in the Justices Court of San Jose Township filed July 2, 1928, in which the defendant made oath that he owned two unencumbered houses and lots at 420–410 Race Street."

It should be added that during all the time in question the property stood in defendant's name and was commonly known as "Locurto's Place." As is usual in cases of this character an unrecorded deed was produced. This deed purported to convey the property to the defendant's brother-in-law and was dated a short time prior to the date mentioned in the information. Testimony was also given of a purported lease to another individual executed by this brother-in-law at a time when he was not the record owner of the property.

We should not be understood as implying that any of the testimony outlined was not contradicted. It was denied in nearly every particular. Some of defendant's witnesses were so profuse in their denials that they seemed to be talking about a place in another county. That the place was operated for the illegal sale of intoxicating liquor was admitted by all. The testimony relating to the mixed ownership and proprietorship of the place was such that the jury could determine the issue either way, depending upon what credence they should give the various witnesses.

[1, 2] Appellant makes a preliminary attack upon the information, insisting that it does not charge a public offense. This information reads: "The District Attorney of the County of Santa Clara, State of California, hereby accuses John Locurto of a misdemeanor, to-wit: Maintaining a common nuisance in that, on or about the 19th day of July, A. D. 1928, in the County of Santa Clara, State of California, the said defendant did wilfully and unlawfully maintain a common nuisance, to-wit: That said defendant on Race Street, in the County of Santa Clara, State of California, kept and maintained a place and building where intoxicating liquor,

to-wit: whisky was sold. That the act hereinbefore complained of was and were then and there prohibited and unlawful."

The statute applicable to the case is section 21 of title 2 of the Volstead Act as adopted into the laws of this state by the Wright Act (Stats. 1921, p. 79), enacted by the state Legislature and approved by the electors on a referendum. This section reads in part: "Any room, house, * * * or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty," etc. U. S. Stats. vol. 41, p. 314 (27 USCA § 33). The section denounces the maintenance of any place where intoxicating liquor is manufactured, sold, or kept in violation of the provisions of the same statute; it recognizes the provisions of the act which authorize the manufacture, sale, and keeping of intoxicating liquors under license for certain purposes and under certain restrictions.

The information specifies but one element of the crime as thus defined—the maintenance of a place where intoxicating liquor was sold in violation of law. In charging the unlawful maintenance of a place where intoxicating liquor was sold, the information charged one of the specific acts, or the ultimate fact, which constitutes the crime as denounced by the statute. The only act which was necessary to constitute the crime under the statute was the unlawful keeping of the place where intoxicating liquor was sold contrary to law, and, this being so, the information charged a public offense when it charged the unlawful commission of that act. No demurrer having been filed and no motion for arrest of judgment having been made, we are concerned here merely with the question whether the information charges a public offense. We hold it sufficient upon the well-settled rule that "no more is required of a criminal pleading than that 'it be direct and certain, and allege all the acts and facts which the legislature has said shall constitute the offense charged.'" People v. Frankovich, 64 Cal. App. 184, 221 P. 671, quoting from People v. Fowler, 88 Cal. 136, 138, 25 P. 1110.

[3] The appellant argues that the information is insufficient because it does not allege that he was maintaining a place where liquor *is* sold. The information was filed on August 24, 1928, and charged an act committed on July 19, 1928. It was properly framed in the past tense, charging that on that day appellant maintained a place where intoxicating liquor was sold. If it was uncertain because it did not appear whether the liquor was sold on that date or on some date in the distant past, that was a matter for a special demurrer.

[4, 5] Further criticism is made because it was not alleged that the liquor was "kept for sale" on the premises or that the place was maintained "for the purpose" of keeping and selling liquor. This was not necessary. Selling and keeping intoxicating liquor in violation of the statute are distinct offenses under section 21, and nowhere is it made an element of the offense that the place must be maintained for the "purpose" of either selling or keeping it. That the information does not charge that more than one sale was made does not affect its legal sufficiency because, under circumstances to be proved at the trial, evidence of one sale may be sufficient to constitute the crime. People v. Mehra, 73 Cal. App. 162, 170, 238 P. 802; Barker v. United States (C. C. A.) 289 F. 249, 250; People v. Colombo, 82 Cal. App. 485, 488, 255 P. 846.

[6] The information is substantially in the language of the statute, and contains a statement of the acts constituting the offense "in such manner as to enable a person of common understanding to know what is intended." Penal Code, § 950, subd. 2; People v. Frankovich, 64 Cal. App. 184, 188, 221 P. 671. No more is needed to make it free from attack on this appeal when the point was not raised by demurrer in the court below.

[7] We find no merit in the appellant's contention that the evidence is insufficient to sustain the verdict. The portions of the evidence upon which the statement of facts is based support the jury's verdict in every essential element. Counsel for appellant seem to enjoy their frequent reflections upon the character of the witnesses produced by the prosecution. They refer to these witnesses as "exceedingly disreputable and strongly impeached." To prove that the chief witness for the prosecution was "disreputable," they offered testimony that before he became a federal agent he had been a "bootlegger." This testimony came from witnesses who had been convicted and served time for "bootlegging," or who freely confessed on the stand that they had been engaged in that illegal vocation. Two deputy sheriffs were called by appellant for the purpose of impeaching the testimony offered by the prosecution, but they completely discredited themselves by their apparent aversion to the efforts of the federal government to enforce the law and their interest in the appellant's affairs. The one reputable witness called by the defense to prove the bad reputation of the chief witness for the state unexpectedly testified that "it has always been all right."

[8] We might add that nothing is to be gained by discussions of this character in the briefs on appeal. The matter of the credibility of the witnesses is one which must be determined by the jurors who have the witnesses before them and may judge their truthfulness by their appearance on the stand and the evidence in the case.

[9] Criticism is made of the ruling of the

trial court in admitting testimony of admissions made by appellant. It is argued that this testimony came in before the "corpus delicti" had been established. The point is without merit. "Corpus delicti" means the body of the crime. Proof of the "corpus delicti" is proof that a crime has been committed by someone. In this case the body of the crime was that a place was maintained by some one where intoxicating liquor was unlawfully sold. Proof that the appellant was the one who maintained the place was not necessary to prove the "corpus delicti." The admissions received in evidence were for the purpose of proving that appellant was the one who was responsible for the crime which had previously been shown to have been committed.

Other criticisms of the rulings of the trial court do not require discussion. The testimony now objected to was either pertinent and properly admitted over objection, or it was received without objection by appellant.

[10, 11] The trial court fully instructed the jury on the matter of the burden of proof. It refused the instruction requested by appellant to the effect that, if the evidence proved that Mike Horn maintained the place, the verdict should be not guilty. The proposed instruction was improper. Mike Horn may have maintained and conducted the place before or after the date mentioned in the information, but this would not absolve appellant of the charge that he maintained it at that time. The proposed instruction on the use of the oral admissions of the appellant was based upon a misconception of the law relating to the "corpus delicti," as heretofore pointed out. The trial court properly rejected it. The record in the abatement proceedings was put in evidence upon stipulation of appellant. It was evidence tending to impeach the testimony of appellant and of two of his witnesses. To have given appellant's proposed instruction that it should not be considered as evidence for any purpose would have been clear error.

[12] Appellant tendered an instruction reciting that he had offered testimony tending to show that he was not present at the place at the time the liquor was alleged to have been sold and that "it is sufficient if the testimony introduced by the defense raises a reasonable doubt in your minds as to whether or not John Locurto was present at the time and place alleged in the information." The proposed instruction was properly rejected. The jury, of course, is not limited to the testimony offered by the defendant in support of his alibi defense or upon any other issue of the case. People v. Foster, 198 Cal. 112, 127, 243 P. 667.

Criticisms are directed to the charge given the jury as a whole. It would serve no purpose to discuss these criticisms in detail. They are highly technical objections to matters of phraseology, or they are based on an erroneous construction of the statute under which the information was framed. We have read the charge in full, and have read the entire record. We are satisfied that the jury was fully and fairly instructed, that the appellant was accorded a fair and impartial trial, and that no error complained of was in the least degree prejudicial.

Judgment and order affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

97 Cal. App. 120

NEWBERRY v. EVANS et al. (Civ. 3421.)★

District Court of Appeal, Third District, California. Feb. 21, 1929.

Rehearing Denied March 20, 1929.

1. Drains 🔑20—Evidence supported findings that funds alleged to have been misappropriated by drainage district directors were paid to landowner for damage to trees.

In action against directors of drainage district for alleged misappropriation of funds paid to owner of land over which ditch had been constructed without condemnation proceedings and without owner's consent, evidence *held* sufficient to support findings that such payment was not in satisfaction of all damage by reason of construction and maintenance of ditch, but that settlement was in payment of damage done to trees.

2. Eminent domain 🔑268, 271, 273—Owner of land wrongfully taken for public use may sue in ejectment or for trespass, or may proceed by injunction.

Where land is wrongfully taken for public use, owner has several remedies, and may bring action in ejectment, proceed by injunction, or resort to common-law action of trespass.

3. Eminent domain 🔑309—Landowner ratifies wrongful taking by recovering judgment for value of land taken in action of trespass.

Where land is wrongfully taken for public use, owner resorting to common-law action of trespass ratifies wrongful taking by suing for and recovering judgment for value of land taken.

4. Eminent domain 🔑69—Drainage district held to have no right to use land, where no condemnation proceedings were had and no compensation paid owner (Const. 1879, art. I, § 14).

Where no condemnation proceedings were ever had and landowner never received any compensation for land, drainage district *held* not to have acquired right to use land for drainage purposes, under Const. 1879, art. 1, § 14.

5. Drains 🔑20—Taxpayer may maintain action against drainage district directors for alleged misappropriation of funds, without unavailing demand on directors to bring action.

Taxpayer *held* entitled to maintain action against directors of drainage district for alleged

★Rehearing denied.

misappropriation of funds, without demand on directors to bring action, it being obvious that such demand would have been unavailing.

6. Drains ⚷20—Director of drainage district not participating in alleged misappropriation of funds held not necessary party defendant in action against directors therefor.

In taxpayer's action against directors of drainage district for alleged misappropriation of funds, in which there was no evidence that certain director participated in any way in such misappropriation, it was not necessary to make such director party defendant.

7. Drains ⚷20—In action against drainage district directors for alleged misappropriation of funds, interest was properly allowed from date directors withdrew funds (Civ. Code, § 3287).

In action against directors of drainage district for alleged misappropriation of funds, trial court correctly allowed interest on each item from date it was drawn by directors from funds of district under Civ. Code, § 3287.

Appeal from Superior Court, Sonoma County; Rolfe L. Thompson, Judge.

Action by H. O. Newberry against W. E. Evans and others. From the judgment, defendants W. E. Evans and others appeal. Modified and affirmed.

See, also, 260 P. 310.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for appellants.

Barrett & McConnell and C. W. Anderson, all of Santa Rosa, for respondent.

JAMISON, Justice pro tem. The Wilfred Bellevue drainage district is a duly organized and existing drainage district. The appellants were, during the times hereinafter specified, the directors thereof.

This controversy arose over the actions of appellants in constructing a ditch over the lands of one F. W. Wilson for drainage purposes without first securing his consent so to do and without instituting condemnation proceedings. Wilson brought suit against appellants for the damage inflicted upon his fruit trees growing on said land, resulting from the manner in which said ditch was constructed, and for damage to his land caused by the caving in and washing away of the walls of said ditch, and by the overflow of the water from the ditch. That case was originally commenced against the district and said directors jointly, but in the first amended complaint the said drainage district was not included as a party defendant. It filed no answer, and the case was tried upon the theory of the individual liability of Evans, Pedrotti, and Morken alone. In that case the court rendered judgment in favor of Wilson and against Evans, Pedrotti, and Morken for $325 for the damage to his fruit trees. After the rendition of the judgment, Evans, Pedrotti, and Morken entered into an agreement with Wilson, under which Wilson agreed to take $300 and his costs in settlement of the judgment, and in June, 1923, the $300, together with $82 costs, was paid to Wilson by Evans and Pedrotti, out of the funds of the said drainage district (Morken having ceased to be a director in March, 1923). The said directors also paid out from time to time from the funds of said district their own costs and expenses laid out and expended by them in that case. Up to the time that Morken ceased to be a director the amount so paid out by said directors from the funds of said district amounted to the sum of $156.60, the total amount so paid out by all the directors being the sum of $544.60.

Respondent is a landowner in said district and taxpayer therein, and as such brought this action and prayed therein that judgment be rendered in favor of said district against these directors for the said sums so wrongfully misappropriated by them out of the funds of said district. Judgment was rendered in favor of said district and against the said Evans and Pedrotti for the sum of $544.60 and against the said Morken for $162.60, with interest thereon at 7 per cent. per annum from date of payment from the funds of the district of the various sums making up the amount of the judgment. From this judgment, the said Evans, Pedrotti, and Morken have appealed.

This case was before this court upon a former appeal. Newberry v. Evans et al., 76 Cal. App. 492, 245 P. 227. That was an appeal by these appellants from a judgment in favor of said drainage district. Upon this appeal, after a very thorough consideration of the case, a reversal was had, and the court in its opinion suggested that appellants, if so advised, might amend their answer in such manner that upon a new trial inquiry might be had into the following propositions, to wit: (1) Whether the district, by the compromise of the Wilson judgment, secured the land, or the right to use the land damaged, and has been, or is now, as the effect of such compromise, in possession and control, either as owner or otherwise, and using the same for the purposes of its drainage system; (2) whether defendant Morken was in any way connected with the alleged wrongful appropriation of the funds of the district to the payment of the Wilson judgment. And in this connection the court, speaking through Hart, J., said: "Justice plainly demands that these matters should be fully gone into. If the district is now or has been, under the compromise of the Wilson judgment, in the enjoyment of the right to use the land of Wilson alleged in his complaint to have been damaged by defendants, then the district should be held to have taken said land according to the principles underlying the doctrine of eminent domain and should be required to stand for the payment of the Wilson judgment, as compromised."

[1] For a reversal of this case appellants are relying largely upon the insufficiency of the evidence to support certain findings of the court. One of these findings is to the effect that it is not true that said ditch was constructed on the Wilson land by said district, nor is it true that since its construction has it been, or is it now used as a part of the drainage system of said district; that the said judgment awarded Wilson arose out of and was wholly for damages to his fruit trees occurring from the construction of said ditch on his land; and that Wilson did not accept the $300 and $82 costs paid him in settlement and compromise of his judgment upon any understanding or agreement upon his part or upon the part of said district that same would be in satisfaction of all or any damage which had accrued to him by reason of the construction or maintenance of said ditch. Wilson tsetified that before the ditch was constructed he had a talk with appellants Evans and Pedrotti, who approached him for the purpose of getting his consent to allow the ditch to be placed over and across his land, and that he refused to give the right of way; that the ditch was put across his land on New Year's Day, 1921, and the day following, which was Sunday, about 30 men being employed for that purpose, and that he knew nothing about it until the work was done; that at the time he agreed to take $300 and costs in satisfaction of his judgment he stated to them that the judgment only covered the damage to the trees, and that he still retained the land, and that the district had no right to it; that on one occasion after the settlement of the judgment, when appellant Morken and a Mr. Brewer came to his place and attempted to clean the ditch, he warned them to stay off of his land and not to attempt to do any work on the ditch. He further testified that every fall he dug dirt into the ditch and threw brush in it to fill it up.

Stanley A. Stetson, who became a director in 1925, testified that after he became such director he had a conversation with Wilson regarding a right of way where the ditch is constructed, and that Wilson told him that after the present suit was settled he would give them a right of way provided they would agree to build a ditch large enough to take care of the water; that he repeated this to the other directors. and that Pedrotti said not to take Wilson's word, but that before they did anything to get a deed for the right of way. These statements of Stetson would indicate that the directors of the district, as late as 1925, did not consider that they had a right of way over Wilson's land for the ditch and that it was necessary to procure Wilson's consent or deed for same. Appellant Pedrotti testified that when the settlement of the Wilson judgment was made it was understood that the settlement was in payment of the damage done to Wilson's trees. It appears from this testimony that there was substantial evidence supporting the aforesaid finding of the court.

[2-4] Appellant claims that, admitting that the drainage district wrongfully appropriated the land of Wilson for a public use, that satisfaction of the Wilson judgment worked a dedication of the land to the district. It will be conceded that if appellant's land had been taken for a public use without his consent and without proceedings to condemn it, and was being occupied and used for a public purpose, and that under these conditions Wilson brought an action for his compensation for the taking of his land, that a judgment in his favor for such compensation would be a ratification upon his part of the unauthorized taking. 10 Cal. Jur. p. 387; McDougald v. Southern Pac. R. R. Co., 162 Cal. 1, 120 P. 766.

In the case of Newberry v. Evans et al., supra, the appellate court said: "While, as seen, there is testimony in the present record showing that the damage done to the property of Wilson, for which the judgment in his action against the defendants awarding him damages was given, was an incident of an attempt upon the part of the Drainage District to take the property for a public use and its benefit, still there is no evidence herein that the District actually took the property or is using or ever used it for its purposes." The appellate court also decided in that case that the Wilson judgment was for damage to the trees standing upon the land, and not for any damage to the land, or for the taking of the land, and that the said directors, while acting as such, committed the trespass, and that the Wilson judgment is a personal judgment against them.

Appellant cites the cases of Soulard v. City of St. Louis, 36 Mo. 546, and Hickerson v. City of Mexico, 58 Mo. 61. Both of these cases sustain the proposition that where the owner of land, taken for a public use, sues for and recovers the value of the land so taken, it amounts to a ratification of the taking. Where land is wrongfully taken for a public use the owner has several remedies which he may pursue; he may bring an action in ejectment, may proceed by injunction, or may resort to the common-law action of trespass. 10 Cal. Jur. 443. In the latter proceeding, if he sues for and recovers judgment for the value of the land taken, he thereby ratifies the wrongful taking. Article 1, § 14, Constitution of 1879, provides that: "Private property shall not be taken or damaged for public use without just compensation having been first made * * * or paid into court." No condemnation proceedings were ever had against the Wilson land, nor has he ever received, by judgment or otherwise, just or any compensation for his land. The drainage district has therefore acquired no right to the use of his land for drainage purposes.

[5] Appellant raises the point that respondent cannot maintain this action as a taxpayer in the absence of a demand upon the directors to bring the action. We are of the opinion that obviously such demand would have been unavailing, and, such being the case, a demand was unnecessary. Osborne v. Stone, 170 Cal. 480, 150 P. 367; Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826; Wickersham v. Crittenden, 93 Cal. 17, 28 P. 788.

[6] Appellant also claims that Director Bacon should have been made a party to this action. There is no evidence that Bacon participated in any way in the misappropriation of the funds of the district. Under these conditions it was not necessary to make Bacon a party defendant.

[7] We are of the opinion that the trial court acted correctly in allowing interest on each item from the date it was drawn by the directors from the funds of said district. Section 3287 of the Civil Code provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. * * * The right of the district to the various sums wrongfully withdrawn by appellants, accrued upon the date of each of said withdrawals.

We are of the opinion that the evidence supports the findings of the trial court, but that the judgment against Morken should be credited with the sum of $6.

Judgment against appellants is affirmed as so modified. Respondent to have his costs on this appeal.

We concur: FINCH, P. J.; PLUMMER, J.

MAIRO v. YELLOW TAXI CAB CO. OF CALIFORNIA. (Civ. 6576.)★

District Court of Appeal, First District, Division 2, California. Feb. 28, 1929.

Rehearing Denied March 28, 1929. Hearing Granted by Supreme Court April 29, 1929.

Release ⚿58(1)—Unimpeached release entitled defendant in personal injury action to directed verdict.

In personal injury action, release unimpeached by evidence entitled defendant to a directed verdict.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Walter Mairo against the Yellow Taxi Cab Company of California. Judgment for defendant, and plaintiff appeals. Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Cooley, Crowley & Gallagher, of San Francisco, for respondent.

BURROUGHS, Justice pro tem. This is an action for damages for personal injuries alleged to have been suffered by the plaintiff on February 11, 1925, through the negligence of a taxicab driver in the employ of defendant Yellow Taxi Cab Company of California. Upon stipulation of the parties, the action was dismissed as to all other defendants. The cause was tried with a jury. At the conclusion of the evidence, the jury, under the instructions of the court, returned a verdict for the defendant, and from the judgment entered therein the plaintiff appeals.

At the close of plaintiff's case in chief, the defendant introduced in evidence three separate instruments, each one signed by the plaintiff and purporting to release the defendant from all liability which it might have incurred by reason of the accident which was the cause of plaintiff's injury and the foundation for this action.

The first one is dated February 14, 1925, and recites a consideration of $1, and a further consideration of medical care and hospital services. Another is dated March 18, 1925, and the consideration named is $25, and the last release recites a consideration of $14.

In rebuttal of this evidence plaintiff admitted that he signed all of said releases and received the consideration set forth in each one thereof, but testified that the first release was obtained by fraudulent representations made by one Dr. Ryan that it was a permit to operate. This release was signed in the hospital three days after the accident. Plaintiff further testified that the second release was represented to him as being a receipt for $25, which was given to him for a suit of clothes to replace the one he was wearing at the time of the accident. He also testified that the third release was represented to him as being a receipt for wages to help him out. Both the last-named releases were executed after plaintiff had left the hospital.

It appears from the undisputed evidence that on February 12, 1925, the day following the accident, that plaintiff, in the presence of Dr. Ryan, signed a statement that he had no dependents. According to plaintiff's own testimony, he only signed one document in the presence of Dr. Ryan. The undisputed evidence of Daniel J. O'Brien, Jr., was that, when the release was signed on February 14, 1925, Dr. Ryan was not present; that Mr. Miller, an attorney, read the release to the plaintiff; that it was read slowly and distinctly, and plaintiff was informed that it released

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★Hearing granted. 281 P. 66.

the defendant from all liability arising out of the accident; that, although the defendant did not consider it was at fault, it would, as a consideration, pay the hospital and doctor bills incurred by plaintiff; and that plaintiff then made the statement that that was what he wanted, and he also said the driver was no more at fault than he was.

From this undisputed evidence it is clear that the release of February 14th stands unimpeached by any evidence in the record, and justified the court's action in instructing the jury to return a verdict for the defendant. Estate of Sharon, 179 Cal. 447, 177 P. 283.

This conclusion renders unnecessary any further discussion concerning the other releases or the claim of the defendant that the plaintiff as a matter of law was guilty of contributory negligence.

Judgment affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

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97 Cal. App. 282

STROUT v. WAYNE TANK & PUMP CO.★
(Civ. 6613.)

District Court of Appeal, First District, Division 1, California. Feb. 28, 1929.

Rehearing Denied March 30, 1929.

Brokers ⚷86(4)—Evidence held to support conclusion that agent suing for commission was procuring cause of sale of water softener.

In action by agent to recover balance of commission for selling an industrial water softener, evidence *held* to support conclusion that sale was through plaintiff as procuring cause so as to entitle him to full commission, though softener was installed by company located outside of plaintiff's selling territory, and agency contract provided that plaintiff should receive only one-half of regular commission on sales made to customers within his territory by outside agents.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Gale S. Strout against the Wayne Tank & Pump Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lee M. Olds, of San Francisco, for appellant.

A. E. Shaw, of San Francisco, for respondent.

PER CURIAM. An action to recover the balance of a commission claimed by the plaintiff for services rendered to the defendant, an Indiana corporation, in the sale of an industrial water softener.

The plaintiff was employed by the corporation as its district manager, with the exclusive right to sell in that part of California lying north of the southern boundary lines of Monterey, Fresno, and Mono counties certain machinery which the corporation manufactures. Under his contract the plaintiff was to be paid as compensation for the sale of industrial water softeners a commission of 20 per cent. based on the f. o. b. Fort Wayne, Ind., list prices, it being further agreed that on the company's products sold by other representatives to purchasers located outside the territory of the plaintiff for use within said territory the latter should receive 50 per cent. of the above commission.

On or about January 24, 1925, the defendant by a proposal in writing, executed on its behalf by George W. Bonnell at St. Louis, Mo., and which was directed to "McNamara Plumbing Co., 6236 Delmar avenue, St. Louis, Mo., for O'Connor Sanitarium, San Jose, California," offered to sell one water softener to be located at the O'Connor Sanitarium, San Jose, Cal., which was within the territory of the plaintiff, and to furnish an engineer to superintend the installation and starting of the same. The purchase price of the softener and its equipment was $4,385 f. o. b. the O'Connor Sanitarium at San Jose. Upon the proposal was indorsed an acceptance by the plumbing company, and both were approved by the vice president of defendant corporation by an indorsement thereon dated February 14, 1925.

It appears without dispute that for some time immediately prior to the above transaction the plaintiff had been negotiating with the authorized agent of the sanitarium, who was then in California, for the sale to the owners of the sanitarium of a water softener of the kind described in the above proposal, and that the agent, on behalf of his principals, had accepted a proposal made by the plaintiff and agreed to purchase the softener and its equipment at the above price. Said agent testified that Bonnell, who appears to have been an agent for the defendant at St. Louis, had previously attempted to induce the witness to purchase a water softener for the above sanitarium, but without success. It also appears that the plumbing company had submitted to the owners of the sanitarium a bid for the installation therein of certain plumbing, including the water softener, and that the agent, after accepting the proposal made by the plaintiff, returned to St. Louis. According to his testimony, he had intended to deal directly with the defendant for the purchase of the water softener and to have the same installed by the plumbing company. Upon his return to St. Louis, however, it appeared to him to be more convenient to handle the purchase and installation thereof as one transaction. He accordingly delivered to the plumbing company the written proposal received from the plaintiff, instructed them that

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★Rehearing denied.

the order for the softener should be given directly to the plaintiff, and the obligation to furnish as well as to install the softener was included in the contract with the plumbing company.

While this transaction led to the making of the above proposal by the defendant to the plumbing company and its acceptance by the latter, it cannot reasonably be contended from the evidence but that the plaintiff was the procuring cause of the sale.

The latter was credited upon the books of the defendant with but one-half of the commission upon the above sale, but the record fails to disclose that the balance was claimed or paid to any other of its agents. Moreover, no evidence was adduced which tended to show that defendant's agent at St. Louis was not aware of the negotiations between the plaintiff and the owners of the sanitarium.

The trial court found that the sale was made by the plaintiff, and the evidence sufficiently supports its conclusion that, notwithstanding the apparent effect of what passed between the defendant and the plumbing company, the sale was effected through the agency of the plaintiff as the procuring cause. Under such circumstances he was entitled to recover (Ayres v. Thomas, 116 Cal. 140, 47 P. 1013; Hill v. McCoy, 1 Cal. App. 159, 81 P. 1015; Deovletian v. Whitney, 55 Cal. App. 76, 202 P. 905), and the judgment is accordingly affirmed.

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97 Cal. App. 351

BARBIERI v. BARBIERI. (Civ. 6651.)

District Court of Appeal, First District, Division 2, California. March 4, 1929.

1. Divorce 🔑303(3)—Modification of decree as to custody and maintenance of child is discretionary with trial court.

Motions to modify final divorce decree in respect to custody and maintenance of minor child are addressed to the discretion of the trial court.

2. Divorce 🔑298(1)—Parent's care of child is presumed to be for the best interest of the child, unless parent is unfit.

Law presumes that the interest of the child will be best subserved by awarding its care to parent, unless he or she is unfit to have its care.

3. Divorce 🔑298(1)—Mother was entitled to custody of child, under findings that she is proper person for custody of child and that father is unable to care for it.

Where findings in divorce case are that mother is fit and proper person to have custody of child and that father is unable to care for it, the mother was entitled to its custody.

4. Divorce 🔑298(1)—Mother is entitled to custody of minor child placed in custody of strangers to preference of any one else, where entitled thereto under findings in divorce case.

Where temporary custody of minor child is given to stranger without abandonment or waiver of right of mother entitled thereto under findings in divorce case, mother is entitled to assert her right to custody in preference to any other person.

5. Divorce 🔑303(3)—Award of custody of child to convent without finding as to unfitness of parents, on modification of divorce decree, held breach of rights of parents.

Award of custody of minor child to convent, on modification of divorce decree in respect to custody and maintenance of child, in absence of finding of unfitness of parents, was breach of right of parents.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Giuseppe Barbieri against Rose Barbieri. From order modifying final decree in respect to the custody and maintenance of minor child of parties, the defendant appeals. Reversed.

A. J. Stebenne, of Redwood City, for appellant.

A. Kincaid, of Redwood City, for respondent.

NOURSE, J. This is an appeal from an order modifying a final decree of divorce in respect to the custody and maintenance of the minor child of the parties.

The litigation commenced in 1920 when the plaintiff filed a suit for divorce charging his wife with cruelty. The defendant filed a cross-complaint upon the same grounds, and upon the trial of the issues the court found that none of plaintiff's allegations had been proved; that all the allegations of the cross-complaint were true. Thus we have a finding that defendant was a fit and proper person to have the care, custody, and control of the minor child, and that the plaintiff was unable to care for it. As a result of an agreement of the parties, the actual custody of the child was awarded to the defendant's parents in the interlocutory decree, which was entered February 10, 1921. The same order was made in the final decree of February 25, 1922, and these parents have continuously taken such care of the child that no word of criticism of their conduct appears in any part of the record.

On September 2, 1926, the plaintiff in the action, pretending to be aggrieved because the grandparents permitted the child to be removed to the home of their son for a few weeks because another member of the family was ill at the home of the grandparents, moved the court for a modification of the decree so that the custody should be awarded to a convent in Redwood City. The motion was heard upon the affidavit of plaintiff and the oral testimony of the defendant. There is no dispute as to the facts. At the time of the interlocutory decree the child was 3½ years of age. At the time of the hearing of the motion she was about 9 years. She was left with the grandparents with the consent of her parents, and throughout her stay with them has been well cared for, attending school and Sunday school from the time she reached the proper age. The home of the grandparents was found to be a fit and suitable home for the child; that "there could not be a better place."

[1-4] Motions of this character are always addressed to the discretion of the trial court, but there are certain well-defined rules affecting the rights of the parties which must be followed in the exercise of that discretion. Thus the law "presumes that the interest of a child will be best subserved by awarding its care to a parent, unless he or she is unfit to have its care." Newby v. Newby, 55 Cal. App. 114, 202 P. 891. Where, as here, the findings are that the mother is a fit and proper person to have the custody of the child and that the father is unable to care for it, the mother is entitled to the custody. Where temporary custody is given a stranger without abandonment or waiver of this right on the part of the mother, but with the consent of all parties, the mother is entitled to assert her right to the custody in preference to any other person. Newby v. Newby, supra.

[5] Thus, if any showing had been made that the interests of the child required her removal from the care of the grandparents (and none was attempted beyond the mere conclusions of the plaintiff), then, under the rule of the case cited, the award should have been made to one of the parents. In any event, the award of the custody to the convent, in the absence of a finding of unfitness, was a breach of the rights of the parents.

We find no merit in respondent's objections to the transcripts; they are both certified as required by the statute.

Order reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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97 Cal. App. 420

PRICE et ux. v. HOLLYWOOD AUTO TRANSFER & STORAGE CO.

(Civ. 5461.)

District Court of Appeal, Second District, Division 1, California. March 7, 1929.

1. Trial 🔑398—Finding containing general facts, with statement "except as otherwise herein expressly found," was not contradictory.

Finding containing certain general facts as found to be true, guarded by statement "except as otherwise herein expressly found," was not contradictory to other findings.

2. Carriers 🔑168—Finding held not to establish that liability of one storing and transporting furniture was limited, except as applying to storage.

Finding, in action against one agreeing to store and transport furniture, to recover for damage to furniture caused by negligence in improper and careless packing, *held* not to establish that liability of defendant was limited, except as applying to storage of goods.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by R. B. Price and wife against the Hollywood Auto Transfer & Storage Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Howard B. Henshey, of Los Angeles, for appellant.

Ray Howard, of Los Angeles, for respondents.

HOUSER, Acting P. J. Plaintiffs were the owners of certain furniture and furnishings, which included an Italian statue, which they wished to store for a time with the defendant and thereafter transport to a ranch located approximately 100 miles from the place where plaintiffs were then residing. Both at the time the property was transported from the residence of the plaintiffs to the warehouse of the defendant, as well as after the property had been delivered at the warehouse, the plaintiffs directed the attention of the employés of the defendant who were in charge of that particular business to the statue and urged that more than ordinary care be taken in packing it for shipment to the plaintiffs' ranch, and were uniformly assured by such employés in effect that they understood their business and that the statue would be properly packed for such transportation. After the packing had been done by the defendant and the statue had been transported to the ranch, it was discovered that it had been broken and thereby greatly damaged. The trial court found that the damage was caused by the negligence of the defendant in improperly and carelessly packing the statue, and rendered judgment in favor of the plaintiffs; from which this appeal is taken.

[1] It is first contended by the appellant that some of the findings are contradictory of other findings, and therefore that the judgment is left unsupported. On examination of the findings to which attention has been directed, it appears that, although by one statement therein contained certain general facts are found to be true, that finding is guarded by the statement, "except as otherwise herein expressly found"—thus relieving

the findings as a whole from the criticism thereon advanced by appellant.

[2] Further error is specified by the appellant in that, as alleged by it, by contract of the parties the liability of the defendant was limited, and consequently that the amount of the judgment was unauthorized. In that connection it is noted that the trial court expressly found that the contract relating to a limited liability of the defendant applied to *storage* of the goods only and "did not contemplate the relieving of the liability of defendant or the limiting of its liability on account of any failure properly to pack, repack, or deliver said statue, but the court finds that said statue was repacked and delivered by defendant upon an express oral contract, and on a written order of plaintiffs requiring that said statue be well packed to prevent breaking its foot; and the court further finds that no contract whatever was entered into by the said plaintiffs whereby the responsibility of defendant for any piece or package, or its contents, was limited to the sum of $25, but finds that the fact that said statue was of a value in excess of $25 was duly made known to defendant, and that plaintiffs offered to pay a reasonable additional charge for such higher valuation, but that defendants exacted no such additional charge and thereby waived the same." It is therefore manifest that by the express finding by the trial court appellant's point is not well taken.

Appellant also urges that the evidence was insufficient to support the several findings made by the trial court. It would be but a waste of time and energy to herein set forth the findings to which objection is made, together with the evidence relating thereto. Suffice it to say that on consideration thereof this court is of the opinion that the point advanced by appellant cannot be sustained.

The judgment is affirmed.

We concur: YORK, J.; CRAIL, Justice pro tem.

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97 Cal. App. 325

GREEN v. CONNELL. (Civ. 5109.)

District Court of Appeal, Second District, Division 2, California. March 1, 1929.

1. **Contracts 🔑350(2)—Evidence sustained finding that architect's compensation was to be percentage of certain amount, and not actual cost of building constructed.**

In architect's action for compensation, evidence *held* to sustain finding that compensation was to be ascertained by computing certain per cent. of certain amount, and not by such per cent. of actual cost of building constructed.

2. **Appeal and error 🔑1011(1)—Findings will not be disturbed on appeal, where evidence is sharply conflicting.**

Appellate court will not disturb findings where evidence is sharply conflicting, since such conflict in evidence is for the jury.

3. **Appeal and error 🔑236(2)—Indefiniteness of complaint is not ground for reversal, in absence of demurrer or motion for nonsuit, where parties and court viewed issues clearly and without differences.**

Judgment will not be disturbed on appeal for indefiniteness of complaint, where there was no demurrer or motion for nonsuit, and where both parties and the court viewed the issues clearly and without differences.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Henry W. Green against J. F. Connell. Judgment for plaintiff, and defendant appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant.

J. M. Fursee, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. The plaintiff brought suit on the contract, alleging: That he and defendant entered into a contract on the 18th day of July, 1922, whereby defendant was to pay plaintiff 4 per cent. of the cost of a building for which plaintiff was to prepare plans and specifications. That he entered upon the work and the "cost of the building was approximately sixty thousand dollars." That advances had been made by the payment of $756 to plaintiff. That demand upon defendant was made by plaintiff for the "balance of fee according to their agreement." That at such time it was "mutually agreed between the parties that the fee was to be limited to 4% on fifty thousand dollars." That defendant has not paid and refuses to pay any part of the $1,245, due, owing, and unpaid.

All of these allegations are generally denied in the answer. Under a heading "Special Defenses" therein, the employment is admitted, and it is therein alleged that the building was to cost from $20,000 to $25,000, for 2 per cent. thereof, and guaranteed by plaintiff that it would not go over $30,000 in cost. Therein it is also alleged that progress payments were made until $155 overpayment had been made.

Defendant filed a cross-complaint, and therein, among other allegations, alleged that cross-defendant "undertook to comply with said agreement and worked thereon, that he notified cross-complainant that the work was completed and contract fully complied with and asked approval of plans and specifications. That the building constructed thereunder would not cost to exceed $30,000—that cross-plaintiff signed the plans but did not sign or approve the specifications. That cross-plaintiff is nearly blind and could not clearly see the plans and specifications." Then follow allegations setting up many alleged deficiencies of the plans and specifications.

The defendant also alleged in his cross-complaint that he had inadvertently overpaid the plaintiff the sum of $155, which he prayed to have returned to him together with the sum of $1,500 as damages.

The court found that the parties had entered into a contract on or about the 22d day of August, 1922, whereby plaintiff was to execute plans and specifications for a building which was not to exceed a cost of $35,000, and that plaintiff was to receive 4 per cent. of its cost for his services. The plaintiff drew plans and specifications for a house that would cost more than such sum to build, but that they were drawn at the instance and request of defendant and under his supervision. That it is not true that an agreement was ever entered into between the parties that plaintiff should receive 4 per cent. of $50,000. The judgment went for the plaintiff for $730 on the complaint and that cross-complainant should take nothing.

A review of the evidence shows that the parties did meet and did discuss the drawing of plans and the preparation of specifications and the correction of plans formerly drawn for plaintiff by another architect. That the work was entered upon and plans were drawn and specifications prepared under the very frequent consultation between the parties. That the plans and specifications were changed and added to many times at the request of defendant, and when finished it was found that the house constructed in conformity therewith would cost in excess of $50,000. This was too much for defendant and the house was never built.

Appellant, the defendant and cross-complainant below, asks for a reversal of the judgment on the ground that the minds of the parties never met and that therefore no contract was ever entered into. That the findings are not supported by the evidence. That the complaint does not state a cause of action, in that it does not allege performance nor that the house was ever built, so that the cost, the basis of the payment for services, has never been ascertained.

The court has found that the plaintiff was to prepare plans and specifications for a house to cost not to exceed the sum of $35,000 and defendant was to pay 4 per cent. of the cost therefor. The transcript of the testimony shows that on or about the 22d day of August, 1922, after the work had progressed considerably, there was conversation wherein the parties agreed to 4 per cent. as the basis of plaintiff's compensation. Some weeks later, after it had become apparent that the cost of the building would far exceed $35,000, the parties discussed the matter of compensation again. The plaintiff testified that the defendant said: "I never bargained to build any house that was going to cost any $60,000 to $65,000. I did not intend to spend any more than $30,000 or $35,000."

[1] This testimony was sufficient to sustain the finding that the services were to be paid for by computing 4 per cent. of the cost of the house which was not to exceed $35,000. That is, the compensation was to be estimated upon that amount even if the house should cost more, and it was upon this basis that the trial court computed the amount of the judgment.

[2] As to all of the other claims of insufficient evidence to support the findings, we desire to say that this case is one where the trial court's direct contract with the witnesses and the documentary evidence would be particularly valuable. As it appears to us, the evidence is sufficient to sustain every finding. The sharp conflict is for the trial court.

We now come to the consideration of defendant's claim that the case should be reversed because the complaint does not state a cause of action. We think the complaint would not have withstood an attack upon it by demurrer, as it certainly does lack definiteness; but no demurrer was ever interposed. No objection was interposed to the reception of evidence during the trial, except objections to specific questions, and the correctness of the rulings thereon are not here questioned. No motion for nonsuit was made.

Unquestionably the modern tendency of courts of appeal is to sustain judgments ripened under conditions here related, and it is our duty to do so if the cause found upon can be found in the pleadings and neither party seems to have suffered through the imperfections of the pleadings.

[3] We have heretofore sketched the pleadings, and it seems to us that no tedious analysis is needed to demonstrate that both parties and the court viewed the issues clearly and without differences. While the complaint nowhere flatly alleges performance, it says the services were entered upon and pursued for several weeks; that "the cost of said building was approximately $60,000." The answer alleges that a contract of employment with definite terms was entered into, the work was begun and progressed for several weeks, when defendant found he had overpaid. The cross-complaint adds allegations to the effect that cross-defendant and appellant claimed the work had been finished, that the plans had been presented to defendant and by him signed, and the building for which the plans and specifications projected would cost not less than $50,000. These pleadings did say in plain meaning, if not in so many words, that the plans and

specifications were finished and that the house if built would cost far more than defendant wished to expend therefor. The transcript of the testimony demonstrates that the case was fully tried with this view of the issues by both court and counsel, and the frailties of the complaint cannot be laid hold of here for the first time for the purpose of affording the losing party a new trial. Horton v. Dominguez, 68 Cal. 642, 10 P. 186; Russell v. Ramm, 200 Cal. 348, 254 P. 532; Fowler v. Enriquez, 56 Cal. App. 107, 204 P. 854; Noakes v. City of Los Angeles, 179 Cal. 38, 175 P. 409; Boyle v. Coast Imp. Co., 27 Cal. App. 714, 151 P. 25; Barrett v. Metropolitan Cont. Co., 172 Cal. 116, 155 P. 645.

Judgment affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

97 Cal. App. 291

PEOPLE v. TEMPLE. (Cr. 1729.)★

District Court of Appeal, Second District, Division 1, California. Feb. 28, 1929.

Rehearing Denied March 13, 1929. Hearing Denied by Supreme Court March 28, 1929.

1. Criminal law 🔑829(1)—Refusing instructions covered by instructions given held not error.

Refusing requested instructions which, in so far as they were proper, were fully incorporated within instructions given, *held* not error.

2. Homicide 🔑340(2)—Instruction that self-defense was not available to defendant seeking quarrel or to one who, by prearranged duel, or by consent, has entered into deadly mutual combat, held not prejudicial under evidence.

In manslaughter prosecution, instruction that self-defense was not available as plea to defendant bringing on quarrel with design to force deadly issue, or to one who, by prearranged duel, or by consent, has entered into deadly mutual combat, in which he slays his adversary, *held* not prejudicial under evidence, where jury, in order to convict, must have totally disbelieved defendant's statements that he believed he was about to be killed or injured by deceased.

3. Homicide 🔑340(2)—Instruction that plea of self-defense is unavailing where assault is brought on by person of his own procurement held not prejudicial under evidence.

In manslaughter prosecution, instruction that plea of self-defense is unavailing where an assault is brought on by person of his own procurement or under an appearance of hostility which he himself creates with view of having his adversary act on it, *held* not prejudicial under evidence where jury, in order to convict, must have totally disbelieved defendant's statement that he believed he was about to be killed or seriously injured by deceased.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Harmon Temple was convicted of manslaughter, and he appeals. Affirmed.

Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

YORK, J. The appellant, who shot and killed his father-in-law, G. W. Priest, was found guilty by the jury of the crime of manslaughter, but the appellant contends that the evidence shows conclusively that he had to shoot the deceased in the defense of his own life.

The fact that the evidence shows that the deceased had threatened the life of the appellant and that this threat had been communicated to him by his wife, who was the daughter of the deceased, and the fact that the killing occurred in the home of the appellant, where the deceased had come against the direct order of both the appellant and his wife, has caused us to scan with particular care each of the instructions to the jury.

[1-3] Such an inspection of the instructions discloses the fact that, although several correct instructions that were requested by the appellant were refused by the trial court, nevertheless, in so far as these instructions were proper, they were fully incorporated within the instructions given by the court. The appellant objects generally to the instructions, but we will refer to those instructions set out in appellant's opening brief. His objection is that it was error to instruct the jury: "You are instructed that self defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for killing. You are further instructed that self defense is not available as a plea to one who, by prearranged duel, or by consent, has entered into a deadly mutual combat in which he slays his adversary. A man may not wickedly nor willfully invite or create the appearances of necessity of the actual necessity which, if present to one without blame, would justify the homicide."

Appellant also objects to what he calls the second of the instructions, reading as follows: "Whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts and is killed, the plea of self defense under such circumstances is unavailing." A modification added by the court to one of defendant's instructions contained the following: "* * * But such

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★Rehearing denied. Hearing denied by Supreme Court.

person or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat must really and in good faith have endeavored to decline any further struggle before the homicide was committed." The objection of the appellant is that there was an utter absence of any evidence that the defendant had "sought a quarrel" or engaged in a "prearranged duel" or consented to a deadly "mutual combat" and that there was no evidence that the appellant brought on or procured an assault, or created an "appearance of hostility," or "was the assailant," or "engaged in mortal combat."

The appellant urges that he had no opportunity to withdraw or to "endeavor to decline" any "further struggle" before the shooting, had such been required of him by law. He claims there was no "struggle," no "duel," no "combat," and not even a "quarrel," and that therefore the instructions, appellant contends, were not adapted to the evidence, and were therefore mere legal abstractions calculated to mislead the jury by diverting their minds from the true issue before them for trial.

The evidence shows that the defendant, who had been warned that the deceased was coming to his home for the purpose of either getting him to admit certain misconduct, or else shooting the defendant, had a shotgun loaded and waiting for the deceased when he arrived; that, upon the entry of the deceased into the home of defendant, he attempted to search the deceased for weapons; and that, when the deceased profanely remonstrated against such search, and stepped to one side, reaching towards an inside pocket, the defendant grabbed a shotgun, and immediately fired point blank at the deceased. The appellant insists that the reason he did not look to see whether or not the deceased was actually drawing a gun from his pocket was that he expected to see fire coming in his direction at any second, and he was attempting to beat the deceased to a draw. That the deceased had raised his coat and had said to him: "Oh, I am going to shoot you, God damn you!" and at that moment the appellant reached right over, picked up a shotgun, and fired; that he believed the deceased to be armed, but that he did not positively know it; that he believed at that time that he was about to be killed or have great bodily harm done to him. He testified that he had known of several acts of violence committed by deceased, and that at least two different times to his knowledge the deceased had attempted to commit unprovoked murders, but had been prevented by the intervention of other people.

All of these facts were fully before the jury, and the trial court allowed a full and thorough examination of the witnesses on all points material to the matter before the court.

An examination of all of the instructions shows that the jury was thoroughly instructed, and the jury, in view of the instructions given, in order to convict the defendant, must have totally disbelieved his statement as to the fact that he believed he was about to be killed or seriously injured by the deceased, and must have disbelieved in toto the defendant's wife, who was a daughter of the deceased. Under the instructions given, the jury could not have brought in the verdict that it did without such disbelief on its part; therefore, in view of the evidence in this case, there was no instruction given which could have caused any injury to the defendant. All of the instructions given, taken together, fully and correctly recite so much of the law as to self-defense as is applicable to the evidence in this case.

We find no errors in the record; the judgment of conviction and order denying motion for new trial are affirmed.

I concur: CONREY, P. J.

HOUSER, J. I dissent. My principal reason therefor is based upon what, to my mind, is the inapplicability to the facts in the case of either of the instructions as set forth in the majority opinion. The evidence fails to disclose that defendant "*sought a quarrel,*" or that if he did so, it was "*with the design to force a deadly issue.*" Nor was there any evidence of any "*fraud, contrivance or fault*" on the part of defendant by which he attempted "*to create a real or apparent necessity for killing.*" No pretense is made that "*by prearranged duel, or by consent*" defendant entered into "*a deadly mutual combat*" with the person who was killed. Nothing can be found in the evidence to warrant the insinuation contained in the instruction that defendant *wickedly* or *willfully invited* or *created* "*the appearance of necessity, or the actual necessity, which, if present to one without blame, would justify the homicide.*"

In other patent particulars of a similar nature, the instructions quoted in the majority opinion were equally faulty, in that no evidence was presented upon which they might have been predicated. Especially did such condition prevail with reference to the instruction that "such person or the person in whose behalf the defense was made, *if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.*"

Considering the premises, the prejudicial effect of the language occurring in such instructions is apparent.

97 Cal. App. 285

BANK OF ITALY v. ZERGA et al.★
(Civ. 6402.)

District Court of Appeal, First District, Division 2, California. Feb. 28, 1929.

Rehearing Denied March 28, 1929. Hearing Denied by Supreme Court April 29, 1929.

1. Evidence ⟹441(1)—Parol evidence that at time copartnership was formed members expected to execute certain contract which was not executed held admissible, since it was on matter collateral to articles of copartnership.

In action on note given when forming partnership, parol evidence that at time copartnership was formed members expected to execute a lucrative contract of agency, but that expectations were dispelled by subsequent events, *held* admissible, since evidence was on matters related, but collateral, to articles of copartnership, and it did not violate rules regarding parol evidence.

2. Appeal and error ⟹1011(1)—Trial court's determination on conflicting evidence will not be disturbed by reviewing court.

Determination of trial court on conflicting evidence will not be disturbed by court of review.

Appeal from Superior Court, City and County of San Francisco; F. M. Jamison, Judge.

Action on a promissory note by the Bank of Italy, as executor of the last will and testament of James F. Fugazi, sometimes known as James Fugazi, deceased, against A. Zerga and another. From a judgment for defendants, plaintiff appeals. Affirmed.

O'Gara & De Martini, of San Francisco, for appellant.

Richard Fitzpatrick, of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants, basing its claim on a promissory note. The defendants appeared and answered. A trial was had in the trial court before the court sitting without a jury. The court made findings of fact in favor of the defendants, and from a judgment entered thereon the plaintiff has appealed and has brought up a bill of exceptions.

Plaintiff's testator, James F. Fugazi, for many years had been a broker engaged in acting as the agent of different transportation companies. Before 1914 he had been associated with certain members of his family. Still later he became associated with one of the defendants, J. F. Bulotti. In the spring of 1920 Fugazi and Bulotti commenced negotiations with the defendant A. Zerga, looking toward the formation of a contract of copartnership including the three. Prior to 1914 the Fugazi Company had been on the pay roll of certain railroad corporations as agents drawing fixed salaries. During the federal administration of the railroads that arrangement did not exist. In May, 1920, Mr. Fugazi expected that the arrangement could be and would be renewed. Relying on those expectations, he stated to the defendant Zerga that the paid contracts of agency would certainly be renewed in the immediate future. At the time of the negotiations, the parties estimated a one-third interest, as the books then stood, as of a value of $5,000; but, if the paid agency should be obtained, there was a clear additional value of $3,000. Thereafter articles of copartnership were drawn up and executed by all of the parties. The document is not an unusual set of articles of copartnership. It recites that they have associated themselves "for the purpose of carrying on a steamship and general brokerage and exchange business and selling tickets, fares and other evidences of transportation from and between the city and county of San Francisco, state of California, and elsewhere, to and from other parts of the world passenger tickets. * * *" The document does not purport to enumerate any of the clients of the copartnership. At about the same time the defendant Zerga executed and delivered his note to Fugazi and Bulotti in the sum of $5,000, payable within one year and bearing interest at 6 per cent. He also executed and delivered to the same persons his note in the sum of $3,000, without interest, payable May 2, 1922. The last-mentioned note is the subject of this action. In the complaint it is recited that, as J. F. Bulotti does not consent to become a plaintiff, he is made a defendant.

[1] The plaintiff asserts that the defendants attempted to alter the terms of the written articles of copartnership by introducing parol evidence of the facts hereinabove recited. The point is not well taken. The articles of copartnership did not even purport to recite the names of the clients of the copartnership nor the factors making up the partnership business. The evidence introduced showed that, at the time the copartnership was formed, the former members confidently expected to execute, in the immediate future, a lucrative contract of agency with railroad companies which would bring to each member of the copartnership $3,000 or more per annum; that they based their computations on those expectations; but that those expectations were wholly dispelled by subsequent events. The evidence was admissible, and did not violate any rules regarding parol evidence. It was on matters related, but collateral, to the articles of copartnership, and as such it was admissible. Whittier v. Home Savings Bank, 161 Cal. 311, 317, 119 P. 92.

Still claiming that, under the facts, the oral evidence was incompetent and was improperly received, the plaintiff claims that it should be disregarded by this court. As we have

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★Rehearing denied. Hearing denied by Supreme Court.

shown, it was not incompetent, and we need not dwell further on this point.

[2] Finally, the plaintiff asks us to take judicial notice of the fact that the federal government surrendered control of the railroads March 1, 1920, and therefore the testimony of the defense was not true. Whether it was true or false was a question addressed to the trial court, and its determination on conflicts will not be disturbed by a court of review.

We find no error in the record. The judgment is affirmed.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

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97 Cal. App. 365

RICHEE v. GILLETTE REALTY CO. et al. (Civ. 5164.)

District Court of Appeal, Second District, Division 2, California. March 4, 1929.

1. Appeal and error 🔑1040(10)—Judgment after filing of answer will not be reversed for nonprejudicial error in overruling demurrer to complaint for uncertainty.

To warrant reversal of judgment, rendered after filing of answer, for error in overruling demurrer to complaint on ground of uncertainty, some error prejudicial to defendant's substantial rights, as distinguished from abstract error, must appear.

2. Pleading 🔑433(3)—Pleading stating fact only inferentially will be held good after judgment, in absence of demurrer.

Where a fact is stated only inferentially and no demurrer is interposed, the pleading will be held good after judgment.

3. Appeal and error 🔑1073(2)—Default judgment for amount adjudged reasonable as attorney's fees, as prayed in complaint setting out notes providing for payment of sum so adjudged, held not prejudicial to defendant.

Default judgment, awarding amount determined to be reasonable as attorney's fees in addition to principal of and interest on notes providing for payment of sum adjudged reasonable as attorney's fees in action thereon, *held* not prejudicial or harmful to defendant, though complaint did not allege that such sum or any other designated amount was reasonable as attorney's fees, where it set out notes hæc verba and prayed amount thereof, with interest and reasonable attorney's fees.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by E. R. Richee against the Gillette Realty Company, a corporation, and others. From a judgment for plaintiff, named defendant appeals. Affirmed.

Dudley Robinson, of Los Angeles, for appellant.

Burke & Pennington, of Los Angeles, for respondent.

IRA F. THOMPSON, J. A complaint was filed in the court below to recover on two promissory notes, which are set out in hæc verba, each containing the following clause: "And in case suit or action is instituted to collect this note, the Gillette Realty Company, a corporation promises to pay, besides the costs and disbursements allowed by law, such additional sum as the court may adjudge reasonable as attorney's fees in such suit or action." The prayer of the complaint is for the amount of the notes, interest, and such attorneys' fees as the court may adjudge reasonable. The defendant the Gillette Realty Company failed to appear, and after default the court rendered judgment in the sum of $1,306.65, of which amount it is conceded $1,206.06 represents principal and interest, and $106.61, the amount determined by the court to be reasonable as attorneys' fees. The appeal is from the judgment.

[1, 2] Appellant asserts that the judgment is unwarranted and excessive because respondent failed to plead that the sum of $106.61, or some other sum, was a reasonable sum to be allowed as attorneys' fees. There is a familiar rule of law applicable to cases where answer has been filed and judgment has been rendered that, "in order to warrant a reversal upon the ground of error in overruling a demurrer interposed on the ground of uncertainty in the complaint, it must appear that some substantial right of the demurrant has been affected, some prejudicial error, as distinguished from abstract error, suffered by him, or he has no room for complaint." Rooney v. Gray Bros., 145 Cal. 753, 79 P. 523. Also see Krieger v. Feeny, 14 Cal. App. 538, 112 P. 901, and cases there cited. Another method of phrasing a very similar principle is that, "where a fact is stated only inferentially and no demurrer is interposed, the pleading will be held good after judgment."

[3] Applying the good sense of these statements to the present situation, it is immediately apparent that the plaintiff sought to recover a reasonable attorneys' fee in accordance with the promise of appellant to pay the same. It could make no difference in the actual result that respondent did not allege that the sum of $106.61, or some other designated amount, was a reasonable sum to be allowed as attorneys' fees. The appellant by its silence and nonappearance signified its assent to the rendition of the judgment as prayed for and its willingness that the court determine a reasonable amount which it had agreed to pay. The court would have been under the necessity of determining the reasonableness of the amount to be allowed in any event. The appellant is not prejudiced or harmed in any degree.

The case of Alexander v. McDow, 108 Cal. 25, 41 P. 24, was an action upon a promissory note and is very much in point here. Judgment was entered by default and contained an award of attorneys' fees. The note was set out in hæc verba in the complaint and contained a stipulation for the payment of "ten per cent. of total amount due for attorney's fees incurred in the collection of this note, when collection is made by attorney or other officer." The prayer of the complaint demanded judgment for the amount of the note, interest, costs and "ten per cent. on the amount which may be found due for principal and interest for attorney's fees incurred in the collection of this note." The court there said: "We think, also, that there is sufficient in the complaint to support the allowance of attorney's fees. The note, which is set forth in full provides for them, and the prayer of the complaint asks for them. * * *" There is no appreciable difference between the facts in the above-mentioned case and the case here.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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97 Cal. App. 166

RICHARDS et al. v. SILVERIA. (Civ. 3670.)★

District Court of Appeal, Third District, California. Feb. 25, 1929.

Rehearing Denied March 27, 1929. Hearing Denied by Supreme Court April 25, 1929.

1. Landlord and tenant 🔑55(3)—In landlords' action against tenant, plaintiff's testimony that plaintiffs' acts in removing certain trees, etc., of which defendant complained in cross-complaint, were done with latter's consent, was sufficient to support findings to that effect.

In action by landlords against tenant for waste and other breaches of terms of lease, testimony of one of plaintiffs that plaintiffs' acts in removing trees, leveling parts of land, and taking possession of part of land for short time, of which defendant complained in his cross-complaint, were done with latter's consent, was sufficient to support court's findings to that effect.

2. Landlord and tenant 🔑55(3)—Evidence justified finding that tenant's destruction of bunch grass on 20 acres constituted waste and that market value of land depreciated $300.

In action by landlords against tenant for waste committed by tenant and for other alleged breaches of lease, evidence *held* sufficient to justify trial court's finding that destruction of bunch grass on about 20 acres of land constituted strip or waste, which lessee agreed in lease not to make or suffer, and that market value of land was depreciated in sum of $300.

3. Landlord and tenant 🔑55(3)—In landlords' action against tenant, court was not bound to accept tenant's statement that he removed only eight fig trees, in view of testimony of landlord and another.

In action by landlords against tenant, court was not bound to accept tenant's statement that he only removed about eight fig trees, in view of testimony of one of landlords that, when they left state in 1922, trees were in fine condition, and testimony of another to effect that the following year there were probably 40 per cent. or 50 per cent. that one could see growing.

4. Evidence 🔑474(18)—Owner of land was qualified to give opinion regarding market value of land with and without fig trees removed by tenant.

In action by landlords against tenant, landlord, being owner of land, was qualified to give opinion regarding market value of land with and without fig trees growing thereon.

5. Trial 🔑89—Witness' statement that he determined market value of land by returns did not warrant striking out all of his testimony regarding market value.

Witness' isolated statement that he determined market value of land by fair returns or production that an acre would give a man by proper farming was not sufficient basis of motion to strike out all testimony of witness regarding market value of land with fig trees and without the fig trees which tenant removed.

6. Landlord and tenant 🔑55(3)—Where ten-year lease commenced in 1921, action for waste brought in 1925 was not premature.

Where ten-year lease commenced December 1, 1921, landlords' action for waste brought April 10, 1925, was not prematurely brought.

7. Landlord and tenant 🔑49(1)—Acceptance of rent after breach of terms of lease does not constitute waiver of damages caused by breach.

Acceptance of rent after breach of terms of lease may constitute waiver of lessor's right to declare forfeiture, but not of damages caused by breach.

8. Limitation of actions 🔑184—Court properly denied defendant leave to amend answer during progress of trial by pleading statute of limitations.

In action by landlords against tenant for waste and other breaches of terms of lease, trial court did not abuse discretion in denying defendant leave to amend his answer during progress of trial by pleading statute of limitations.

9. Costs 🔑185—Mileage paid to witnesses held properly allowed as costs.

Allowance as costs of mileage paid to witnesses *held* not error.

10. Witnesses 🔑29—Witnesses were properly allowed mileage for their first attendance and also for their return at time to which case was continued.

Where trial commenced September 29, 1925, and on next day continuance was ordered to October 8, 1925, and court directed witnesses to appear at that time or at any subsequent time to which case might be continued, and trial was resumed October 20. 1925, witnesses were properly allowed mileage for their first attendance was also for their return at time to which case was continued.

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Ed Richards and another against John M. Silveria, Jr., in which defendant filed a cross-complaint. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. B. Scott, of Modesto, for appellant.

G. B. Hjelm, of Turlock, for respondents.

FINCH, P. J. The plaintiffs leased to the defendant a tract of land containing about 79 acres for a term of ten years, commencing December 1, 1921. This action was brought April 10, 1925, to recover damages for alleged waste committed by the defendant and for other alleged breaches of the terms of the lease, but the plaintiffs did not claim a forfeiture of the defendant's rights under the lease, and he continued in possession of the property. In addition to denials of the alleged breaches of the lease, the defendant filed a cross-complaint for damages on account of alleged breaches of the lease by the plaintiffs. Judgment was entered in favor of the plaintiffs, and the defendant has appealed. The particular issues raised by the pleadings and in question here appear from the findings of the trial court substantially as follows:

By the terms of the lease the defendant agreed not to "make or suffer any strip or waste" on the premises. In April, 1922, the defendant plowed up about "twenty acres of bunch grass pasture land," which "constituted desirable pasture lands." Such bunch grass "is of such a nature that if plowed down it dies and * * * cannot be produced from artificial seeding." The land on which it grew is not suitable for other crops, and by th destruction of the bunch grass growing thereon the market value thereof was depreciated in the sum of $300.

At the time the defendant went into possession under the lease there was on the land an orchard of one acre in area of fig trees "then approximately two years old, * * * in reasonably healthy condition. * * * During the first year of said term of lease said defendant, without the consent or knowledge of the said plaintiffs and contrary to the terms of said lease did wholly destroy and kill said growing fig orchard," and the market value of the land was thereby depreciated in the sum of $350.

The plaintiffs removed "certain apple trees and certain pear trees" from the leased lands, leveled parts of the land, and for a short time went into possession of about 4 acres of the land, all with the consent of the defendant.

[1] Plaintiff Ed Richards testified that the plaintiffs' acts of which the defendant complains in his cross-complaint were done with the latter's consent. This testimony is sufficient to support the court's findings in that respect, and therefore the issues presented by the cross-complaint may be dismissed from further consideration.

[2] There is ample evidence to justify the finding of the trial court as to the damage caused by the destruction of bunch grass on about 20 acres of the land, and that such destruction constituted "strip or waste." The evidence is to the effect that such grass is perennial; that on the land in question having continued for at least 50 years. Witnesses testified that the market value of the land was permanently depreciated to the extent of from $40 to $50 an acre by the destruction of the bunch grass.

[3-5] Appellant contends that the "only evidence as to the number of trees removed was that given by" himself that "I pulled out about eight fig trees." The plaintiffs testified that they left California in June, 1922; that, when they left, the fig trees were practically all alive and in fine condition in every way. Charles Hoagland testified that in March, 1923, "there was probably 40% or 50% that you could see growing; * * * there might have been a percentage there that I did not see, of small stuff that had been started at that time." In view of the testimony of Hoagland and the plaintiffs, the court was not bound to accept the defendant's statement that he removed only about eight fig trees. Hoagland and plaintiff Ed Richards were both shown to be qualified to give their opinions as to the market value of the land with and without the fig trees growing thereon. The latter was the owner of the land, and the former testified that "Mr. Richards has some very fine fig trees * * * on that particular place." His testimony shows a general familiarity with fig raising in the county. He testified that "there has not been very many fig orchards sold" in the preceding two years; that he did not know of any sales of fig land during the last four years "in that particular neighborhood," but that he knew of "some that has been sold" in San Joaquin county. At one stage of his testimony he volunteered the statement: "The way I determine the market value of land is by returns or production that an acre of land will give a man by proper farming." Counsel for appellant thereupon moved to strike out all his testimony "because that is not the proper way to arrive at market value." The court denied the motion, saying that the witness "gave other reasons." While market value is the ultimate test, a very important factor in making up an estimate of the market value of agricultural land is its productivity. It does not appear from the statement of the witness that he left out of consideration other factors which must be considered in determining market value, and such isolated statement is not a sufficient basis of a motion to strike out all the testimony of the witness.

[6-10] The other contentions of appellant may be disposed of generally. The action

for waste was not prematurely brought. 35 C. J. 1223. Acceptance of rent after breach of the terms of a lease may constitute a waiver of the lessor's right to declare a forfeiture, but not of damages caused by the breach. It cannot be held that the trial court abused its discretion in denying defendant leave to amend his answer during the progress of the trial by pleading the statute of limitations. 16 Cal. Jur. 619. There was no error in the allowance as costs of mileage paid to witnesses. The trial commenced September 29, 1925. On the next day a continuance was ordered to October 8, 1925, and the court directed the witnesses to appear at that time or at any subsequent time to which the case might be continued. The trial was resumed October 20, 1925. Witnesses were properly allowed mileage for their first attendance and also for their return at the time to which the case was continued. United States v. Venable Const. Co. (C. C.) 158 F. 833. See, also, Howes v. Abbott, 78 Cal. 270, 20 P. 572.

The judgment is affirmed.

I concur: PLUMMER, J.

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97 Cal. App. 372

Ex parte GARRITY. (Cr. 1767.)

District Court of Appeal, Second District, Division 1, California. March 4, 1929.

1. Criminal law 🔑996(1)—Court held without jurisdiction to modify judgment imposing fine only by later providing for alternative jail term (Pen. Code, § 1205; Corporate Securities Act, § 14, as amended by St. 1925, p. 970, § 9).

Trial court *held* without jurisdiction, under Pen. Code, § 1205, to modify judgment imposing fine only, as authorized by Corporate Securities Act (St. 1917, p. 673), § 14, as amended by St. 1925, p. 970, § 9, by providing several weeks later for defendant's imprisonment in county jail until satisfaction of fine.

2. Criminal law 🔑996(1)—Court's lack of jurisdiction to modify judgment imposing fine only by later providing for alternative jail term could not be waived nor jurisdiction stipulated (Pen. Code, § 1205; Corporate Securities Act, § 14, as amended by St. 1925, p. 970, § 9).

Trial court's lack of jurisdiction, under Pen. Code, § 1205, to modify judgment imposing fine only, under Corporate Securities Act (St. 1917, p. 673) § 14, as amended by St. 1925, p. 970, § 9, by providing several weeks later for defendant's imprisonment in jail until satisfaction of fine, could not be waived nor jurisdiction stipulated by defendant.

Application by J. W. Garrity for a writ of habeas corpus. Writ granted and petitioner's discharge from custody ordered.

John F. Murphy, of Los Angeles, and J. Howard Ziemann, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

HOUSER, Acting P. J. Habeas corpus. From the application for, and the return to, the writ herein, it appears that, following the conviction of J. W. Garrity of the crime of conspiracy to violate the Corporate Securities Act (Stats. 1917, p. 673, as variously amended), and on October 31, 1928, judgment was pronounced by the trial court by which the said Garrity was sentenced to pay a fine of $5,000, with no alternative for the payment of such fine. Although the record herein does not disclose the fact, it is conceded by respective counsel that, at the time of the conviction of the defendant of the said crime of conspiracy, he was also convicted of the commission by him of certain other offenses, as to which, under certain specified conditions, the execution of the judgment was suspended; that, after judgment had been pronounced by the trial court, and pending an investigation relative to a decision by the trial court as to whether "probation" (or suspension of the judgment) should be granted to the defendant as to his conviction of the charge of conspiracy, a stipulation was entered into between counsel, respectively, representing the defendant and the prosecution, to the effect that a delay by the trial court beyond the statutory period in reaching a conclusion as to the matter of "probation" for the defendant, would in no wise affect the power of the court in the premises. In that connection, attention is directed to the fact that the return to the writ herein contains a record of the minutes of the trial court of date December 6, 1928, in substance, that as of that date, "by stipulation, matter of probation and sentence is reopened. * * * Further hearing on probation and sentence is continued to December 20, 1928, at 10:00 a. m. If fines of $5,000 each are not paid by December 20, 1928, the defendants shall be remanded to the Sheriff of Los Angeles county to be confined in the county jail until paid out at the rate of $8 per day. By stipulation, any irregularity in sentence is waived."

On December 20, 1928, among other things, the minutes of the trial court contain the following: "* * * Defendant J. W. Garrity is committed to the custody of the Sheriff of Los Angeles county until his fine of $5,000 is paid, or until it is paid at the rate of one day for each $8 of fine not paid."

[1] By section 14 of the Corporate Securities Act (Stats. 1917, p. 673, as variously amended), any one of several penalties therein provided may be imposed for the violation of the act, to wit, "imprisonment in the state prison not exceeding five years, or in a coun-

ty jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment." St. 1925, p. 970, § 9. It is therefore clear that in accordance with the terms of the statute, in the first instance, to wit, on October 31st, the trial court had authority to render a judgment by which a fine only would be imposed. The record shows that the judgment rendered at that time was that the defendant pay a fine only; but that some weeks later the trial judge attempted to modify the judgment so that, if the fine were not paid voluntarily, the defendant would be obliged to serve an indefinite term in the county jail "until it is paid out at the rate of one day for each $8 of fine not paid."

The point made by the applicant herein is that sentence of a fine of $5,000, without any alternative therefor, having been originally imposed on October 31, 1928, the trial court was without jurisdiction at a later date, to wit, on December 20, 1928, to modify its judgment by at that time providing an alternative in case the fine were not paid.

The contention of the respondent is that by section 1205 of the Penal Code the action taken by the trial court was fully authorized. That section is as follows: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. But the judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

In the case entitled In re Kennerly, 190 Cal. 774, 214 P. 857, where the authorities affecting the question are reviewed, it is ruled that, on conviction of an offense where the governing statute provides for punishment by fine, the judgment may direct imprisonment at a specified rate per day until the fine be satisfied. It has also been held that the payment of the fine is the punishment imposed by the court, and that the alternative of imprisonment is not by way of punishment, but is merely the method of enforcing the satisfaction of the fine. Ex parte Kelly, 28 Cal. 414; Ex parte Crittenden, 62 Cal. 534; Ex parte Karlson, 160 Cal. 378, 117 P. 447, Ann. Cas. 1912D, 1334; In re Kennerly, 190 Cal. 774, 214 P. 857. However, the distinction should be noted that, as to each of the foregoing authorities, no time elapsed between the imposition of the fine and the alternative relating thereto—the two propositions having been contemporaneously pronounced by the court—whereas in the instant case the judgment by which the fine was imposed preceded the alternative by several weeks.

In the case of In re Sullivan, 3 Cal. App. 193, 84 P. 781, it appeared that the defendant was convicted of the crime of assault with a deadly weapon; whereupon the trial court rendered judgment that the defendant pay a fine of $700, and directed that, if the fine were not paid, the defendant be imprisoned in the state prison "until the fine was satisfied at the rate of $2 per day." Five days later the trial court vacated the judgment in the action and rendered another judgment therein which was identical with the first, except that the county jail (instead of the state prison) was designated as the place of imprisonment "in case the fine was not paid." It was held that, in rendering the second judgment, the court was without jurisdiction. In passing upon the point, in part, the court said: "* * * The moment legal restraint was imposed as a means of enforcing the payment of the fine, that moment the execution of the judgment was commenced, and the power of the court was exhausted, and its jurisdiction to recall, annul, or change its judgment was at an end. In our opinion the court must exercise the discretionary power conferred by section 1205 of the Penal Code, *when the original judgment is rendered, or else the power to make the direction therein provided for is lost.* The judgment originally rendered must, under the very terms of the statute, contain such direction, or else this method of enforcing payment of the fine does not exist. *If the court had imposed a fine of $700 on petitioner, and said nothing about imprisonment until the fine was paid, it would hardly be contended that such direction could, for any reason or cause, be inserted at some subsequent time.* If no such direction is made, the judgment can only be enforced as provided in sections 1206 and 1214. A void direction has the same effect, and in that event the methods of enforcing the judgment just mentioned are exclusive. The invalidity of the judgment last pronounced is apparent on its face, and hence the writ of habeas corpus will lie." The doctrine of that case is affirmed in Re Humphrey, 64 Cal. App. 572, 576, 222 P. 366. And in principle the ruling is the same in Re Gottschalk, 47 Cal. App. 260, 190 P. 649; In re Bouchard, 38 Cal. App. 441, 176 P. 692.

Although in different jurisdictions, the authorities are not entirely harmonious one with the other; in the case of State v. Rice (1920) 145 Minn. 359, 177 N. W. 348, it is held that one sentenced to pay a fine cannot be imprisoned to enforce the payment thereof unless such condition be imposed at the same time that the judgment to pay the fine is rendered. See, also, Ex parte Grove (1927) 43 Idaho, 775, 254 P. 519; Daley v. City of Decatur (1921) 18 Ala. App. 141, 90 So. 69.

In the instant case, with reference to the authority of the trial court to modify its judgment, this court is led to the conclusion that the trial court was without jurisdiction in the premises.

[2] It may be remembered that, as shown

by the record, by stipulation of the parties "irregularity in sentence" was "waived" by the defendant. It is clear by the authorities hereinbefore cited that, after rendering the judgment in the first instance, the jurisdiction of the trial court to thereafter modify its judgment was exhausted, and that lack of jurisdiction in the matter could not be waived nor jurisdiction be stipulated by the defendant. See, also, Mintie v. Biddle (C. C. A.) 15 F.(2d) 931; People v. Penn, 302 Ill. 488, 135 N. E. 92.

It is ordered that the defendant in the lower court be discharged from custody.

I concur: YORK, J.

Because of his disqualification, CRAIL, Justice pro tem., who was present at the oral argument of respective counsel herein, does not participate in the decision.

97 Cal. App. 179

PEOPLE v. MILLER. (Cr. 1070.)

District Court of Appeal, Third District, California. Feb. 25, 1929.

1. Intoxicating liquors 🔑236(6½)—Evidence held to sustain conviction for unlawful possession of liquor.

Evidence *held* to sustain conviction for unlawful possession of intoxicating liquor, as against contention that it did not affirmatively appear that liquor was not kept for domestic use in private dwelling house.

2. Intoxicating liquors 🔑236(6½) — Glasses and effort to destroy liquor tends strongly to show keeping for beverage purposes.

The presence of glasses and the effort to destroy the evidence of the liquor tends strongly to show that it was kept for beverage purposes.

3. Criminal law 🔑304(20)—Court judicially knows that jackass brandy is intoxicating liquor ordinarily used for beverage purposes.

Court takes judicial notice of the fact that jackass brandy is an intoxicating liquor ordinarily used for beverage purposes.

4. Intoxicating liquors 🔑224—Prosecution has burden of proving illegality of possession of intoxicating liquor.

In prosecution for possession of intoxicating liquor, the prosecution has the burden of proving the illegality of the possession.

5. Intoxicating liquors 🔑238(4)—Whether possession of intoxicating liquor found in dwelling was lawful or unlawful is for jury to determine from all circumstances.

In prosecution for possession of intoxicating liquor, the fact that it was found in a private dwelling house is a circumstance to be weighed in favor of the theory of lawful possession, and the question in such case of whether possession was lawful or unlawful is for the jury to determine from all the facts and circumstances.

6. Criminal law 🔑836 — Separately numbered instructions relating to same subject-matter and read together held to constitute "single charge," within statute as to indorsement (Pen. Code, § 1127).

Instructions which related to same subject-matter and were read together, though separately numbered, *held* to constitute but a single charge within Pen. Code, § 1127, requiring court to indorse and sign its decision upon each charge presented.

7. Intoxicating liquors 🔑236(13)—State was not required to prove that liquor was fit for beverage purposes at time it was offered in evidence.

In prosecution for unlawful possession of intoxicating liquor, it was unnecessary for the prosecution to prove that the liquor was fit for beverage purposes at the time it was offered in evidence, where such liquor, in effort to destroy it, had been dumped into a sink and mingled with grease and soapy water.

8. Criminal law 🔑836 — Colloquy between court and counsel held not part of "charge," within statute as to reduction of charge to writing and signature of court (Pen. Code, § 1127).

Colloquy between counsel and court intended only as an explanation of the giving of certain instructions did not constitute a part of the charge, within Pen. Code, § 1127, providing for reduction of charge to writing and for signature of court.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Charge.]

9. Criminal law 🔑824(4)—Omitting to instruct concerning legal possession of liquor not offered by defendant held not ground for reversal (Volstead Act).

In prosecution for possession of liquor, failure to instruct pursuant to Volstead Act (27 USCA § 1 et seq.) that it is lawful to possess intoxicating liquor in one's private dwelling house, when kept only for use of family or guests, *held* not ground for reversal, where no such instruction was offered.

10. Criminal law 🔑1172(1)—Inadequacy of instructions is harmless where conclusion that miscarriage of justice has not resulted is inevitable.

That jury might well have been more fully and specifically instructed as to certain elements of the particular offense is not ground for reversal, where record discloses inevitable conclusion that miscarriage of justice has not resulted.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Fred Miller was convicted of unlawful possession of intoxicating liquor, and he appeals. Affirmed.

Clifford A. Russell, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

THOMPSON, J. The appellant was convicted of the unlawful possession of intoxicating liquor. He was also charged with the prior conviction of a similar offense, to which he entered a plea of guilty.

[1] It is now contended that the evidence fails to support the verdict, chiefly because it does not affirmatively appear that the liquor was not kept by the defendant for domestic use in a private dwelling house. The appellant also complains of certain instructions and oral remarks made by the trial judge.

August 24, 1928, two officers visited the residence of the defendant at Knights Landing. One went to the front door and the other approached the rear door. The officer, Litsch, testified:

"I ran to the back door. * * * As I came up on the porch, * * * Mr. Miller ran to the sink with two bottles and threw them down into the sink and broke them. I went in, * * * and the liquor was in the sink running down. * * * It was brown, * * * about the color of ordinary jackass (brandy); * * * there was the odor of jackass and gin. It smelled very strong of gin and very strong of jackass brandy. * * * As I came in the door, * * * Mr. Miller stepped back from the sink and said, 'I beat you to it that time,' and laughed. * * *

"Q. Would you say it was fit for beverage purposes before it got into the trap? A. Yes, oh sure, * * * that was fit for beverage purposes. * * * Up in the cupboard were a lot of whisky glasses."

The gooseneck drain from the sink to the sewer was immediately removed by the officer, and its contents were analyzed by a chemist and found to contain 11.46 per cent. of alcohol by volume. The presence of water in the gooseneck would account for a lower percentage of alcohol than would normally be found in jackass brandy.

[2-5] The evidence sufficiently shows that the defendant had in his possession at his residence jackass brandy which was kept for illegal purposes. The character of the liquor was identified by an analysis and from its odor. The presence of the glasses and the effort to destroy the evidence of the liquor tend strongly to show that it was kept for beverage purposes. People v. Erbel, 72 Cal. App. 543, 237 P. 769. The court will take judicial notice of the fact that jackass brandy is an intoxicating liquor ordinarily used for beverage purposes. People v. Silva, 67 Cal. App. 351, 357, 227 P. 976. While it is true that the burden rests upon the prosecution to prove the illegality of the possession of intoxicating liquor (People v. Buttulia, 70 Cal. App. 444, 233 P. 401), and the fact that it was found in a private dwelling house is a circumstance to be weighed in favor of the theory of lawful possession of the liquor, the question as to whether it was lawfully or unlawfully possessed by the defendant, was a matter for the jury to determine from all the facts and circumstances of the case (People v. Mullaly, 77 Cal. App. 60, 65, 245 P. 811). The sudden breaking of the bottles and the dumping of the jackass brandy into the sink, at the approach of the officers, and the statement that, "I beat you to it that time," together with the request made of the officer by the defendant at the time of his arrest, as follows: "Why don't you give a man a break?" as well as the presence of whisky glasses and slot-machines in the house, strongly indicate guilty knowledge of the defendant, and meet the required burden on the part of the prosecution of proving the unlawful possession of the liquor.

The appellant claims that the trial court failed to comply with the provisions of section 1127 of the Penal Code, in that instruction No. 12 does not appear to have been signed by the judge, and for the reason that certain oral comments which were made by the judge in the course of his charge to the jury amounted to the giving of unwritten instructions without the consent of counsel.

The transcript of proceedings on appeal, however, clearly shows that instruction No. 12 was given immediately preceding instruction No. 13, which was signed and indorsed by the judge as "given." The record shows that immediately after the statement that, "The court will now instruct the jury," 13 instructions follow in consecutive order. Instructions numbered 12 and 13 each relates to the same subject-matter. They both refer to the necessity of proving that the intoxicating liquor must have been fit for beverage purposes. Except for the colloquy which intervened between the court and counsel respecting the application of this instruction No. 12, they were given in the following connected form as one charge, to wit: "You are instructed that unless the prosecution proves that the liquor introduced in evidence was fit for beverage purposes at the time it was in the possession of the defendant, you must acquit the defendant." "You are instructed that in such a case as this, it is not necessary and incumbent upon the prosecution to prove that the liquor introduced in evidence is fit for beverage purposes. Given. W. A. Anderson, Judge."

[6] The foregoing instructions are in the precise language certified to and must be deemed to have been given as certified. Although the first of these separately numbered instructions fails to show the signature of the judge, the fact that they relate to the same subject-matter and that they were read together justifies the conclusion that they constituted but a single charge. This sufficiently complies with the requirements of section

1127 of the Penal Code, which provides that, "Upon each *charge* presented and given or refused, the court must endorse and sign its decision. * * *"

[7] Instruction No. 13 is a correct statement of the law for the reason that it refers specifically to the liquor which was "introduced in evidence." It is apparent that the particular liquor which was introduced in evidence need not then necessarily be fit for beverage purposes. It had undergone a substantial change since it was first found in the possession of the defendant. It is necessary for the prosecution to prove that the liquor with which the defendant is charged with being illegally possessed was ordinarily fit for beverage purposes. But that liquor had been dumped into a sink and mingled with grease and soapy water in the gooseneck of the drain. It was the contaminated contents of this drain pipe which was offered in evidence. The dumping of this liquor by the defendant was for the evident purpose of destroying its identity as an illegal beverage. It would be absurd to say that the liquor must still be fit for beverage purposes after the willful attempt to destroy the evidence of its character by mingling it with other deleterious substance. It was therefore unnecessary for the prosecution to prove that the liquor was fit for beverage purposes at the time it was offered in evidence.

[8-10] It is claimed that the colloquy between the court and counsel respecting the application of instruction No. 12 constituted oral instructions which were, therefore, erroneously given. A fair reading of the record leads to the conclusion that this discussion was not intended by the court as a part of his charge. It was not directed to the jury, but was solely in response to counsel's criticism of the instruction No. 12. A mere colloquy between counsel and the court, intended only as an explanation for the giving of certain instructions, does not constitute a part of the charge which, under the provisions of section 1127 of the Penal Code is required to be reduced to writing and signed by the judge. People v. Ruef, 14 Cal. App. 576, 114 P. 48, 54. Finally, it is contended that the court erred in failing to instruct the jury pursuant to the provisions of the Volstead Act (27 USCA § 1 et seq.) that it is lawful to possess intoxicating liquor in one's private dwelling house when it is kept only for the use of the family or guests. But no such instruction was offered. The jury was fully and properly charged as to the burden of proof. The latter portion of instruction No. 9 informed the jury that: "* * * Proof of the *unlawful possession* (of the liquor) beyond a reasonable doubt is the gist of the charge contained in the information." A defendant may not complain of a failure to give instructions upon particular features of an offense, which he relies upon as a defense, in the absence of a specific request for such instructions. 8 Cal. Jur. 309, § 362; People v. Matthew, 194 Cal. 273, 283, 228 P. 424. Even though it be conceded that the jury might well have been more fully and specifically instructed as to certain elements of the particular offense, the record discloses the inevitable conclusion that a miscarriage of justice has not resulted.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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97 Cal. App. 160

TERRY v. PETERSON.★ (Civ. 3700.)

District Court of Appeal, Third District, California. Feb. 23, 1929.

Rehearing Denied March 23, 1929. Hearing Denied by Supreme Court April 22, 1929.

1. Automobiles 🔑245(13)—Whether lanterns were lighted, at barricade struck by defendant's automobile, just before collision with car coming from opposite direction, held for jury.

In action for death in collision of automobiles traveling in opposite directions, evidence *held* sufficient to take to jury question whether lanterns were lighted at barricade which was struck by defendant's automobile just before collision.

2. Automobiles 🔑245(13)—Negligence of defendant, whose car struck barricade just before collision with automobile coming from opposite direction, held for jury.

In action for death in collision between automobiles traveling in opposite directions, in which it was shown that defendant's car struck and demolished barricade just before collision, defendant's negligence *held* for jury, regardless of whether lanterns at barricade were lighted.

3. Automobiles 🔑201(9)—Defendant's negligence in colliding with barricade would be proximate cause of collision with automobile immediately thereafter, though defendant completely lost control of car.

If defendant was guilty of negligence in colliding with barricade just before collision with plaintiff's car, such negligence was proximate cause of collision with plaintiff's car, even though defendant completely lost control of his automobile by first collision, since primary cause may be proximate cause, though it operates through successive instrumentalities.

4. New trial 🔑71—Where there is substantial conflict, ordering new trial on ground verdict is against weight of evidence is not abuse of discretion.

Where there is substantial conflict in evidence, trial court will not be deemed to have abused discretion in determining that verdict or finding was against weight of evidence, and that there should be a new trial.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

★Rehearing denied. Hearing denied by Supreme Court.

Action by J. R. Terry against P. J. Peterson for damages for the death of a minor. After judgment for plaintiff, defendant's motion for new trial was granted, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court: CURTIS, J., voting for a hearing.

Seth Millington, of Gridley, and Alva A. King, of Colusa, for appellant.

Atran & Sheets, of Colusa, and Myrick & Deering and Scott and Leo J. McEnerney, all of San Francisco, for respondent.

FINCH, P. J. This case was tried before a jury, which returned a verdict in favor of the plaintiff for damages in the sum of $6,500 for the death of his son in a collision of automobiles alleged to have been caused by the negligence of the defendant. Judgment was entered accordingly. Thereafter the trial court granted defendant's motion for a new trial upon the ground of insufficiency of the evidence to sustain the verdict. This appeal is from the order granting a new trial.

The collision occurred about 8 o'clock in the evening of June 4, 1926, on a straight stretch of the state highway, which runs north and south through level land, about 2 miles north of Maxwell, Colusa county. Shortly before the collision a patch had been placed in the east side of the pavement, and immediately south thereof there was a barrier across the east edge of the pavement, consisting of a 2 by 12 board 10 feet in length, supported by sawhorses. The west end of the board extended 4 feet over the pavement. Lanterns having red globes were placed on the pavement and the ground at the ends of the barricade. The defendant was driving north in a Buick automobile while the deceased was going south in a Ford roadster. The defendant's automobile struck and demolished the barricade and then swerved to the left and, continuing in a northerly course, collided with the Ford roadster between 50 and 100 feet north of the barricade. When the defendant's automobile came to a standstill, the left front wheel thereof was west of the west edge of the pavement and the roadster was 15 feet or more further west; the deceased lying near it unconscious.

There is testimony that the lanterns at the ends of the barricade were lighted at 5 o'clock in the evening; that they were still lighted at 6 o'clock; and that shortly after the collision the lanterns, which had been broken in the collision, were still warm. The board constituting the barrier had been painted white, but there is evidence that it had become a "dirty grayish white"; that "it was very hard to see." The defendant testified that he did not see the barrier before his automobile collided with it and that he saw no lights at the ends thereof. His wife testified that she was riding in the front seat of the Buick, watching the road ahead carefully, and that she did not see the barrier until the collision therewith. She testified positively that there were no lights at the barrier. The headlights of both automobiles were burning, and both appear to have been traveling at a speed of between 30 and 35 miles an hour.

[1-4] It is clear from the foregoing facts that it was a question of fact for the jury whether the lanterns at the barricade were lighted at the time of the collision. If they were lighted it was a question of fact for the jury to determine whether the defendant was guilty of negligence in failing to see them. If they were not lighted, still it was a question of fact for the jury whether the defendant was negligent in failing to see the barricade in time to avoid a collision therewith. The rule of law applicable to the facts is so well settled that it is deemed sufficient to cite a few of the numerous decisions bearing upon the question. Hoy v. Tornich, 199 Cal. 545, 250 P. 565; Gonzales v. Davis, 197 Cal. 256, 240 P. 16; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Haines v. Fewkes, 190 Cal. 477, 213 P. 490; McManus v. Arnold Taxi Corp., 82 Cal. App. 215, 255 P. 755; Duggan v. Forderer, 79 Cal. App. 339, 249 P. 533; Carnahan v. Motor Transit Co., 65 Cal. App. 402, 224 P. 143; Haynes v. Doxie, 52 Cal. App. 133, 198 P. 39. If the defendant was guilty of negligence in colliding with the barricade, such negligence was the proximate cause of the collision with the Ford roadster, even though the defendant completely lost control of his automobile by the first collision. "A primary cause may be the proximate cause though it operates through successive instrumentalities." 19 Cal. Jur. 559. Under the decisions cited, however, it cannot be held as a matter of law that the defendant was guilty of negligence. "If there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or finding is against the weight of the evidence and that there should be a new trial." Buck v. Borchers (Cal. Sup.) 263 P. 226.

The order is affirmed.

We concur: ROLFE L. THOMPSON, J.; PLUMMER, J.

97 Cal. App. 171

LIBERMAN v. McDONNELL et al.★

(Civ. 6692.)

District Court of Appeal, First District, Division 1, California. Feb. 25, 1929.

Rehearing Denied March 20, 1929.

1. Brokers ⚷31—Stockbroker, selling principal's stock on floor of exchange as principal in accordance with rules and customs, held not purchaser from principal.

Rule and custom of stockholders, members of New York Curb market, of dealing with one another on the floor of the exchange as principals, did not affect broker's relationship with principal for whom he was selling stock and did not constitute broker a purchaser from such principal.

2. Brokers ⚷22—Stockbroker is required to exercise reasonable care and diligence.

Stockbroker is bound to exercise reasonable care and diligence in transactions in which he is employed.

3. Brokers ⚷37—Evidence, in action against stockbrokers for price of stock sold to purchaser who failed before price was paid, held not to support action on account stated.

In action against stockbrokers for price of stock sold by brokers on New York Curb market to concern which failed before purchase price was paid, in which it was claimed that the brokers by selling stock as principal became purchaser thereof from plaintiff, evidence not showing sale to brokers was intended, or that promise to pay on receipt of indorsed certificate was unconditional, *held* insufficient to support an action upon an account stated.

4. Brokers ⚷37—Evidence, in action against stockbrokers for price of stock sold to purchaser failing before purchase price was paid, held not to support action for money had and received.

In action against stockbrokers for price of stock sold by brokers on New York Curb market to concern which failed before purchase price was paid, in which it was claimed that the brokers by selling stock as principal became purchaser thereof from plaintiff, evidence not showing that sale to brokers was intended, or that promise to pay on receipt of indorsed certificate was unconditional, *held* not to support action for money had and received.

Appeal from Superior Court, City and County of San Francisco; John L. Hudner, Judge.

Action by M. Liberman against James McDonnell and others. Judgment for plaintiff, and defendants appeal. Reversed.

Richard C. Harrison, Sydney Schlesinger, and Sloss & Ackerman, all of San Francisco, for appellants.

Harry K. Wolff, of San Francisco, for respondent.

PER CURIAM. An action to recover the price agreed to be paid for 200 shares of the stock of the Southern States Oil Company, a corporation, which were sold by defendants on the New York Curb market.

The defendants, namely, James F. McDonnell, Hubert McDonnell, Robert E. McDonnell, Harold L. Mack, Robert M. Ridley, Gilbert W. Cullen, and W. P. O'Connor, are copartners doing a stockbrokerage business under the name of McDonnell & Co., with offices in San Francisco and New York; the firm being an associate member of the New York Curb market. According to a stipulation filed by the parties in which it was agreed that all the facts and documents set forth therein were true and should be considered in evidence for all purposes, the plaintiff on December 14, 1923, signed and delivered to defendants in San Francisco an order the material parts of which are as follows: "Sell for my account and risk, subject to the rules of the Exchange where executed, open stop 221 Southern States Oil 25, a/c M. Liberman. Good only for the above date unless otherwise specified." On the above date and for a few days thereafter the stock of said oil company was listed upon the Curb market mentioned and was bought and sold therein. On December 20th in San Francisco the plaintiff signed and delivered to the defendants a second order in the same form but canceling the above and directing the stock to be sold when and if the market price of the same fell to $30 per share. Each of the above orders was an open stop order directing the stock—which on the date thereof was quoted above the selling price mentioned therein—to be sold in the event and as soon as the market declined to that price. On December 21, 1923, the plaintiff at 8:14 o'clock a. m. San Francisco time instructed the defendants to cancel the second order and to sell the 221 shares at the market price. At 8:15 o'clock a. m. on the same date San Francisco time the defendants by telegraph directed their New York office to sell the stock in accordance with the plaintiff's instructions. The shares were on the same day offered for sale in the name of McDonnell & Co. upon the floor of the New York Curb market to the highest bidder. Within a few minutes thereafter defendants on the floor of the market received from the firm of Richards & Hutchinson Company, members of the market, an offer to buy 200 of said shares at $32 per share, and from the firm of Warrick & Brady, also members, an offer to buy the remaining 21 shares at $31.75 per share, both of which offers defendants accepted. The San Francisco office of the defendants at 8:23 o'clock a. m. of the same day, San Francisco time, received advices by telegraph of the above sales with the prices for which the stock had been sold, and immediately informed the plaintiff of the facts by telephone. They also on the same day mailed

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★Rehearing denied.

to the plaintiff a communication in writing, which he received on December 22, 1923, of which the following is a copy:

"San Francisco, December 21, 1923.

"Mr. M. Liberman, 122 Georgia street, Vallejo, Calif.

"In accordance with your instructions we have this day sold for your account and risk

Quantity	Security	Broker
21	So. States Oil	Name on request
200	So. States Oil	

Price	Tax or Int.	Commission	Amount
31¾	.12	3.15	$ 663.48
32	.80	30.00	$6,369.20

"All orders for the purchase and sale of any article are received and executed with the distinct understanding that actual delivery is contemplated, and that the party giving the order so understands and agrees.

"It is further understood that on all accounts the right is reserved to close transactions without notice when protection is exhausted or so nearly so in our judgment as to endanger the account, and to settle contracts in accordance with the rules and regulations of the Exchange where orders are executed.—Memorandum only. E. & O. E.

"If not correct advise at once.

"Respectfully,

"McDonnell & Co., per———."

On the day he received the above telephonic communication the plaintiff mailed to the defendants four temporary certificates representing the 221 shares mentioned, two being for 100 shares each and two representing 10 and 11 shares respectively, each indorsed by the plaintiff in blank. With the same was inclosed the following letter:

"Gentlemen:

"I am herewith inclosing 221 shares Southern States Oil which you have sold for me today. These shares are properly indorsed by me and you may mail me check for same as soon as convenient.

"Thanking you for your prompt and good service, and wishing you the season's greetings,

"Very truly yours, Meyer Liberman."

The certificates were received by the defendants in San Francisco on December 22, 1923, and on the same day were forwarded by registered mail to their New York office, where they arrived on December 27, 1923. On December 26, 1923, at 10 o'clock a. m., New York time, at the opening of the regular session of the New York Curb market, all trading in the stock of the Southern States Oil Company was by the governors of the market suspended, and at 11 o'clock a. m. on the same day the firm of Richards & Hutchinson Company, having announced its inability to meet its obligations, was suspended from membership therein. These facts were on the same day communicated by telegraph to defendants' San Francisco office, and the plaintiff was by telephone immediately advised thereof. On that day the defendants also mailed to the plaintiff the following letter, by mistake dated December 20, 1923, which he received on December 27, 1923:

"Dear Sir: On December 21st we notified you that we had sold for your account and risk 200 shares Southern States Oil at 32. On December 22nd you delivered to us against this sale certificates Nos. 2468 and B5410 for 100 shares each, which we in turn forwarded to New York in order to make delivery to the broker to whom they were sold for your account. We are notified by our New York office this morning that trading has been suspended in this stock, and that Richards and Hutchinson, the house to whom we sold your 200 shares ctfs. Nos. 2468 and B5410, had failed this morning. The certificates which you delivered to us on December 22nd were forwarded to New York the same day. We cannot pay the proceeds from the same until delivery has been accepted by the broker to whom sold, thereby consummating the sale. In this case the broker to whom the stock was sold failed before the stock which you delivered to us on December 22nd could be delivered to him in New York, and consequently we have had to cancel the notification of sale sent to you on December 21st. The above 200 shares will be returned to you when returned to us from New York.

"Yours very truly, McDonnell & Co."

In reply the defendants were notified that the plaintiff refused to accept a return of the certificates, and, according to the stipulation, the same are now at the San Francisco office of the defendants.

It appears that the selling price of the 21 shares sold to Warwick & Brady was duly collected from defendants and paid to the plaintiff. This item is not involved in the controversy.

The concluding paragraph of the stipulation, which was dated October 30, 1925, is as follows: "There has been no trading in Southern States Oil on the New York Curb since December 26, 1923. From time to time since that date at other places in the city of New York shares of such stock have been dealt in at various prices, the highest price at which during such period such shares were sold having been $12.00 per share, and the lowest price at which during such period such shares were sold having been 37½ cents per share. The price at which shares were sold most recently was 37½ cents per share. There is at present no market for such shares."

The claim of the plaintiff to recover the selling price of the stock from the defendants is set forth in his complaint in three separate counts, namely, an account for money had and received to plaintiff's use, another for the agreed price of goods sold and delivered, and the third upon an account stated. The court found for the plaintiff and entered its judgment accordingly.

Defendants as grounds for reversal contend that the findings are unsupported.

The findings here material are the following:

"7. On the 14th day of December, 1923, plaintiff, having had some previous transactions with defendants at their San Francisco office, entered into an agreement with defendants by telephone to sell for him for cash 221 shares of Southern States Oil upon condition that he was to receive full payment therefor, either by cash or cash credit upon their books, immediately upon indorsement and delivery of certificate at their San Francisco office. This arrangement was agreed to by defendants.

"8. That all the conversations, dealings and transactions with the defendants so far as the sale of Southern States Oil stock was concerned were had between the plaintiff herein and one Roy J. Malfanti, a duly authorized employee and representative of defendants.

"9. That on December 21, 1923, the defendants, through their duly authorized agent and representative, notified plaintiff by telephone from San Francisco to Vallejo, California, that said plaintiff's 221 shares of Southern States Oil had been sold by defendants for the sum of $7,032.68, and requested plaintiff to immediately bring or send in the indorsed certificate, and stated that defendants would immediately upon receipt of same at their San Francisco office pay plaintiff in cash the full sale price thereof or give him cash credit for said amount upon the books of defendants. This arrangement was agreed to and accepted by him.

"10. That all papers and documents signed between the parties and introduced in evidence were merely executed as forms with the intent and object of all the parties of carrying out and performing the terms of the oral arrangements made between the parties on December 14, 1923, as set forth in finding 7 hereof, and confirmed by the arrangements of December 21, 1923, as set forth in finding 9 hereof."

It was further found that defendants inserted the firm's name above the indorsement of the defendant upon the certificates, sold the stock as theirs and not as the agent, representative, or broker of the plaintiff; that the stock was purchased by the defendants as their own property, and an unconditional credit for the purchase price thereof given to plaintiff on their books. The court also found that it had been the custom and practice of defendants in dealing with their customers to pay the latter the sale price of stock sold immediately upon notification of the sale and the delivery to them at San Francisco of the certificates therefor indorsed in blank; also, that the defendants sent to the plaintiff a statement in December, 1923, showing a cash balance in his favor of the selling price of the stock, which he accepted as correct; and that although he was notified on December 26, 1923, that the account had been debited with the amount representing the selling price of the 200 shares, namely, $6,369.20, such action was without his consent.

Contrary to what might be implied from the language of finding No. 7, the evidence shows without dispute that no stock had been sold by defendants for the plaintiff previous to the transaction in question; their only dealings having been purchases for his account. While the testimony of the latter supports the finding that an oral authorization for the sale of the stock was made by telephone on December 14, 1923, the stipulation shows that on the same day the plaintiff signed a written authorization to sell under conditions stated for his account and risk, which is set forth above, this being followed by a second writing of the same tenor on December 20th and a telephonic authorization on December 21st to sell at the market. Moreover, the record contains no evidence reasonably supporting finding 10, that all papers and documents signed by the parties were forms merely. On the contrary, it is evident from the care taken by the parties to reduce their agreements and instructions to writing where time permitted that the same were intended to have their normal legal weight and effect. The evidence shows that defendants in two subsequent transactions paid the selling price of certain stock sold for the plaintiff upon delivery to them of the indorsed certificates therefor; and it was testified by two witnesses called by the plaintiff that the same course was followed in transactions had by them with other brokers, and also that such was the custom. Defendants denied that it was customary to make such payments, and testified that the practice was to pay the principal only after collection of the selling price unless he had a credit balance with the broker. While the court from this evidence found that such had been the custom and practice of the defendants, the question was not in issue in the action; no payment having been made by the brokers. That an entry was made upon the books of the defendants by which the plaintiff was credited with the selling price of the shares is admitted, but, as stated, defendants were notified from their New York office two days thereafter and before the indorsed certificates reached New York that the buyer had failed, following which a counter or debit entry of the amount was made and the plaintiff immediately advised of the facts.

[1] In connection with the finding that de-

fendants inserted the firm name above that of the plaintiff after the latter had indorsed the certificates, and that the sale on the Curb market was made in the firm name, not only was the sale made before the indorsement, but by agreement it was to be made subject to the rules and regulations of the exchange. Undisputed evidence shows that according to these rules members deal with one another as principals, and such is the general rule among brokers in transactions on the floor of the exchange, their principals not being disclosed. Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Banta v. City of Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611; Northrup v. Shook, Fed. Cas. No. 10,329, 10 Blatchf. 243; 2 Dos Passos Stockbrokers and Stock Exchanges (2d Ed.) p. 749 et seq.; 8 Harvard Law Review, p. 435, "A Simple Purchase and Sale Through a Stockbroker," by Lloyd Norton; 9 Corp. Jur. p. 511, Brokers, § 12. This, however, does not change the relation between the broker and his principal. As to the latter he is still an agent (Hadfield v. Tracy, 101 Conn. 118, 125 A. 199, 34 A. L. R. 581; Tuckerman v. Mearns, 49 App. D. C. 153, 262 F. 607), and the effect of the above rule or custom, which was designed to facilitate the business of the exchange, is not to constitute the broker a purchaser from his principal.

[2] In the present case each order signed by the plaintiff directed the sale to be made for his account and risk; and after the sale on the exchange had been made, but before the certificates had been indorsed or delivered, he was notified in writing that the contract of sale had been so made. To this he expressed no dissent, and in his letter of December 21, 1923, set forth above, with which was inclosed the indorsed certificates, appears the following: "I am herewith inclosing 221 shares of Southern States Oil which you have sold for me to-day." It was not until after the failure of the purchasers and a sharp decline in the market price of the stock that a claim or suggestion was made that the same had been purchased by the defendants; this contention, as stated above, being based upon the promise by defendants' employé that immediately upon the indorsement and delivery of the certificates the plaintiff should be credited with the selling price or a check mailed for the amount, and the fact that a credit entry was so made on their books. The promise and the credit entry were manifestly made upon the assumption that the purchaser would perform; and while a broker is bound to exercise reasonable care and diligence in transactions in which he is employed, it is not claimed that defendants were wanting in these respects or that the plaintiff, in reliance either upon the promise or the book entry, in any way changed his position.

[3, 4] The evidence was insufficient to support an action either upon an account stated or for money had and received. Moreover, neither the stipulation nor the testimony discloses any facts which reasonably justified the conclusion that there was a sale of the stock to the defendants, that the promise to make the credit entry or to send a check for the amount of the selling price upon receipt of the indorsed certificates or a credit entry subsequently made was intended or understood as an unconditional promise to pay, or as an acknowledgment of an obligation not dependent upon performance by the firm of Richards & Hutchinson Company.

After an examination of the entire record, including the evidence, we are of the opinion that the conclusions of the trial court cannot be sustained and that the result was a miscarriage of justice.

The judgment is accordingly reversed.

97 Cal. App. 228

PEOPLE v. LOVELACE. (Cr. 1758.) ★

District Court of Appeal, Second District, Division 1, California. Feb. 26, 1929.

Rehearing Denied March 11, 1929. Hearing Denied by Supreme Court March 28, 1929.

1. Statutes 🔑241(1)—Words of statute, unless used in particular sense, should be interpreted in accord with usual, natural, or ordinary meaning (Pen. Code, § 4).

Unless it appears that words used in statute have been used in a particular sense, they should be given an interpretation in accord with the usual, natural, and ordinary meaning attributed to them, in accordance with provisions of Pen. Code, § 4, providing for construction of statutory provisions according to fair import of their terms, with a view to effect its objects and promote justice.

2. Criminal law 🔑982—Refusal to consider application for probation, after plea of guilty to involuntary manslaughter, held erroneous; "perpetrate;" "inflicted" (Pen. Code, §§ 188, 192, and § 1203, as amended by St. 1927, p. 1493).

Refusal to consider application for probation, under Pen. Code, § 1203, as amended by St. 1927, p. 1493, after plea of guilty to the crime of involuntary manslaughter, *held* erroneous, in that involuntary manslaughter, as defined under section 192, is the unlawful killing of a human being, without malice, and malice in accordance with section 188 may be express or implied, while "perpetrate," as used in section 1203 in accordance with ordinary meaning, requires acting consciously, or with intent as a wicked deed, and "inflicted" requires mutual intent to cause distress or suffering; to impose as a penalty or punishment.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Inflict; Infliction; First and Second Series, Perpetrate.]

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

★Rehearing denied. Hearing denied by Supreme Court.

Malcolm Lovelace was convicted of involuntary manslaughter, and from a judgment refusing to consider an application for probation, and denying probation, he appeals. Reversed, with directions.

Frederic H. Vercoe, Public Defender, and Franklin Padan, Chief Deputy Public Defender, both of Los Angeles.

U. S. Webb, Atty. Gen., and Alberta Belford, of Los Angeles, for the People.

HOUSER, J. Defendant pleaded guilty to the crime of involuntary manslaughter. Although defendant was granted leave to file an application for probation, the trial court refused to consider it, and denied probation to defendant on the sole ground that, under the provisions of section 1203 of the Penal Code, as amended by St. 1927, p. 1493, the trial court had no power or authority to grant probation to "one who in the perpetration of the crime inflicted great bodily injury." The appeal is from the judgment, and the ultimate point raised by appellant is that the alleged error of the trial court in refusing to consider the application of defendant for probation on the ground specified was prejudicial to his substantial rights in the premises. People v. Jones (Cal. App.) 262 P. 361.

That part of section 1203 of the Penal Code, upon which reliance was placed by the trial court, and which is here urged as authority to sustain its refusal to consider the application of defendant for probation, is as follows: "Probation shall not be granted to any defendant who at the time of the perpetration of the crime or at the time of his arrest was armed with a deadly weapon (unless at the time he had a lawful right to carry the same), nor to one who used or attempted to use a deadly weapon in connection with the perpetration of the crime, *nor to one who in the perpetration of the crime inflicted great bodily injury or torture.* * * *"

So far as is here concerned, the words of the statute which require construction are "perpetration" and "inflicted." It is apparent that if such words are to be taken in the sense that the first signifies the simple *commission* of an act which by the statute constitutes a crime, and that the second merely means that by reason of such act "great bodily injury" *resulted*, no criminal act (either malum in se or malum prohibitum, however insignificant the latter, or however lacking in either actual or presumed criminal intent on the part of the guilty person), which, even as against the express or implied will, or the manifest *contrary conduct*, of such person at the time of the commission thereof, results in "great bodily injury" to any person whomsoever—may be the subject upon which that portion of the probation law here under consideration, as expressed in section 1203 of the Penal Code, may lawfully operate.

[1, 2] A familiar rule of construction of statutes is that, unless it appear that words therein have been used in a particular sense, they should be given an interpretation which will accord with the usual, natural, or ordinary meaning attributed to them. Moreover, section 4 of the Penal Code contains the provision that all the statutory provisions of the Penal Code "are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." But, aside from what may be the generally accepted significance of the particular words in question, it may be noted that the dictionary definition of the word "perpetrate" includes the thought that it is used "commonly in a bad sense; as to perpetrate a crime" (Webster's New International Dictionary); or, as stated in Funk and Wagnall's New Standard Dictionary, the word is "now used *only in a bad sense*; to be guilty of; commit as a wicked deed"; from which it would appear that in the "perpetration of the crime," as designated by section 1203 of the Penal Code, the guilty person necessarily must have acted, consciously or with a guilty intent to "commit (the act) as a wicked deed," or with gross carelessness or recklessness. Such, also, is the common or ordinary acceptation of the word "perpetrate." No one would think of using it in connection with the doing of a kindly, a gracious, or a just act. A man may *perpetrate* a fraud upon another; but it would seem incongruous that in a suit in equity to redress the wrong a judge would "*perpetrate*" a just judgment. If on a crowded street or sidewalk two boys should be tossing a baseball one to the other, or engaged in what is commonly known as "playing catch," and if, while so engaged, one of the boys should make a "bad throw" and the other fail to catch the ball, with the result that the ball should come in contact with the head of an infant in the arms of its mother with such force as to kill the child, although by reason of the failure on the part of the boys "to use due care and circumspection" (section 192, Pen. Code), they might be charged with the offense of manslaughter, would it be a correct use of English to speak of the incident as the "*perpetration*" of a crime, or to say that "great bodily injury had been *inflicted*"? Illustrations might be multiplied by which it might be shown that from pure accident or from a lack of "due care and circumspection" the crime of manslaughter might be "perpetrated," by reason of which "great bodily injury" might be "inflicted," but in the "perpetration" of which no actual intent would be present to commit either manslaughter or any other crime.

Although possibly by neither the popular nor the dictionary definition of the word "inflicted" does it necessarily follow that the meaning to be conveyed is that an actual intent must be in operation to impose a blow of any sort, or to cause distress or suffering, nevertheless in Webster's New International Dictionary one of the meanings ascribed to the word is "to impose, as a penalty or punishment." On consideration of the history of the probation law in question (section 1203, Pen. Code), it will be found that the original probationary benefits ordinarily available to one who committed a crime were denied in cases only of "murder, robbery, burglary, or rape by force and violence," and that the language by which the denial of the right of probation in such cases was indicated was strikingly similar to that employed in the present statute—the language in the original statute refusing probation being "where, in the *perpetration* of any such crimes, great bodily injury or torture is *inflicted.*" It is obvious that in committing the crime of murder, as distinguished from other crimes where homicide results, "great bodily injury * * * is inflicted" "with *malice* [or intent] aforethought." Section 187, Pen. Code. It is common knowledge that in the commission of either robbery, burglary, or rape, for a failure on the part of the victim of such crime to comply instantly with the demands of the perpetrator thereof, "great bodily injury" is likely to be administered as a penalty or punishment, which act manifestly is willful and intentional on the part of the guilty person and readily suggests the reason for the denial of probation in such a case. The infliction of the "penalty or punishment" upon the victim by the perpetrator of either of such crimes cannot be attributed to chance, accident, or misfortune, but legally must be imputed to deliberate design or intent.

So far as relates to the question here under consideration, as between the statute as originally enacted and as it now appears, in substance, literally the only difference is that formerly it applied to certain *specified* crimes of violence only, whereas in the present statute its provisions apply to "*any*" crime, from which fact the inference may be deduced that in the enactment of the new statute the identical considerations were present in the minds of the legislators which were so apparent and outstanding in the original statute there appearing as a basic reason for denial to the violator of the law of even the possible benefits of the statutory provisions relating to probation. The purpose of that portion of the probation law as it now exists and here under consideration is obvious; that is, to preclude or prevent the exercise of probationary discretion in cases involving *willful* and *intentional* wrong, and to expand the former statute so as to now include therein offenses which, in the wicked "perpetration" thereof "great bodily injury" is intentionally "inflicted." A consultation of the index of felonies appearing in the Penal Code discloses the fact that, in addition to those specified in the statute as originally enacted, to wit, "murder, robbery, burglary, or rape by force and violence," there are at least thirty other crimes in the "perpetration" of which "great bodily injury" is likely to be "inflicted." Moreover, in the "perpetration" of each of such additional crimes, malice or an implied or specific intent to commit it is necessarily present. The mention of some of them will illustrate the point: Abduction; arson; malicious burning of property; assault with a deadly weapon; assault with caustic chemicals; enticing away child; administering stupefying drugs; false imprisonment; extortion; kidnaping; mayhem; administering poison with intent to kill; engaging in or aiding prize fights. On the other hand, in the "perpetration" of crimes amounting to *felonies* arising from the operation of motor vehicles and in which "great bodily injury" is likely to be "inflicted" the actual resulting injury is, almost, if not quite, universally of an accidental nature, and without any direct intent that it shall happen. Section 141 of the California Vehicle Act (Stats. 1923, p. 517) provides in substance that:

"The driver of any vehicle which strikes any person or collides with any other vehicle shall immediately stop and give his name and address and the names and addresses of all passengers not exceeding five in his vehicle, also the registration number of his vehicle, to the person struck or the occupants of the vehicle collided with, and shall also render to such persons all necessary assistance, including the carrying of such persons to a physician or surgeon for medical or surgical treatment, if such treatment is required, or if such carrying is requested by the person struck or any occupant of such vehicle collided with. Any person violating any of the provisions of this section is punishable by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year. * * *"

It is undeniable that daily within this state dozens of automobile accidents occur in which "great bodily injury" is "inflicted." Can it be true that in the enactment of the statute in question it was the intention of the Legislature to include within its purview all misdemeanors or felonies which are thus "perpetrated"? We think not.

In the case of The Queen v. Clarence, 22 Queen's Bench Div. 23, it was held (by illustration) that if a man by a grasp of the hand should infect another with smallpox it would be "an unnatural use of language to say that a man by such an act 'inflicted' smallpox upon the other." It was also held in the same case that knowingly suffering from a venereal disease and yet having connection with and imparting the disease to one of the opposite sex who is ignorant that the embracer is so suffering is not to "inflict grievous bodily harm," as coming within the purview of the statute prohibiting the same. The point in the case, as expressed in one of the opinions therein, is that in the *infliction* of anything by one person upon another the element of *intent* must be present. And so in Jefferson Standard L. I. Co. v. Myers (Tex. Com. App.

1926) 284 S. W. 216, where the authorities are cited, in principle it is ruled that an insane person is incapable of *inflicting* an injury; that the word involves *an exercise of the will*; *something done voluntarily*; and necessarily implies *intention.* To the same effect is Accident Insurance Co. v. Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. Ed. 740, and Kortendick v. Town of Waterford (1910) 142 Wis. 413, 125 N. W. 945, where, among other things, the court said: "The criticism to this language is that the word 'infliction' denotes and implies *actual wrong.*"

For the purpose of considering the eligibility of the defendant in the instant case to probation, it will be remembered that he pleaded guilty to the crime of *involuntary* manslaughter. By section 192 of the Penal Code manslaughter is defined as "the unlawful killing of a human being, *without malice,* * * * without due caution and circumspection," and section 188 of the Penal Code declares that "malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

In People v. Kelley, 24 Cal. App. 54, 140 P. 302, among other things, it is said: "Involuntary manslaughter, *as the phrase necessarily imports* and as our code defines that crime, is the taking of life in certain unlawful ways without any intention of doing so." And the same ruling is inferable from each of the following cases: People v. Sidwell, 29 Cal. App. 12, 18, 19, 154 P. 290; People v. Searle, 33 Cal. App. 228, 231, 164 P. 819; People v. Pearne, 118 Cal. 154, 157, 50 P. 376.

It may, therefore, be considered as established by judicial decision, as well as by statute, that in cases of involuntary manslaughter (especially where, as here, the crime was committed "without due care and circumspection") no intention to commit the act *may be even imputed* to the guilty person—from which, in the instant matter as presented to the trial court, it is manifest that the fact that in the commission (or "perpetration") by defendant of the crime of involuntary manslaughter, "great bodily injury" was suffered by the victim does not in and of itself warrant or admit of a legal or other presumption or conclusion that the killing was intentional or willful. It follows that within the meaning of the statute in question one who in the perpetration of a crime inflicts great bodily injury must do so willfully and intentionally (expressly or impliedly) before the substantial rights relating to probation, to which, under the terms of the statute, he is entitled, will be denied him.

The judgment is reversed, with directions to the trial court to rearraign defendant for judgment, and thereupon and in accordance with law to hear and determine on its merits the application of defendant for probation, and thereafter to proceed in the premises as it may be advised.

We concur: CONREY, P. J.; YORK, J.

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97 Cal. App. 106

CASE v. SISICH et al. (Civ. 6537.)★

District Court of Appeal, First District, Division 1, California. Feb. 20, 1929.

Rehearing Denied March 22, 1929. Hearing Denied by Supreme Court April 18, 1929.

1. Adjoining landowners 🔑9(2)—Complaint to remove encroachments caused by bay windows, cornices, etc., on defendant's building projecting over plaintiff's property stated cause of action for abatement of nuisance (Civ. Code, § 3479; Code Civ. Proc. § 731).

Allegations that plaintiff owned adjoining lots to defendant's, and that bay windows, cornices, finish, and extensions on defendant's building projected over plaintiff's property, and that such projections were not a part of the foundation of defendant's building and could be easily removed at a cost of not exceeding $250, *held* to state a cause of action as against demurrer for abatement of nuisance, under Civ. Code, § 3479, and Code Civ. Proc. § 731.

2. Adjoining landowners 🔑9(1)—Encroachment upon space above land is a nuisance.

Where the encroachment is not upon the land but upon the space above the land, while not a trespass, it is a nuisance.

3. Adjoining landowners 🔑9(2)—Plaintiff's right to abate nuisance caused by projections from defendant's building on adjoining property held not defeated because plaintiff could not build on his own lot (State Housing Act of 1923, as amended by St. 1925, p. 477).

Plaintiff's right to maintain action to abate nuisance from encroachment because parts of defendant's building projected over plaintiff's property *held* not defeated because under State Housing Act of 1923 (St. 1923, p. 781), as amended in 1925 (St. 1925, p. 477), plaintiff had not shown that he had applied for and secured a permit to build on his property.

4. Pleading 🔑214(1)—Demurrer admits truth of allegations of complaint.

Demurrer admits truth of allegations of complaint.

5. Adjoining landowners 🔑9(2)—Courts will not decree removal of encroachment not removable without considerable expense, where there is no direct evidence of actual damage.

Courts will not decree removal of encroachment where there is no direct evidence of actual damage, and encroachment complained of merely encroaches upon plaintiff's land a fraction of an inch, and where the expense of removal will far exceed the damage caused, but court will award damage instead.

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Clay Case against John Sisich and others. From the judgment, plaintiff appeals. Reversed, with directions.

Alfred Voyce and Sawyer & Sawyer, all of San Francisco, for appellant.

R. H. Countryman, of San Francisco, for respondents.

CAMPBELL, Justice pro tem. This is an appeal by plaintiff from a judgment entered in favor of defendant Sisich resulting from an order sustaining a demurrer to plaintiff's second amended complaint without leave to amend.

The action is to remove a building encroachment upon the property of plaintiff alleged to be a nuisance. According to the complaint, plaintiff and defendant are owners of adjoining properties, and defendant's property is improved with a building, the bay windows, cornices, finish, and extensions of which overhang and thereby encroach upon and overlap into the space above plaintiff's land. The ownership by plaintiff and defendant of their respective adjoining parcels of land is set forth in paragraphs I and II of the complaint; defendant's land being a lot 30 feet by 97 feet and 6 inches facing on Sacramento street between Jones and Leavenworth streets in the city of San Francisco, while plaintiff's land is a lot L-shaped at the rear of and adjoining defendant's land and being 40 feet by 53 feet 3 inches on its northerly line and 67 feet 6 inches on its southerly line, together with a strip of land 97 feet and 6 inches long and 8 feet and 9 inches wide lying west of and adjoining the west line of defendant's land and connecting this interior lot of plaintiff with Sacramento street. Plaintiff then in paragraphs IV, V, and VI proceeds to allege the character and extent of the encroachment as follows:

"IV. That said real property of defendants, as aforesaid, is immediately adjoining on the east, plaintiff's said land fronting on the said southerly line of Sacramento Street, and at all the times herein there has been erected and now is erected and standing upon defendants' said land a three story wooden frame building about forty-five feet in height, which said building at all the times herein has had and still has on and in the west sidewall thereof, and as a part of its structure immediately adjoining plaintiff's said real property on the east as alleged herein twelve (12) westerly outwardly projecting bay windows, projecting westerly and outwardly three (3) feet and six (6) inches, the base of the lowest of which is about nine (9) feet higher than the top surface of the foundation land of said building, all of which bay windows, from the base of the lowest up to and including the roof of said defendants' building, and all cornices, finish and extensions attached thereto, daily and continuously overhang above and thereby encroach upon and overlap into the space above plaintiff's said land and property, immediately adjoining on the east, 18½ inches westerly beyond the true and correct easterly boundary line of plaintiff's said property. Said encroachment is not a part of the foundation of defendants' said building and can be easily removed, and as plaintiff is informed and believes and therefore alleges all of said encroachment can be removed at a total cost and expense of $250.00.

"V. Plaintiff is in the course of improving his entire said property by the construction of a steel frame and concrete 12-story first-class house thereon, thereby enhancing and increasing the market and rental value, use, possession and occupation of his entire said property, and said daily and continuous overhanging above, encroachment upon and overlapping as herein alleged at all of said times has rendered and still does now, and if permitted to remain, will at all times in the future render said property dangerous and unsafe for said use and said purposes, and thereby has obstructed and still does now obstruct, and if permitted to remain will at all times in the future continue to obstruct the free use, occupation and possession, together with the safe and comfortable enjoyment by said plaintiff of all of said plaintiff's property as alleged herein and is preventing and delaying plaintiff in the construction of his said building on said land, all without right and against the wish, will and desire of said plaintiff.

"VI. Said overhanging above, encroachment and overlapping upon plaintiff's said property, as alleged herein, is a nuisance and injuriously affecting plaintiff's said property and the market and rental value, use, possession and occupation of plaintiff's said property by the plaintiff in the further improvements thereon as herein alleged, all to his financial damage and loss in many thousands of dollars. Said nuisance is daily and continuous, and if permitted to exist will effectually destroy the entire value of plaintiff's property, its use, possession and occupation and cause the plaintiff to suffer irreparable loss and damage, for which there is no plain, speedy and/or adequate remedy at law, to the plaintiff."

Defendant Sisich demurred, specifying as the grounds of demurrer that the second amended complaint does not state facts sufficient to constitute a cause of action, assigning fifty-three grounds of demurrer for uncertainty, urging that the second amended complaint is ambiguous in all these fifty-three particulars wherein it is specified as uncertain, and that it is unintelligible for the same fifty-three reasons. As the demurrer was sustained without leave to amend and the argument is directed principally to the question raised by the general demurrer, we will direct our discussion to such question.

[1] Briefly stated, the complaint alleges that plaintiff owns a lot adjoining and at the rear of the lot of defendant Sisich, together with a strip of land 8 feet and 9 inches in width connecting this lot with Sacramento street; that the bay windows, cornices, finish, and extensions on defendant Sisich's building project out 9 feet above the ground over this strip of land a distance of 18½ inches from defendant Sisich's property line, and is not a part of the foundation of defendant Sisich's building, and can be easily removed and at a cost of not exceeding $250. Admitting these facts to be true, as we must as against the demurrer, it would seem that a cause of action is stated.

[2] This court held in Agmar v. Solomon (Cal. App.) 261 P. 1029, in which case a rehearing was denied by the Supreme Court, that a mandatory injunction will issue against the maintenance by a landowner of an encroachment on the land of an adjoining owner to compel the removal of such encroachment, and, further quoting from Felsenthal v. Warring, 40 Cal. App. 119, 120, 180 P. 67, 71, that "to justify the issuance of an injunction there must be substantial injury. Substantial 'injury,' however, does not necessarily involve substantial 'damage.' The rule that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can be heard to say that he is injured by being prevented from doing to the hurt of another that which he has no right to do." The same principle is applicable to a nuisance. The encroachment, which is admitted for the purpose of the demurrer, is a nuisance. Civ. Code, § 3479; Code Civ. Proc. § 731; Meyer v. Metzler, 51 Cal. 142; Stallard v. Cushing, 76 Cal. 472, 18 P. 427. Where the encroachment is not upon the land but upon the space above the land, while not a trespass, it is a nuisance. Kafka v. Bozio, 191 Cal. 746, 218 P. 753, 29 A. L. R. 833.

[3] In support of the judgment, respondent Sisich contends that, under the State Housing Act of 1923 (St. 1923, p. 781), as amended in 1925 (St. 1925, p. 477), plaintiff could not build upon his lot without a permit from the board of works, and that a building such as it is alleged plaintiff contemplates constructing on his lot cannot be so constructed without violating the provisions of the State Housing Act. Granting this to be true, it does not in any manner excuse defendant Sisich from the penalty of maintaining a nuisance nor prevent plaintiff from having the encroachments complained of removed, which he could do whether or not any building was in the course of construction on his premises. It would seem that respondent's theory is that, before plaintiff may bring an action to abate the alleged nuisance, he must show that he has applied for and secured a permit to build. In other words, respondent's right to maintain a nuisance depends on the success or failure of appellant in obtaining a permit from the board of works.

So far as plaintiff's right to have the encroachments complained of removed, it is inmaterial whether a building is in the course of construction by him or whether he contemplates improving his premises by the erection of a building thereon, as he is not seeking damages by reason of being prevented from so improving his property, but seeks merely a decree directing the removal of the encroachments. Such allegation, therefore, relative to the character and extent of the building, is immaterial and redundant, and may be treated as surplusage.

[4] We have examined the authorities cited by respondent, but do not see their application to the questions raised by the demurrer, which admits the truth of the allegations of the complaint. Simmons v. Briggs, 69 Cal. App. 447, 231 P. 604.

[5] It is true the courts will not decree the removal of an encroachment where there is no direct evidence of actual damage and the encroachment complained of, as in McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134, merely encroaches upon plaintiff's land from one-half to five-eighths of an inch and where the expense of removal will far exceed the damage caused, but will award damages instead. In the present case, however, the question is before the court on demurrer, and the complaint alleges that the encroachments can be removed at a cost of $250.

While what we have said has been addressed mainly to the general demurrer, we may add that in our opinion the objections urged specially are without merit.

The judgment is reversed, with direction to the trial court to overrule the demurrer.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

97 Cal. App. 288

Ex parte MALDONADO. (Cr. 1526.)

District Court of Appeal, First District, Division 2, California. Feb. 28, 1929.

1. Fines 🔑12—Judgment sentencing defendant for possession of liquor to pay $500 fine or be imprisoned one day for each dollar of fine held within jurisdiction of city court (National Prohibition Act, tit. 2, § 29 [27 USCA § 46]; Wright Act).

Judgment sentencing defendant for possession of intoxicating liquor under the Wright Act (St. Cal. 1921, p. 79), adopting the National Prohibition Act (27 USCA), to payment of $500 fine or imprisonment for one day for each dollar of fine not paid, *held* within jurisdiction of city court; being judgment for fine with no direct imprisonment, imprisonment being merely a means of enforcing the payment of the fine, in view of National Prohibition Act, tit. 2, § 29 (27 USCA § 46).

2. Habeas corpus 🔑4—Remedy for failure to inform accused in misdemeanor case of rights before plea of guilty is appeal and not habeas corpus proceeding.

Failure to inform accused in liquor prosecution in city court of legal rights before he pleaded guilty should be raised by appeal from judgment on plea and not by habeas corpus proceeding.

3. Indictment and information 🔑137(5)—Failure to inform accused of legal rights before plea of guilty is properly raised by motion to set aside information in felony case.

In a felony case, the failure to inform accused of his legal rights before he pleaded guilty is properly raised by motion to set aside information.

4. Habeas corpus 🔑30(1)—Errors in trial and denial of statutory rights which could be waived are not grounds for discharge on habeas corpus.

Errors in trial and denial of statutory rights which could be waived are grounds for appeal, but not for discharge on habeas corpus, since writ of habeas corpus is not a substitute for an appeal.

5. Intoxicating liquors 🔑211—Complaint charging unlawful possession of liquor held insufficient to charge violation of ordinance making possession in public or semipublic place in city unlawful.

Complaint charging unlawful possession of intoxicating liquor, without alleging that the possession was in a public place, *held* insufficient to charge a violation of ordinance denouncing possession in public or semipublic place in city.

6. Indictment and information 🔑154—Defect of complaint failing to state offense was not waived by failure to demur.

Failure of complaint charging unlawful possession of intoxicating liquor to allege that the possession was in a public place in the city as required by the ordinance for violation of which the accused was prosecuted was not waived by failure to demur, since the complaint with such omission failed to state any offense under the ordinance.

7. Habeas corpus 🔑30(2)—Insufficiency of complaint under ordinance held not available in habeas corpus proceedings after conviction, where good under statute (National Prohibition Act [27 USCA]; Wright Act).

Failure of complaint, charging unlawful possession of intoxicating liquor under city ordinance denouncing possession of liquor in public or semipublic place, to allege that defendant's possession was in a public place as required by such ordinance, did not entitle the accused to discharge on habeas corpus after conviction; the complaint being good under the National Prohibition Act (27 USCA) adopted by the Wright Act (St. Cal. 1921, p. 79).

Application by Roque Maldonado for writ of habeas corpus directed to Sheriff of Santa Clara County. Writ denied.

Southard M. Modry, of San Francisco, for petitioner.

N. E. Wretman, City Atty., of San Jose, for respondent.

KOFORD, P. J. A writ of habeas corpus, issued by the Supreme Court, was returned in this court. The return of the sheriff of the county of Santa Clara shows that the prisoner, upon a plea of guilty of possession of intoxicating liquor, was sentenced by the city judge of the city of Sunnyvale to pay a fine of $500 or to be imprisoned for one day for each dollar of fine so imposed and not paid.

[1] The judgment and sentence which might result in 500 days' imprisonment in case the $500 fine remains unpaid is not in excess of the jurisdiction of the city court. The judgment is for a fine and includes no direct imprisonment. Imprisonment is mentioned only as a means of enforcing the payment of the fine. In re Kennerly, 190 Cal. 774, 214 P. 857; Jones v. Police Court (Cal. App.) 260 P. 919. The amount of the fine does not exceed the penalty for the first offense of possession prescribed by the National Prohibition Act (27 USCA), adopted as the law of this state by the Wright Act (St. 1921, p. 79). Section 29, tit. 2, National Prohibition Act (27 USCA § 46).

[2-4] The return shows that the petitioner was duly arraigned and informed of his rights before he pleaded guilty. It is claimed by petitioner that he was not so informed of his legal rights. Affidavits showing that he was, and others showing that he was not, so informed have been tendered here, and a motion has been made to reopen the case after argument and submission for the purpose of taking evidence in this court upon this habeas corpus proceeding to determine whether the trial judge did or did not so inform the defendant of his legal rights at the time of his arraignment. In a felony

case this point is properly raised by a motion to set aside the information. People v. Salas, 80 Cal. App. 318, 250 P. 526; People v. Napthaly, 105 Cal. 641, 39 P. 29. Here it should be raised by appeal. The writ of habeas corpus is not a substitute for an appeal. 13 Cal. Jur. 217, § 4. Errors in the trial and denial of statutory rights which could be waived are grounds of appeal, but are not grounds for discharge on habeas corpus. 13 Cal. Jur. 236, § 17. Enough appears to show that the prisoner was accorded a trial. His complaints, if grounded in fact, refer to irregularities. The motion to reopen the case to hear evidence should be denied.

[5, 6] The complaint upon which the prisoner was convicted charges that he did willfully and unlawfully have in his possession certain intoxicating liquor, to wit, white wine containing more than one-half of 1 per cent. alcoholic content, which possession was then and there in violation of Ordinance No. 104 of said city of Sunnyvale. A copy of the said city ordinance has been filed in this court for examination. The possession of intoxicating liquor is not made unlawful by the ordinance unless such possession is in a public or semipublic place in the city. The complaint fails to state any public offense defined in the said city ordinance. The case of In re Hernandez, 64 Cal. App. 71, 220 P. 423, is direct authority for this ruling. It distinguishes the Hayward Case in 62 Cal. App. 177, 216 P. 414. It holds that the omission of the complaint to charge that the possession was in a public place, as specified in the ordinance, is a defect in the complaint which is not waived by failure to demur, but constitutes a failure to state an offense under the ordinance.

Inasmuch as no offense is stated in the complaint under the city ordinance, we have not attempted to decide whether, in respect to this particular charge, the ordinance differs enough from the state law to be valid under the theory of the Iverson Case, 199 Cal. 582, 250 P. 681, and the Simmons Case, 199 Cal. 590, 250 P. 684, or whether it is invalid under the authority of the Mingo Case, 190 Cal. 769, 214 P. 850, and the Sic Case, 73 Cal. 142, 14 P. 405.

[7] But, even though the complaint fails to state a violation of the terms of the ordinance, yet if it states a public offense under the National Prohibition Act adopted by the Wright Act, the conviction is nevertheless good. Ex parte Mansfield, 106 Cal. 400, 39 P. 775; Ex parte Murphy, 190 Cal. 286, 212 P. 30. This it does under the authority of People v. Norcross, 71 Cal. App. 2, 234 P. 438, and Olivieri v. Police Court of Bakersfield, 62 Cal. App. 91, 216 P. 44. These last two cited cases were decided upon appeal, and, as is well known, a complaint will fall more easily before an attack upon an appeal than in a habeas corpus proceeding.

This case is distinguished from the Mingo Case, supra, because there the sentence, which was given under a void ordinance, exceeded that provided by state law. It included a straight jail sentence while here the punishment is by fine alone; the imprisonment being only mentioned to enforce the payment of the fine. In re Kennerly, supra.

The conviction being upon a complaint sufficient under the Wright Act and the National Prohibition Act, and the sentence being within the terms of the same acts, the prisoner is not entitled to be discharged upon this proceeding.

The motion to reopen the cause is denied, and the prisoner is remanded.

We concur: STURTEVANT, J.; NOURSE, J.

97 Cal. App. 244

LOS ANGELES CREAMERY CO. et al. v. LEVINSON. (Civ. 6196.)

District Court of Appeal, Second District, Division 1, California. Feb. 27, 1929.

Bankruptcy ⚷295—Judgment for plaintiff in state court for accounting for profits from sale in bankruptcy proceeding held sustained.

In action in state court for accounting for moneys received by defendant as profits from sale of assets under jurisdiction of federal court in bankruptcy proceeding, judgment for plaintiff *held* sustained.

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge pro tem.

Action for an accounting by the Los Angeles Creamery Company and others, by William H. Moore, Jr., trustee, against M. Levinson. Judgment for plaintiffs, and defendant appeals. Affirmed.

Schweitzer & Hutton, of Los Angeles (B. R. Ware, of Los Angeles, of counsel), for appellant.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondents.

YORK, J. Appellant objects strenuously to the judgment on the ground that the respondents are attempting to secure a judgment from a state court in a matter which, they contend, has been fully passed upon by a United States court. An examination of the transcript does not bear out this objection.

This action, as we view it, is an action for an accounting for moneys received by the defendant Levinson, as profits accruing from the purchase and sale of certain assets, the sale being one held under the jurisdiction of the United States court in a bankruptcy proceeding. The respondents also ask for a judgment decreeing that such profits were held by defendant Levinson in trust for the use and benefit of the bankrupt estate, and therefore incidentally for the plaintiffs in this case and other creditors thereof.

The trial court in its findings found that the Los Angeles Creamery Company, Kahn-Beck Company, Leo Levy, O. L. Bishop, Chas. Winkelman, Joseph Weinblatt, Ray Levy, and M. Reingold were unsecured creditors of the bankrupt estate, and found the respective amounts due to each creditor. The trial court further found that 10 per cent. only of their claims had been paid and that each and all of said claims had been proved for the amounts specified in the findings. The trial court found the particular facts as to a fraud committed by the defendant Levinson at the sale held by the trustee in bankruptcy under the order of the federal court, wherein and whereby the defendant Levinson prevented bidders at said sale from bidding the full value of the property to be sold by said trustee, and particularly by threatening to appeal from any order or judgment affirmed by the United States District Court, even, if necessary, to the Supreme Court of the United States, and that each and every bid made at such sale was effected by such threat, and that the full value of the property sold by said bankrupt was not received because of such threat.

The trial court found in detail that a secret agreement with one Gus Compselides was made by the defendant Levinson, wherein and whereby it was agreed that Compselides was to refrain from bidding at the sale, and that in the event that said Levinson, through his agent and dummy, Hardstein, was successful in purchasing the said assets at the bankrupt sale, a net secret profit to Levinson of $20,000 would be paid; that secretly at the time of the sale the defendant Hardstein represented the defendant Levinson and that Compselides then and there secretly authorized the said Hardstein to bid the sum of $17,000 for the assets sold by the referee, with the understanding that he, Compselides. would purchase said assets, together with a certain "Coffee Shop" lease, from Levinson, for the sum of $37,000.

After finding in detail the way in which said transaction was finally consummated, the court found that defendant Levinson received a secret profit of $20,000 from Compselides and his associates; that the existence of this secret agreement was not known to any of the creditors of the bankrupt estate, nor to the trustee in bankruptcy, nor to the referee in bankruptcy, until after the referee's order confirming the sale had become final, nor until about the time of the commencement of this action.

The nearest authority among the many authorities cited seems to be the case of In re Chas. Knosher & Co. v. Baxter, in an opinion by Judge Morrow of the United States Circuit Court of Appeals for the Ninth District, and concurred in by Judges Gilbert and Ross, appearing in 197 Federal Reporter, beginning at page 136, but quoting from page 141. It is stated, among other things: "It is clear that, if the creditors of the bankrupt were entitled to any relief by reason of the alleged inadequacy of the price received for the stock of goods, it was not by summary proceedings, but should have been obtained through the trustee in an action against John Anisfield Company for an accounting, and if the trustee and his attorneys were hostile to the proceeding, as intimated, but not established, he could have been required by order of the bankruptcy court to permit the use of his name in such an action with new attorneys, or, failing in that, the trustee could have been removed and a new trustee appointed with new attorneys instructed to proceed by proper action to determine the rights of the bankrupt estate in a plenary action."

This case was first filed by certain creditors for the benefit of all creditors; thereafter the trustee of the bankrupt estate, by leave of and under an order of the referee in bankruptcy of the District Court of the United States for that district, acting for that court after an order for him so to do was duly made and entered, filed in this action an amended complaint, and on his complaint so filed this cause was tried and determined.

The findings made by the trial court are too voluminous to be herein set forth in full, but they are sufficient to support and justify the judgment rendered by the trial court that the plaintiff Wm. H. Moore, Jr., as trustee for the creditors of the bankrupt stock of Levy's Inc., is entitled to recover from the defendant Levinson a portion of said $20,000, to wit, the sum of $13,333.33, together with interest thereon.

The stipulations made between the parties hereto and the evidence justified the trial court in making each of the material findings made by it.

For the foregoing reasons the judgment is affirmed.

I concur in the judgment: HOUSER, J.

CONREY, P. J. I concur in the judgment. This is an appeal from a judgment against the defendant M. Levinson in an action to establish an involuntary trust in the defendant Levinson, and to recover from him profits fraudulently obtained by him in connection with a sale by the trustee in bankruptcy of certain assets of a bankrupt estate.

On the 2d day of April, 1922, and thereafter, appellant was the owner of certain adjoining premises known as 6409 Hollywood boulevard, city of Los Angeles, hereinafter referred to as "the coffee shop," and 6413 Hollywood boulevard, hereinafter referred to as "the café." On April 2d appellant leased the café to Levy and Ziddell at a rental of $450 per month, and on August 9, 1923, leased the coffee shop to Levy's, Inc., at $350 per month. The term of each lease was to expire on the 31st day of May, 1932. The first lease was afterwards transferred to Levy's, Inc. On January 25, 1924, Levy's Inc., was adjudged bankrupt by the District Court of the United States for the Southern District of California. The leased property, including certain personal property therein contained, was taken into possession by the trustee in bankruptcy. Thereafter the lessor, Levinson, claimed that the rights of the lessee in the leased premises had been forfeited by breach of conditions contained in the leases, and instituted proceedings before the referee in bankruptcy to obtain an order requiring surrender of said premises to the lessor. The referee granted the order as to the coffee shop, but denied it as to the café. This order was made on the 19th day of March, 1924, and the right of Levinson to appeal therefrom expired on the 30th day of March, 1924.

After the referee had announced his decision on the issue concerning these leases, but before entry of the order, the trustee in bankruptcy filed a return of sale showing that he had sold to one Hardstein, at the price of $10.000, all of the right, title, and interest of the lessee and of the trustee in bankruptcy in said leases and personal property. The matter of the confirmation of the sale came up for hearing before the referee on the 20th day of March, 1924. Objections to confirmation of sale were made by some creditors, for various stated reasons. So far as appropriate for consideration here these grounds of protest were that Hardstein was not a bona fide purchaser, but was in fact acting as dummy for Levinson "for the purpose of depriving the estate of the value of said lease"; that Levinson, Hardstein, and one Klemtner had conspired together for the purchase of the bankrupt estate assets for the use and benefit of Levinson and Klemtner, for the purpose of enabling said Klemtner to obtain the assets, including the said lease, for a grossly inadequate consideration, and under an agreement that the leases should be transferred to Klemtner on the basis of a cash bonus to Levinson of the sum of $15,000; that Levinson and Klemtner had conspired together to decrease the sale price of the property, and particularly that Levinson, by threatening to appeal from the order made adversely to him in relation to the café property, had made the lease practically unsalable by the trustee. There was much discussion before the referee by some of the creditors, and by counsel for the several parties, and some evidence was taken, and sundry stipulations were made concerning the matter at issue before the referee. In the course of these transactions additional bids were made alternately by Hardstein and by one Hoffman, ending in a bid of $17,000 by Hardstein. It appeared that the original deal between Levinson and Klemtner had been rescinded, and that Klemtner was "backing" the Hoffman bids. It was admitted that Hardstein was representing and acting for Levinson in making the Hardstein bids. When the matter was finally submitted the referee confirmed the sale to Hardstein at $17,000. This was followed by transfer of the property by the trustee to Hardstein. Thereafter Hardstein, at the instance of Levinson, transferred all of said property, together with the coffee shop lease, to one Compselides, for a total consideration of $37,000.

Thereafter, on the 27th day of June, 1924, the original complaint in this action was filed. It was actually tried upon a second amended complaint and the answer thereto. The essential facts which lie at the foundation of this action are shown in the findings of the court, which, after reciting many facts, including those hereinabove stated, continue as follows:

"That prior to the said sale the said defendant Levinson entered into a secret agreement with one Gus Compselides, wherein and whereby it was agreed between them that said Compselides would refrain from bidding at said sale, and that in the event that said Levinson, through his agent and dummy, Hardstein, was successful in purchasing the said assets at the bankrupt sale for the sum of $10,000, that said Compselides would buy the same together with the 'Coffee Shop' lease, from Levinson for a net secret profit to Levinson of $20,000; and that pursuant to said secret agreement said Compselides was present in court at the time of said sale, sat alongside of the defendant Hardstein, who represented the defendant Levinson, and, after the bidding had reached the point of $16,000, secretly authorized said Hardstein to bid the sum of $17,000, with the understanding that he, Compselides, would purchase said assets and said 'Coffee Shop' lease from Levinson for the sum of $37,000; that pursuant to and because of said agreement the said Compselides did refrain from bidding at said sale, and the defendant Levinson, through his agent, Hardstein, purchased the assets for $17,000, and immediately thereafter sold the same, together with the 'Coffee Shop' lease, to said Gus Compselides and his associate, Tom Michas, for the sum of $37,000, and received a secret profit of $20,000 from said Compselides and his associate."

The court then found that, apportioned according to the relative market value of the two leases, two-thirds of the profits so received by Levinson were paid in consideration of the café lease and the other one-third in consideration of the coffee shop lease; that neither the plaintiffs nor any of the creditors, nor the trustee in bankruptcy, nor the referee, knew anything about the said secret agreement until the referee's order confirming the decree had become final, and about the time of the commencement of this action.

The court entered judgment against Levinson for the sum of $13,333.33 with interest and costs. It is from this judgment that the defendant Levinson appeals.

It is contended by appellant that the superior court had no jurisdiction over the subject-matter of this action; that the cause of action remained exclusively within the jurisdiction of the United States District Court as a court of bankruptcy. Section 2 of the Federal Bankruptcy Act (11 USCA § 11) vests in the District Courts of the United States "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings." Section 23 of the same act (11 USCA § 46) provides that the United States District Courts shall have jurisdiction "of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." It is further provided that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant" (with certain exceptions of no present interest here).

An adequate discussion of the questions raised by appellant in his challenge to the jurisdiction of the superior court would require a very extended statement of the decisions which have construed and applied the bankruptcy laws. Among the important cases cited by counsel for appellant I need only refer to Bardes v. First National Bank of Hawarden, 178 U. S. 524, 20 S. Ct. 1000, 44 L. Ed. 1175; Babbitt v. Dutcher, 216 U. S. 102, 30 S. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Murphy v. Hofman Co., 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327. Probably the most directly applicable authority offered by respondents is In re Knosher v. Baxter, quoted in the preceding opinion by Mr. Justice YORK. I have reached the conclusion that a cause of action arising out of the right to sue for and recover secret profits, obtained by fraudulent means in connection with a judicial sale of assets of a bankrupt estate, presents a case within the general jurisdiction of a court of equity. Where the parties reside in different states and the amount involved is sufficient, the action would properly be brought on the chancery side of a United States District Court. Where the parties all reside within the same state the action is properly brought in a state court. The assets of the bankrupt estate, which were the subject of the sale made by the trustee and confirmed by the referee in bankruptcy, have passed out of the control of the district court as a court of bankruptcy. The title to that property is gone from the estate. If, in connection with those proceedings of sale, and by some secret fraudulent acts committed by the purchaser, he has made profits which in equity and of right should be restored to the estate, there appears to be no instrumentality other than a court of equity capable of judicially ascertaining the facts and enforcing the appropriate remedy. This is an appropriate instance for applying the rule stated in Cocks v. Izard, 7 Wall. 559, 19 L. Ed. 275, where the court said that: "Where a judicial sale is impeached for fraud, or unfair practices, of officer or purchaser, to the prejudice of the owner, a court of chancery is the proper tribunal to afford relief."

The other principal point which appeals to me as requiring further comment is found in appellant's contention that the order of the referee confirming the sale to Hardstein is conclusive upon all questions involving the fairness and integrity of the sale, and therefore is res adjudicata with respect to the subject of this action. It is true that the creditors, at the sale, in the course of their objections to the sale to Hardstein, insisted that Hardstein was only a dummy for Levinson, and that Levinson, by his conduct, was interfering with the sale and was preventing the presentation of adequate bids. It is true that in confirming the sale the referee must have held that under all of the circumstances existing at the moment of confirmation these objections were not sufficient. If it must be held that the transactions between Levinson and Compselides, although unknown to others at the time of the confirmation of the sale, were merely additional evidence, which, if it had been discovered and produced, would have supported the charges of the creditors then objecting to the confirmation of the sale, then it might well be argued that the order of confirmation is res adjudicata with respect to the issues of the present action. But I think it may be reasonably concluded and held that the fraudulent conduct of Levinson in his secret transactions with Compselides was more than merely additional evidence which might have been used to prove that Levinson was interfering with free and fair bidding at the sale. It was a separate and distinct fraudulent transaction, different from and separate from his openly asserted claim made at the sale, that the café lease had been forfeited and was not properly an asset which the trustee had any right to sell. It was apart from and different from the earlier transaction between Levinson and Klemtner. While the deal with Klemtner had resulted in the original $10,000 bid, that arrangement had been rescinded before the day of the confirmation of the sale, and was no longer in existence as an obstruction to bids at the time when the additional bids were made in the presence of the referee. The result is, in my opinion, that the cause of action upon which the present judgment rests is not concluded by the decision and order of the referee in confirmation of the sale.

For these reasons I concur in the judgment here affirming the judgment of the superior court.

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97 Cal. App. 319

NIELSEN v. GILLESPIE et al. (Civ. 6689.)★

District Court of Appeal, First District, Division 1, California. March 1, 1929.

Rehearing Denied March 30, 1929.

Corporations 🔑548(3)—Claim must be reduced to judgment before institution of proceeding to subject corporate assets to payment of debt.

In order to maintain a proceeding to subject assets of corporation to payment of debt and debts of other creditors, it was necessary that claim be first reduced to judgment.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by C. W. Nielsen against A. C. Gillespie and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John C. Scott, of Oakland, for appellant.

Thacher & Wright, of San Francisco, for respondents.

PER CURIAM. An appeal by the plaintiff from a judgment entered for defendants and respondents Gillespie, Gray, and Hendry following his refusal to further amend his fourth amended complaint.

As stated by appellant, the gist of his complaint against respondents is that, being neither directors nor officers of the corporation defendant, which was organized under the laws of the state of California, upon their representations that they would manage and operate its business, three of the five corporate directors were induced to resign, whereupon respondents took control of the corporate business and property; that through the acts of the respondents, which were alleged to have been done for the purpose of destroying the business of the corporation, this result followed, and its property, through proceedings brought by its creditors, was sold for less than its value. It was further alleged that, as a consequence of these acts, the plaintiff, to whom the corporation is indebted in the sum of $6,500, is unable to collect his claim from the corporation, and he seeks by this action to recover from respondents the amount thereof as damages.

If the business of the corporation was destroyed and its property dissipated as alleged, then a suit to recover the damage caused might be maintained by the corporation, and the chose in action, like any other property, would constitute a part of its assets. The facts alleged, however, created no cause of action in favor of appellant. His remedy was a proceeding to subject the assets of the corporation to the payment of his debt and the debts of other creditors. While such appears to have been his object in the present suit, in order to do so it was necessary that his claim be first reduced to judgment. Roberts v. Buckingham, 172 Cal. 458, 156 P. 1018; Delaney Producing & Refining Co. v. Crystal Petroleum Products Corp. (Cal. App.) 264 P. 521. This, so far as shown by his complaint, he had not done, and the demurrer thereto was properly sustained.

The judgment is affirmed.

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97 Cal. App. 414

MacDIARMID v. McDEVITT et al. (Civ. 6203.)

District Court of Appeal, Second District, Division 1, California. March 7, 1929.

1. Bankruptcy 🔑303(3)—Bankruptcy trustee suing stockholders must establish defunct corporation's indebtedness to bankrupt by preponderance of evidence.

To succeed in trial court, bankruptcy trustee, suing stockholders for amount of defunct corporation's indebtedness to bankrupt copartnership, was required to establish such indebtedness by preponderance of evidence.

2. Appeal and error 🔑901—To succeed on appeal, appellant must convince court that there is no substantial evidence to sustain trial court's findings.

To succeed on appeal from judgment for defendants in bankruptcy trustee's action on their liability as stockholders of defunct corporation, appellant must not only produce preponderance of evidence establishing corporation's indebtedness to bankrupt, but must convince Court of Appeal that there is no substantial evidence to sustain trial court's findings.

3. Evidence 🔑584(1)—Prima facie evidence may be controverted by other evidence, direct or indirect (Code Civ. Proc. § 1833).

Prima facie evidence, as defined by Code Civ. Proc. § 1833, may be controverted by other evidence, direct or indirect.

4. Evidence 🔑597—Only satisfactory evidence justifies verdict, but evidence need not be satisfactory to be prima facie or legally sufficient (Code Civ. Proc. § 1835).

Only "satisfactory evidence," as defined by Code Civ. Proc. § 1835, will justify a verdict, but evidence need not be satisfactory to be prima facie or legally sufficient.

5. Appeal and error 🔑931(3)—Presumption is that evidence of alleged fact not found was not satisfactory (Code Civ. Proc. § 1835).

When a fact contended for is not found, the presumption is that the evidence was not satisfactory, within Code Civ. Proc. § 1835.

★Rehearing denied.

6. Trial 🔑384—Trial court determines sufficiency of plaintiff's evidence, usually on motion for nonsuit, but cannot ordinarily determine whether it is satisfactory until evidence is closed (Code Civ. Proc. §§ 1833, 1835).

The trial court determines whether plaintiff's evidence is legally sufficient, under Code Civ. Proc. § 1833, usually on motion for nonsuit, but cannot ordinarily determine whether it is satisfactory within section 1835 until both sides have rested and evidence is closed.

7. Evidence 🔑383(8)—Book of accounts is prima facie, but not conclusive, evidence of transactions recorded therein (Code Civ. Proc. §§ 1833, 1837).

A book of accounts, when admissible, is prima facie evidence of transactions properly recorded therein, within Code Civ. Proc. § 1833, but not conclusive evidence within section 1837.

8. Evidence 🔑383(8)—Credit to be given books of account is ordinarily for jury to determine from their general appearance and condition, manner in which kept, circumstances under which entries were made, etc.

Degree of credit to be given books of account as evidence is ordinarily a question for jury to determine from general appearance and condition thereof, manner in which they were kept, circumstances under which entries were made, and any other relevant facts or circumstances in evidence.

9. Evidence 🔑594—Uncontradicted evidence is not binding on court or jury, where inherently improbable or inconsistent with facts in evidence.

Uncontradicted evidence is not necessarily binding on court or jury, but may be disbelieved, where inherently improbable or inconsistent with facts and circumstances in evidence.

10. Appeal and error 🔑1012(1)—Credit to be given books of account in trustee's action on stockholders' liability for corporation's indebtedness to bankrupt firm was for trial court.

Degree of credit to be given books of account of bankrupt copartnership and defunct corporation *held* for trial court in action by bankruptcy trustee on stockholders' liability for corporation's indebtedness to bankrupt.

11. Appeal and error 🔑931(1)—Appellate court must resolve all intendments in favor of judgment.

It is the duty of the appellate court to resolve all intendments in favor of the judgment appealed from.

12. Appeal and error 🔑931(7)—Judgment on merits, after denying nonsuit and hearing evidence, will not be set aside on inference that court ruled plaintiff's evidence legally insufficient.

Judgment for defendants on the merits, after denying motion for nonsuit and hearing defendant's evidence and plaintiff's rebuttal evidence, will not be set aside by appellate court on inference that trial court ruled that plaintiff's evidence was legally insufficient; presumption being that it did not do so.

Appeal from Superior Court, Los Angeles County; P. E. Keeler, Judge.

Action by George A. MacDiarmid, as sole surviving trustee in bankruptcy of Shepard & Gluck, a copartnership, against T. W. McDevitt and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Kiggens & Hoffman and Moote & Patterson, all of Los Angeles, for appellant.

Chapman & Chapman and Ward Chapman, all of Los Angeles, for respondents West and Conduit.

CRAIL, Justice pro tem. This is an action brought by plaintiff and appellant, as sole surviving trustee of the bankrupt copartnership of Shepard & Gluck, against the defendants, upon their liability as stockholders of the now defunct California Cotton & Factorage Company, a corporation.

This cause was, for the purposes of trial, consolidated and tried with an action originally brought by Shepard & Gluck themselves directly against said corporation. Thereafter the three trustees in bankruptcy were substituted as parties plaintiff, and still later George A. MacDiarmid, appellant here, was substituted as sole plaintiff, as in the instant case.

[1] The amended complaint alleges that in the year 1919 the firm of Shepard & Gluck entered into an arrangement with the California Company, whereby the California Company might from time to time ship its cotton to the city of New Orleans, to be there handled by Shepard & Gluck as brokers, upon certain terms then agreed upon; that from the month of November, 1919, to the month of June, 1921, the Calfornia Company did ship cotton, which was handled by the said Shepard & Gluck, as brokers; that by reason of the said transaction the California Company became indebted to Shepard & Gluck, upon an open book account, in the sum of $159,222.05; that the defendants are stockholders in the California Company owning designated numbers of shares.

The answers of the several defendants deny any indebtedness, and allege other defenses not necessary to mention.

To succeed in the trial court it was necessary for plaintiff to establish said indebtedness by a preponderance of the evidence. But the trial court found against the plaintiff on this as well as other issues.

[2] Appellant presents for our consideration on appeal nine assignments of error, in six of which he claims an insufficiency of evidence to sustain the findings, and in three of which he claims the conclusions of law are not sustained by the findings; but he presents them all under the one heading, which appears in his brief as a bold-faced caption, "The Debt of the Calfornia Company Was Proved by Legally Sufficient Evidence," and

adds: "Under this heading appellant's right to complain has been preserved by the assignments of error, numbered I to IX, inclusive."

Plaintiff attempted at the trial to prove an open book account balance against the California Company. In view of the fact that practically all the books of account were destroyed prior to the cause being heard, plaintiff was compelled to prove the debt by secondary evidence. Plaintiff's contention, set for in his own language, is as follows: "The trial court obviously deemed the proofs of debt submitted not legally sufficient. We contend, on the other hand, that the debt was established by three distinct sorts of secondary evidence; first, by oral testimony as to the *balance*; second, by an original page of the ledger account between the parties, showing the debit balance; and, lastly, by a copy of the ledger and of the account sales book showing the account between the parties. * * * It will be contended that each of these three forms of secondary evidence established the balance or debt sued upon, inasmuch as they proved the contents of the destroyed books of account." Finally, he contends that the lowest measure of relief to which he was entitled "is a judgment against the various stockholders for their proportionate share of $110,565.97."

It is unnecessary to review in this opinion the argument of appellant's counsel, 174 pages in length, so diligently presented, on the various questions of the admissibility of books of accounts, or copies of accounts and summaries of accounts in lieu thereof, when a proper foundation has been laid. For no question of admissibility is involved. The trial court admitted all of the accounts or copies of accounts which plaintiff offered in evidence. The trouble seems to be that appellant fails to keep in mind the distinction between "legally sufficient evidence," so called by him, and conclusive evidence or even satisfactory evidence. He seems to believe that in order to succeed on this appeal it is only necessary to produce such evidence as would get him by a motion for a nonsuit. Even in the trial court it was necessary for him to go one step farther than this and produce a preponderance of the evidence establishing the debt. In this court it is necessary to go still farther and convince the court that there is no substantial evidence to sustain the findings of the trial court.

[3-6] Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. Code Civ. Proc. § 1833. It may be controverted by other evidence, direct or indirect. Moore v. Hopkins, 83 Cal. 270, 23 P. 318, 17 Am. St. Rep. 248. Satisfactory evidence is such evidence as ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence. Code Civ. Proc. § 1835. Evidence need not be satisfactory, as defined in said section, in order to be prima facie or *legally* sufficient. And when a fact contended for is not found, the presumption is that the evidence was not satisfactory, for, had it been, the court would have found the fact. Merrill v. Chapman, 34 Cal. 251. "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted." Code Civ. Proc. § 1837.

The trial court determines whether or not plaintiff's evidence is legally sufficient, usually on a motion of defendant for a nonsuit. But the trial court cannot ordinarily determine whether plaintiff's evidence is satisfactory until both sides have rested and the evidence is closed.

[7, 8] A book of accounts, when admissible, is prima facie, but not conclusive, evidence of transactions properly recorded therein. The degree of credit to be given to books of account as evidence is ordinarily a question for the jury and is to be determined by the general appearance and condition of the books, the manner in which they were kept, the circumstances under which the entries were made, and any other fact or circumstance in evidence bearing upon the question. See 22 C. J. 971.

[9] Uncontradicted evidence is not necessarily binding on the court or a jury, but may be disbelieved where it is inherently improbable, or inconsistent with the facts and circumstances in evidence. Roberts v. Roberts, 168 Cal. 307, 142 P. 1080, Ann. Cas. 1916A, 886; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513.

[10] In this case we have before us a long transcript on appeal, two volumes in printed form. It is full of evidence and circumstances which the trial court was bound to consider in determining the weight to be given to the account books or the secondary evidence thereof upon which the plaintiff relied, and also in determining the debt, if any, which was due from the defendants to the plaintiff. Among other there is evidence which tends to prove that the entries in the so-called spot ledger under date of May 31, 1921, were deliberately falsified; that a great part of the cotton accounted for in the account sales was not the cotton shipped Shepard & Gluck by the California Company; that the entries upon the only sheet of alleged permanent entry which was produced were made more than four months after the transactions occurred; that certain entries in the so-called copy of the ledger account were lump entries; that entries in the ledger of thousands of dollars representing so-called allowances were unsupported by any competent evidence and in any event could not form the subject of a mere book charge; that fictitious accounts appeared on the books of Shepard & Gluck; all of these and other circumstances tended to discredit the entire alleged account and might have justified the court in attaching no

weight to any part of it. On the other hand, there was evidence tending to prove that the California Company's books showed Shepard & Gluck indebted to it at the close of all business in a sum in excess of $13,000. The degree of credit to be given these books was also a question for the trial court.

[11, 12] The plaintiff in his reply brief, by a reasoning which is too intricate to be convincing and too elaborate for insertion here, contends that the trial court must have determined that the plaintiff's evidence was not legally sufficient. A complete answer to the contention is that the court denied the defendants' motion for a nonsuit, heard the evidence of the defendants, heard plaintiff's evidence in rebuttal, and then decided the issues on the merits. Plaintiff does not call our attention to any place in the record where the trial court ruled that his evidence was legally insufficient. As we have said, he merely reasons his way to this conclusion. But on appeal it is the duty of this court to resolve all intendments in favor of the judgment. We will not set aside the judgment of the trial court on the inference that it so ruled. The presumption is that it did not so rule, even if the record failed to show the ruling on the motion for a nonsuit; but it shows such ruling.

Appellant presents other questions; but as it is necessary for him to succeed on the above contention in order to succeed at all on the appeal, we deem it unnecessary to review them.

Judgment affirmed.

I concur: YORK, J.

I concur in the judgment: HOUSER, Acting P. J.

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97 Cal. App. 397

HINTON v. KEEFE. (Civ. 6610.)

District Court of Appeal, First District, Division 2, California. March 6, 1929.

Principal and agent 🔑19—Plaintiff could not recover undisclosed profit obtained by defendant as plaintiff's agent, where failing to prove agency.

In action for money had and received, based on theory that defendant obtained undisclosed profit as plaintiff's agent in sale of property, plaintiff could not recover, where she failed to prove agency.

Appeal from Superior Court, Alameda County; J. J. Allen, Judge.

Action by Rose M. Hinton against Mae E. Keefe. Judgment for defendant, and plaintiff appeals. Affirmed.

George F. Sharp, of Oakland, for appellant.

Gilman & Harnden, of Oakland, for respondent.

NOURSE, J. In her first cause of action plaintiff sued for $1,000 on the theory that defendant had obtained that sum in the nature of an undisclosed profit as plaintiff's agent in the consummation of a sale of personal property. In her second cause of action she sued on a common count for money had and received, on the same theory. The case was tried before the court, and resulted in a judgment for the defendant.

The trial court found that defendant had not acted as plaintiff's agent in the transaction, and that she had not received any money for the use or benefit of the plaintiff. The evidence fully supports both findings. Having failed to prove the agency, the entire case falls.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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97 Cal. App. 193

LAMB et ux. v. HERNDON et al. (Civ. 3665.)

District Court of Appeal, Third District, California. Feb. 26, 1929.

1. Usury 🔑12—Corrupt intent is necessary element of usury.

A corrupt intent is one of the necessary elements of usury.

2. Usury 🔑114—In determining existence of corrupt intent necessary for usury, evidence of surrounding circumstances and negotiations preceding transaction is admissible.

In determining whether corrupt intent necessary to establish usury existed, court had right to admit in evidence all surrounding circumstances and negotiations preceding transaction.

3. Usury 🔑13—Usury can attach only for loan or forbearance of money, goods, or things in action at illegal interest (Usury Law).

Usury can attach only for loan or forbearance of money, goods, or things in action at rate of interest in excess of that provided by law under Usury Law (St. 1919, p. lxxxiii).

4. Usury 🔑32—Parties may agree on cash price and on addition thereto as desired if credit be given, which is neither loan nor forbearance of debt to which usury can attach (Usury Law).

On contract to secure price or value of work and labor done or to be done, or of property sold, contracting parties may agree on one price if cash be paid, and upon as large addition to cash price as may suit themselves if credit be given, in which case it is neither loan nor forbearance of debt to which usury can attach under Usury Law (St. 1919, p. lxxxiii), but merely contract price of work and labor done or property sold.

5. Usury 🔑41—Interest when subject to contingency putting lender's profit in hazard need not be limited to legal rate if parties do not intend violation of usury statute (Usury Law).

When payment of full legal interest is subject to contingency so that lender's profit is wholly or partially put in hazard, interest so contingently payable need not be limited to legal rate, providing parties are contracting in good faith, and without intent to avoid Usury Law (St. 1919, p. lxxxiii).

6. Usury 🔑52, 117—Finding that bonus payable to contractors agreeing to remodel and finance building construction was not payable for forbearance or loan of money held authorized, and provision for bonus did not make note usurious.

In action to restrain sale of real property under deed of trust securing note alleged to be usurious, evidence that note was executed in favor of building contractors, under agreement that contractors should remodel building, advance money to pay off mortgage, provide material and labor necessary for remodeling, and generally finance construction, and that contractors were not to receive any payments until work was completed, when contractors were to receive bonus, finding that bonus was not agreed to be paid for forbearance or loan of money was supported by evidence, and hence provision for bonus did not make note usurious.

7. Attorney and client 🔑89—At common law retraxit occurred when plaintiff appeared in person and voluntarily renounced suit; but under statute authority is conferred on attorney (Code Civ. Proc. § 581).

A retraxit occurred at common law when plaintiff came into court in person and voluntarily renounced his suit or cause of action; but under Code Civ. Proc. § 581, authority is deemed to have been conferred on attorney.

8. Judgment 🔑570(5)—Stipulation by parties in open court for dismissal is judgment on merits (Code Civ. Proc. §§ 581, 582).

Where parties appear in open court and stipulate for dismissal, situation is not covered by Code Civ. Proc. § 581, providing for dismissal by written request to clerk, but is judgment on merits as contemplated by section 582.

9. Compromise and settlement 🔑17(1)—Compromise agreement is decisive of rights of parties thereto, in absence of fraud or undue influence.

Like a judgment, in absence of showing of fraud or undue influence, compromise agreement is decisive of rights of parties thereto.

10. Compromise and settlement 🔑17(1)—Settlement of disputes are to be encouraged, and when acted upon, parties will not be permitted to violate compact unless fraud or undue influence is shown.

It is policy of law to encourage settlement of disputes and prevention of litigation, and, when such settlement has been made, acted upon, and acquiesced in, parties will not be permitted to violate contract unless circumstances of fraud or undue influence are shown.

11. Compromise and settlement 🔑16(1)—Right to rely on original usurious transaction, if existing, would cease to exist on settlement releasing parties from all existing claims.

Though usury existed in original transaction, upon settlement whereby each party released the other from all claims and liabilities of every character then existing, right to rely on previous usurious transaction would cease to exist.

12. Compromise and settlement 🔑16(1)—Compromise agreement settling differences growing out of claim that note given contractor was usurious determined all rights of owner in subsequent suit to restrain sale under deed of trust given pursuant to compromise (Code Civ. Proc. § 581).

Where parties to agreement for remodeling of buildings whereby contractors were to complete and finance work and to be paid nothing until completion of work, when they were to receive bonus, compromised and discharged all differences existing between parties based on claim that note to contractor was usurious, and settlement was based on good consideration, and pending cases were dismissed by clerk of court on application of plaintiff's attorney under Code Civ. Proc. § 581, such compromise and settlement determined all claims of plaintiffs in subsequent action to restrain sale of property under deed of trust given pursuant to settlement.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Arthur H. Lamb and wife against Carrie Pauline Herndon, as executrix of the last will and testament of George L. Herndon, and others, in which defendants filed a cross-complaint. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hugh K. McKevitt, of San Francisco, for appellants.

Devlin & Devlin and W. H. Hatfield, all of Sacramento, for respondents.

JAMISON, Justice pro tem. This is an appeal from a judgment in favor of respondents in an action brought against them by appellants to restrain them, in the first count of the complaint, from proceeding with the sale of property, therein described, under a deed of trust to secure a note alleged to be usurious, and in the second count of said complaint demanding treble the amount of interest paid on said note and on a prior note executed by appellants to respondents Herndon and Finnigan.

The facts involved in this action are about as follows: Appellant Arthur H. Lamb held an option to purchase from the Red Men's Hall Association a certain piece of real property situated in the city of Sacramento for the sum of $75,000, said appellant to assume as a part of the purchase price a deed of trust thereon for $55,000.

On October 26, 1922, for the purpose of assisting said appellant in meeting the terms of said option the said association deeded said property to appellant's wife, Phillis Lamb, taking back a mortgage on said property as security for the unpaid difference, some $17,000, between the purchase price and the $55,000 deed of trust. This arrangement was made under an agreement that in the event of a failure to pay the said mortgage appellants were to reconvey said property to the said association.

The improvements on said property consisted of a hall and lodgeroom building, and the property was worth approximately $75,000. Appellants, in the event of the purchase of said property, contemplated remodeling same into a modern office and store building, which, when so remodeled, would be worth $250,000, but prior to May, 1923, had been unable to finance and purchase the property. Prior to said last-named date appellants had called for bids for the remodeling of said buildings, and respondents Herndon and Finnigan, who were building and construction contractors, had put in a bid for $87,900 for said remodeling in accordance with plans and specifications submitted with said bid, which provided for progress payments monthly up to 75 per cent., the remaining 25 per cent. to be paid within 35 days after the completion of the building. On April 27, 1923, appellants' option on said property being about to expire, they obtained an extension by paying $500 therefor, which sum they borrowed from respondent Finnigan.

On May 29, 1923, there remained unpaid on account of said purchase price secured by said mortgage the sum of $14,500, which it was necessary for appellants to raise to complete the purchase under said option Prior to that date appellants had been negotiating with Herndon and Finnigan in the endeavor to induce them to advance the money for the payment of said mortgage. These negotiations finally resulted in an agreement between the parties by which Herndon and Finnigan agreed to pay $12,000 on said mortgage, to finance the cost of remodeling said buildings, same to be done by Herndon and Finnigan, in accordance with the plans and specifications accompanying their bid as aforesaid, but that, instead of progressive monthly payments, no payments were to be made by appellants until the completion of the buildings; that then 75 per cent. of the contract price was to be paid, and the remainder in 35 days thereafter; that appellants were to deed Herndon and Finnigan a one-half interest in said real property, which interest was to be deeded back to appellants upon payment to Herndon and Finnigan of all sums agreed to be paid to them by or for appellants, Herndon and Finnigan obligating themselves, after said one-half interest was conveyed to them, to execute all necessary mortgages, deeds of trust, and releases which might be necessary for the purpose of securing new loans on said property to carry out the purposes of the agreement. Herndon and Finnigan were to finance the work of remodeling said buildings, including furnishing and paying for all labor and materials used in said work; and that for the purpose of inducing Herndon and Finnigan to pay the said $12,500 on said mortgage and to finance the remodeling of said building and deferring payments of any part of the contract price until the completion of said building appellants agreed to pay them a bonus of $12,000. It is apparent from an inspection of the contract of May 29, 1923, wherein appellants claim the usury had its origin, and in which appellants agreed to pay the said bonus, that the consideration for said bonus was not for the loan of the $12,500 alone, but that the said parties intended at the time and by that agreement that respondents should be given the contract for remodeling the building and should finance same and this intention was carried out by the parties in the contract of June 4, 1923, wherein respondents agreed to do these things, and it is apparent that the consideration for the bonus not only included the said loan but also the remodeling of said building and financing same.

Respondents filed a cross-complaint praying for the reformation of the within agreements, setting forth in their cross-complaint the aforesaid facts regarding said transaction.

The court made no special findings on the facts set forth in the cross-complaint, stating that it was not necessary as the court had found that the agreements between the parties were fair and equitable.

The evidence produced by respondents to the effect that the bonus was to be paid, not alone for the advancement by Herndon and Finnigan of said $12,000, but also for its financing of the remodeling of the buildings and the other things in connection therewith that they agreed to do, was offered and received without objection on the part of appellants.

[1, 2] The case appears to have been tried upon the theory that under the pleadings the court had the right, not only to consider the written agreements, but also extraneous facts and circumstances, including prior negotiations, for the purpose of determining whether or not the transaction was or was not usurious. A corrupt intent is one of the necessary elements of usury (Webb on Usury, 372; Tyler on Usury, 238, and to enable it to determine whether or not the intent existed the court had the right to admit in evidence all the surrounding circumstances and especially the negotiations that preceded the transaction. For as was said by the court in the case of Douglass v. Boulevard Co. et al., 91 Conn. 601, 100 A. 1067: "Every circumstance sur-

rounding or connected with the transaction is material, if in any manner it will reveal the intention of the parties." Lowenstein & Son v. British-American Mfg. Co. (D. C.) 300 F. 853.

The work of remodeling the said buildings was completed on February 26, 1924. Appellants not then being able to secure a loan of said property and not being in a situation to make the payment to Herndon and Finnigan called for by their agreement, the latter conveyed back to appellants the half interest in the property theretofore conveyed to them and appellants thereupon executed their note to Herndon and Finnigan for the amount they owed them and secured same by executing a deed of trust to them upon said property subject to the said deed of trust for $55,000. Thereafter Herndon and Finnigan transferred said note and deed of trust to the California Trust & Savings Bank. On September 10, 1924, appellants having defaulted in the payment of principal and interest, the property was sold under the authority existing in the deed of trust and Herndon and Finnigan were the purchasers at said sale for the amount of the principal, interest thereon, attorney's fees, and costs of sale.

On September 10, 1924, appellants filed an action in the superior court of Sacramento county, No. 33113, against Herndon and Finnigan and others, seeking to set aside the sale under said deed of trust on the ground that said sale was void because the note which same secured was usurious, and on September 16, 1924, appellants filed another action against Herndon and Finnigan and others in the superior court of Sacramento county, No. 33114, in which in the first count thereof they sought to recover judgment for some $33,000, alleging therein that said Herndon and Finnigan had loaned appellants $12,500 and had exacted for said loan a bonus of $12,000 for a period of only about 10 months; that appellants had paid Herndon and Finnigan for said loan about $11,000 in excess of the legal rate of interest, and judgment was asked for treble that sum. The second count was for money had and received in the said sum of $33,000.

On September 24, 1924, and while the two last-named suits were pending, appellants and Herndon and Finnigan effected a settlement of all matters existing between them; appellants having secured a loan on said property for $160,000, paid to Herndon and Finnigan some $76,000 and executed two notes to Herndon and Finnigan, one for $48,000 secured by a fourth deed of trust on the said property, and the other for $2,000 unsecured, Herndon and Finnigan conveying back to appellants the aforesaid property. At the time of said settlement appellant Lamb executed the following release: "This is to certify that there has been a full settlement of all matters between the parties hereto at this date, and that the said undersigned, Arthur H. Lamb hereby acknowledges receipt of all claims and demands of every kind and nature that he has against Herndon and Finnigan or either of them and the said Herndon and Finnigan acknowledge receipt of all claims of every kind and nature they have against the said Arthur H. Lamb except the two notes secured by trust deed of even date herewith."

Thereupon appellants delivered to Herndon and Finnigan authorization for the dismissal of the said actions filed by them on the 10th and 16th of September, 1924, as aforesaid, and they were both dismissed by the clerk of the court upon the application of appellants' attorney on October 22, 1924. The deed of trust on said property securing the note for $48,000 executed by appellants to Herndon and Finnigan contained a provision by which default might be declared for failure to pay the interest accruing on the prior incumbrances on said property. Appellants defaulted in the payment of such interest and thereafter Herndon and Finnigan caused the said property to be sold under the deed of trust and bid the property in for $40,000, leaving a deficiency, with accrued interest, amounting to $14,479.98, and in their supplemental cross-complaint herein Herndon and Finnigan asked judgment for said deficiency.

Appellants in their opening brief state that the material questions of fact involved in this case are whether or not in its inception the transaction between appellants and respondents Herndon and Finnigan was usurious and, if so, whether or not the usury was purged by the settlement of September 24, 1924.

As to the first of these questions the trial court found that from about the 26th day of October, 1922, until May 29, 1923, appellants had been, and were, unable to complete and finance the purchase of said real property, or to arrange for financing the remodeling of said building; that Herndon and Finnigan were at all of said times building and construction contractors engaging solely in said business; and that prior to said 29th of May, 1923, they had submitted to appellants a bid for said remodeling calling for progressive monthly payments; and that it was with the intent and purpose of all of said parties to fix and determine the terms and conditions and compensation upon which the said Herndon and Finnigan should render assistance to appellants and remodel said building, advance the $12,500 to pay on the mortgage given to said association, provide material and labor necessary in said remodeling, and generally finance the said work and not require any payments from appellants until said work was completed, that the agreements dated May 29, 1923, and the building contract of June 4, 1923, were made in which it was agreed that said Herndon and Finnigan should receive said bonus of $12,000; that it was not the intention or agreement of said parties that the money agreed to be paid to Herndon and Finnigan as a bonus was to be paid as a bonus upon any loan, but it was the intention and the agreements between the parties that said $12,000 should be paid for and in consideration of all the aforesaid things done and agreed to be done by said Herndon and Finnigan for appellants in financing the purchase of said real property and remodeling the buildings thereon.

[3, 4] The Usury Law of this state (St. 1919, p. lxxxiii) provides that no person shall directly or indirectly take or receive any money, goods or things in action, or in any other manner whatsoever, any greater sum, or any greater value, for the forbearance of money, goods or things in action than at the rate of $12 upon the $100 for one year; and that any agreement or contract of any nature in conflict with this provision shall be null and void as to any agreement or stipulation therein to pay interest, and that the debt cannot be declared due until the full period of time it was contracted for has elapsed. It is a well-settled principle of the law that usury can attach only for the loan or forbearance of money, goods or things in action at a rate of interest in excess of that provided by law. On a contract to secure the price or value of work and labor done or to be done, or of property sold the contracting parties may agree upon one price if cash be paid and upon as large addition to the cash price as may suit themselves if credit be given. It is neither a loan nor the forbearance of a debt, but simply a contract price of work and labor done or property sold. Graeme v. Adams, 23 Grat. (Va.) 225, 14 Am. Rep. 130; Cockle v. Flack, 93 U. S. 344, 33 L. Ed. 949; Case v. Fish, 58 Wis. 56, 15 N. W. 808.

In the case of Shelley v. Byers, 73 Cal. App. 44, 238 P. 177, the owners of a department store became bankrupt. They agreed with Gollobur and Rosenberg that the latter should advance $140,000 to purchase the stock of goods and make composition with the creditors, the bankrupts to repurchase the stock within four months for $150,000. Gollobur and Rosenberg agreed to conduct a sale during the four months and recover as much as possible of the purchase price through the proceeds, any balance to be paid in cash by the bankrupts. Gollobur and Rosenberg actually expended some $68,000 on the transaction. The amount they were to receive on the repurchase price was in excess of twelve per cent. per annum on the money used. The court found that the transaction was a pledge. The court held that the $10,000 bonus was not a violation of the usury law, but was for interest on the money they were to use in the matter, and also for their business sagacity and trouble in reorganizing the business.

[5, 6] It is also a general principle that when payment of full legal interest is subject to a contingency so that the lender's profit is wholly or partially put in hazard, the interest so contingently payable need not be limited to the legal rate, providing the parties are contracting in good faith and without the intent to avoid the statute against usury. Jameson v. Warren (Cal. App.) 267 P. 372. It was known to the parties hereto at the time said transaction was entered into that the only means by which appellants could repay Herndon and Finnigan was by securing a loan on the building when remodeled. In the event that appellants failed to secure such loan, then Herndon and Finnigan would have to look for payment of their outlay in financing the purchase of the property and remodeling the building to the equity owned by appellants in the property. We are of the opinion that the finding of the trial court that the bonus was not agreed to be paid for the forbearance or loan of money was supported by the evidence.

The court also found, as to both causes of action set forth in appellants' complaint, that on September 24, 1924, appellants through their attorney, Jesse Robinson, filed dismissals and retraxits in both of said suits in the following words: "The above entitled action having been fully compromised and settled the same is hereby discharged and the clerk of the Superior Court of the State of California in and for the County of Sacramento is hereby authorized and directed to enter a dismissal of said action forthwith and this is a retraxit of said suit. Dated September 24th, 1924. Jesse Robinson, Attorney for Plaintiffs."

Freeman in his work on Judgments, vol. 1, § 7, p. 12, says with reference to judgments on retraxit: "A retraxit differs from a nonsuit in this: One is positive, the other is negative. The nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs, but a retraxit is an open, voluntary renunciation of his claim in court, and by this he forever loses his action."

[7] A retraxit occurred at common law when a plaintiff came into court in person and voluntarily renounced his suit or cause of action. Under our law this authority is deemed to have been conferred upon the attorney. Westbay v. Gray, 116 Cal. 660, 48 P. 800; Merritt v. Campbell, 47 Cal. 543.

[8] In the case under consideration, had the application for dismissals of said cases Nos. 33113 and 33114 been made in open court upon the agreement of the litigants as hereinbefore set forth and thereupon the court had entered judgments of dismissal, they would have been judgments on retraxit and would have barred further litigation of the matters involved. Merritt v. Campbell, supra; Westbay v. Gray, supra; Hibernia Sav., etc., Society v. Portener, 139 Cal. 90,

72 P. 716. Subdivision 1 of section 581 of the Code of Civil Procedure provides for a dismissal of the case by plaintiff by written request to the clerk filed with the papers in the case, and such dismissal may be made by an entry in the clerk's register. This was the method adopted in dismissing said cases 33113 and 33114. There were no judgments ordered or entered by the court in either of said actions. Where the parties appear in open court and stipulate for a dismissal the situation is not covered by said section 581, but is a judgment on the merits as contemplated by section 582 of the Code of Civil Procedure. McCord v. Martin, 47 Cal. App. 717, 191 P. 89. But in the case of Rincon Water & Power Co. v. Anaheim Union Water Co. (C. C.) 115 F. 543, the court, in construing sections 581 and 582 of the Code of Civil Procedure, held that a dismissal by defendant's attorney, pursuant to a written stipulation between the parties, was not a judgment on the merits which concluded the rights of the parties. In the case of Pyle v. Piercy, 122 Cal. 383, 55 P. 141, the court said: "We are not inclined to extend the doctrine of retraxit as recognized in the case of Merritt v. Campbell, 47 Cal. 543, and that case is essentially different in its facts from the case at bar. When there has been no adjudication of the cause upon its merits, it will only be in exceptional cases that this court will hold that a judgment of dismissal is the equivalent of a judgment of res adjudicata upon the facts."

However, the trial court found that on September 24, 1924, all differences then existing between the parties were compromised, satisfied, and discharged. This agreement and settlement was based upon a good and sufficient consideration. By that settlement respondents as a consideration for the dismissal of said actions 33113 and 33114 and settlement of all disputed matters then existing between them and appellants deeded back to appellants the aforesaid property, deducted a charge of $1,000 owing them by appellants and accepted appellants' note for $48,000 secured by a deed of trust upon said property subject to three incumbrances totaling $160,000.

[9-11] Like a judgment, in the absence of a showing of fraud or undue influence, a compromise agreement is decisive of the rights of the parties thereto. Cal. Jur. vol. 5, p. 399. It is the fixed policy of the law to encourage the settlement of disputes and the prevention of litigation, and when such settlement has been made, acted upon, and acquiesced in, parties will not be permitted to violate the compact unless circumstances of fraud or undue influence are shown. Bree v. Wheeler, 4 Cal. App. 109, 87 P. 255; Hale v. Akers, 69 Cal. 160, 10 P. 385; Armstrong v. Sacramento Valley R. Co., 179 Cal. 648, 178 P. 516; Crossman v. Davis, 79 Cal. 603, 21 P. 963. In this last-named case the court said: "The only real question presented by the record is, whether or not a certain agreement between the grantors of the parties to this action, by which said parties compromised and dismissed an action pending between them, involving the title to this same property, was a bar to the plaintiff's claim to an interest therein. The court below found that the dismissal of the action under a special agreement involving other disputed matters was sufficient to bar the plaintiff's claim, and in this we think the court was right. * * * The plaintiff had full knowledge of the agreement and dismissal, and must be held to have been bound thereby." Even though there had been usury in the original transaction, it would seem that upon a settlement upon which each of the parties released the others from all claims and liabilities of every character then existing, the right to rely upon a previous usurious transaction would cease to exist. Ector v. Osborne, 179 N. C. 667, 107 S. E. 388, 13 A. L. R. 1207; Hoopes v. Ferguson, 57 Iowa, 39, 10 N. W. 286; Blohm v. Hannan, 82 N. J. Eq. 192, 88 A. 622.

[12] This court is of the opinion that by the compromise and settlement entered into by appellants and respondents on September 24, 1924, all the alleged rights and claims of appellants as set forth in their complaint filed in this case were settled and determined, and that the finding of the trial court to that effect is fully sustained by the evidence.

There is no claim made, nor any evidence offered, that the sale under the deed of trust was otherwise than regular, legal, and in conformity with the requirements of said instrument.

The only contentions made by appellants for reversal, other than the said claim of usury, are that the findings of the court are not supported by the evidence, and as to these contentions we think they are without merit.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

97 Cal. App. 406

ZIMMERMAN v. BOYD et al. (Civ. 5362.)

District Court of Appeal, Second District, Division 1, California. March 6, 1929.

Usury ⊂⇒127—One of defendants, sued on another's obligation to repay loan, could not take advantage of usury in transaction, not being party thereto.

Where answer of defendants, sued on written obligation of one of them to plaintiff to repay loan, did not set up usury as a defense, and suggestion of usury occurred only in affidavit of one defendant in his notice of motion to dismiss action, that defendant not being party to alleged usurious transaction, was in no position to take advantage of its assumed infirmities, even though transaction be assumed as usurious.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by H. Lee Zimmerman against Frank Boyd, sometimes known as Henry Burton Nash, M. E. Gibson, and others, wherein defendants set up a cross-complaint. From the judgment, plaintiff appeals. Reversed.

Clifford Crail, of Los Angeles, for appellant.

HOUSER, J. Plaintiff brought an action in claim and delivery against defendants Frank Boyd and M. E. Gibson. The complaint contained such allegations only as are customary or usual in such an action. The defendants demurred to the complaint on the sole ground of its uncertainty. They also answered the complaint and in the same instrument set up a cross-complaint. Neither of such pleadings contained any averment of fact other than such as related to the ownership, or the possession, or the right to the possession, of the property which was the subject of the action. Thereafter, on motion presented by defendant Boyd only, which was "based upon the documents, records, and files of the action above entitled, and upon the affidavit of Frank Boyd," the trial court "ordered, adjudged and decreed" that the action be dismissed; that plaintiff "return all property taken from the defendant"; that the demurrer to the complaint be sustained; and that defendant recover his costs, but "no damages by reason of the taking of this property." On the same day on which the hearing on the motion occurred, plaintiff caused dismissal to be entered of the action as to defendant Gibson.

On the hearing of said motion and in support thereof it appears that each of the parties to the action was "sworn and examined." The appeal herein is from said "order" or judgment.

So far as is here material, the affidavit of defendant Boyd was as follows:

"That prior hereto he executed and delivered a chattel mortgage indebtedness to one M. E. Gibson, for $1,200 or thereabouts, and that M. E. Gibson borrowed $500 of plaintiff and in evidence thereof made and delivered her written obligation to the plaintiff to repay for such loan the sum of $600 as principal, with interest thereon, and that the actual rate of interest charged by plaintiff on account of said loan exceeded 7% per annum and was not 'clearly' or otherwise expressed in writing as required by section 1 of the Usury Law;

"That under the terms of the said chattel mortgage so executed, as aforesaid, by this defendant, plaintiff herein has brought the action above entitled and seized upon various and sundry personal property, including the following, to wit: [Describing same.]

"And that the basis of the action brought by the plaintiff on the action above entitled was, and is, a usurious transaction and one in violation of and prohibited by the Usury Law of the state of California."

From such affidavit it may be surmised that the transaction among the parties to the action in effect was that as security for an indebtedness amounting to approximately $1,200, owing by Boyd to Gibson, the former gave the latter a chattel mortgage covering certain personal property; that Gibson borrowed $500 from Zimmerman, evidenced by her note for $600, "with interest thereon," and secured same by the chattel mortgage theretofore given to her by Boyd. It also may be conjectured that in some manner the obligation was breached, and that thereupon, in accordance with the provisions contained in the chattel mortgage, Zimmerman commenced an action in claim and delivery. It may be inferred that the basis of the said motion made by defendant Boyd, which included a proposition to dismiss the action, was that, as between Zimmerman and Gibson, the transaction was usurious.

It will be remembered that the answer of the defendants to the complaint contained no allegation by which usury was set up as a defense. The first and only appearance of even a suggestion of usury in the transaction occurs in the affidavit of Boyd presented by him in his notice of motion to dismiss the action, etc. Waiving any and all questions with reference to the regularity of, or the authority for, the procedure which was followed in the matter, it is clear that Boyd, not being a party to the alleged usurious transaction, was in nowise concerned with it and was in no position to take advantage of any of its assumed infirmities. The principle of law governing the situation is approvingly quoted in the case of Matthews v. Ormerd, 140 Cal. 578, 582, 74 P. 136, 138, as follows: "It has been a long and uniformly established law, that one not a party to an usurious contract, may not, for this cause, invalidate it. * * * The reason is extremely obvious. The law of usury was made to prevent oppression, and to rescue the party oppressed; but it never was intended for the benefit of those who are not and cannot be injured by an usurious transaction. It falls within that class of statutes in which, although a contract is declared to be utterly void, it is voidable only at the election of the oppressed party." In 39 Cyc. 999, 1062, 1082, where authorities are cited, the rule is said to be that the defense of usury is purely personal to the borrower, or to those in privity with him.

In the case of Willcox v. Edwards, 162 Cal. 455, 462, 123 P. 276, 279 (Ann. Cas. 1913C, 1392) it is said: "The defense of usury must be made affirmatively in some recognized mode, or it is waived. 22 Ency. of Plead. & Prac. pages 421, 422. The usurious contract, although said by the statute to be 'void,' is held to be only voidable at the election of the payer, and money paid thereon cannot be recovered."

In the instant case, it becomes apparent that, even assuming the transaction as between Zimmerman and Gibson was "usurious," that fact afforded no defense to the action so far as Boyd was concerned, and consequently furnished no ground or authority for the dismissal of the action as to him—upon which the "order" or judgment herein was predicated.

It becomes unnecessary to consider other assignments of error suggested by the appellant.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

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97 Cal. App. 163

Ex parte AYDELOTTE. (Cr. 1777.)

District Court of Appeal, Second District, Division 1, California. Feb. 23, 1929.

1. Bail ⚿42—Admission to bail after conviction in felony case is within discretion of court.

Admission to bail after conviction of defendant in felony case, punishable by imprisonment, is matter of discretion with court.

2. Bail ⚿53—Action of trial court in requiring bail in larger sum on granting continuance because of serious illness of defendant was arbitrary and in excess of its power (Pen. Code, §§ 1129, 1271, 1273, subd. 3; § 1289).

Where failure of defendant, having been admitted to bail in accordance with order of superior court under Pen. Code, § 1271, to appear for trial was justified by fact of serious illness, and there was no showing of threat or intention to become fugitive from justice, action of trial court after continuing trial in requiring bail in larger sum was arbitrary and not within its power as defined by Pen. Code, § 1289, though court has power under section 1273, subd. 3, to enlarge amount of bail fixed by magistrate before indictment and to order defendant committed to custody of proper officer of county after appearance for trial in accordance with section 1129.

York, J., dissenting.

Original application for habeas corpus by William M. Aydelotte. Writ granted.

Arthur B. Rose, of Los Angeles, for petitioner.

Buron R. Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, P. J. On petition of Aydelotte the writ was issued. Return was made on behalf of the sheriff and a traverse was filed by the petitioner. On these papers, and some evidence produced at the hearing, the matter has been submitted.

By indictment duly found and presented in the superior court of Los Angeles county the petitioner stands accused of the crime of grand theft. After indictment the defendant was admitted to bail in the sum of $2,500; he gave bond in that amount and was released from custody. He entered a plea of not guilty, and the case was placed on the calendar, to be tried on the 17th day of January, 1929, at 10 o'clock a. m. When the case was called for trial, the defendant not being present, his attorney represented to the court that the defendant was confined to his bed by a serious illness. The court continued the case until 2 o'clock of that day. Thereupon a physician who had been in attendance upon the defendant and who had examined defendant late the night before testified that defendant's condition was such that, according to the physician's belief, it would result in defendant's death if defendant were brought to court. Thereupon the case was continued to January 18, 1929, at 10 o'clock a. m., and a bench warrant was issued for the arrest of the defendant. When the case was again called on January 18th it appeared that a deputy sheriff, to whom the bench warrant had been delivered, had visited the defendant, but, owing to defendant's apparent illness, had not taken him into custody, and the deputy sheriff so reported to the court. The uncontradicted evidence before the court was as above stated. Thereupon the court continued the case for trial to February 25, 1929. In connection therewith, however, and upon arrest of the defendant under the bench warrant, the court (without any request of defendant or his sureties) exonerated the sureties on the $2,500 undertaking of bail and ordered that defendant remain in custody and that he be released only upon execution of a new undertaking of bail in the sum of $10,000.

[1] With the exception of certain capital cases, the defendant in a criminal action may be admitted to bail before conviction, as a matter of right. Pen. Code, § 1271. If he has

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

been admitted to bail by a magistrate before indictment, the court to which the indictment is returned may enlarge the amount of bail. Pen. Code, § 1273, subd. 3. "When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly." Pen. Code, § 1129. Admission to bail after conviction in a felony case punishable by imprisonment is a matter of discretion with the court. Frankfort v. Superior Court, 71 Cal. App. 357, 235 P. 60. "After a defendant has been admitted to bail upon an indictment or information, the court in which the charge is pending may, *upon good cause shown*, either increase or reduce the amount of bail. If the amount be increased, the court may order the defendant to be committed to actual custody, unless he give bail in such increased amount. * * *" Pen. Code, § 1289.

[2] It is conceded that the defendant in this case had regularly given bail in the sum of $2,500 in accordance with an order of the superior court. He was not present in court when his case was called for trial, but the evidence showed, without impeachment or conflict, that his absence was justified by the fact of serious illness. Nothing appeared to show that the defendant had threatened or intended or in any way indicated that he would become a fugitive from justice. There were no facts in the record with relation to the charge against the defendant which had not been in the record when the $2,500 bond was ordered by the court and given by the defendant with the court's approval. From these facts, in connection with the fact that the trial was postponed, it follows that the action of the court in requiring the defendant to give bail in a larger sum was arbitrary and was not within its power as defined by section 1289 of the Penal Code.

It appears that the said criminal action is set down to be tried only two days from the present time. The fact that the application for this writ was not promptly made, and that counsel desired to brief the case, prevented us from submitting the matter until the present week. Unless the trial shall be continued again, this decision will be of very little practical advantage to the defendant, since at all events he may be committed to custody at the commencement of the trial. Nevertheless, it is our duty to decide the matter.

It is ordered that upon giving a new undertaking of bail in the sum of $2,500, to be approved by a judge of the superior court, at any time before trial of the action in the court below, the petitioner be released from custody. This order is made without prejudice to the right of the superior court at any time upon proper notice and good cause shown either to increase or reduce the amount of bail required to be given by the defendant in said action.

I concur: HOUSER, J.
I dissent: YORK, J.

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97 Cal. App. 238

PEOPLE v. CLEMENT. (Crim. 1523.)

District Court of Appeal, First District, Division 2, California. Feb. 26, 1929.

1. Criminal law 🔑883—Statute does not require jury to find degree of crime of conspiracy, it not being divided into degrees (Pen. Code, § 1157).

Pen. Code, § 1157, requiring jury to fix degree of crime, does not require jury to find degree of crime of conspiracy, since such crime is not divided into degrees.

2. Criminal law 🔑883—Statute does not require jury to fix degree of robbery which defendant conspired to commit (Pen. Code, § 1157).

Pen. Code, § 1157, does not require jury to fix degree of robbery which defendant conspired to commit, since robbery need not have been fully accomplished by defendant in order to warrant his conviction of conspiracy.

3. Criminal law 🔑883—It was unnecessary to fix degree of conspiracy to commit robbery in order that term of imprisonment be known (Pen. Code, §§ 182, 213).

It was unnecessary to fix degree of crime of conspiracy to commit robbery, in order that term of imprisonment of defendant be known, under Pen. Code, § 213, relating to punishment for robbery, and section 182, relating to punishment for conspiracy.

4. Criminal law 🔑1208(9)—Maximum term for conspiracy to commit robbery being fixed and definite, indeterminate sentence law applies, and prison board may fix sentence (Pen. Code, §§ 182, 213, 1168).

Maximum term for conspiracy to commit robbery being fixed and definite, under Pen. Code, §§ 182, 213, indeterminate sentence law applies, and prison board has power to fix sentence of defendant under section 1168.

5. Criminal law 🔑720(1)—District attorney, in argument to jury, could comment on statements contained in defendant's confession duly received in evidence.

District attorney was entitled, in argument to jury, to comment on any of statements contained in confession of defendant which was duly received in evidence.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Robert Clement was convicted of conspiracy to commit robbery, and he appeals. Affirmed.

Leo Sullivan, of Oakland, and J. L. Royle, of Berkeley, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

KOFORD, P. J. Appellant Clement and a codefendant, Turner, were charged in separate counts with two crimes—robbery and conspiracy to commit robbery. Defendant Turner pleaded guilty to the charge of robbery and judgment was duly pronounced against him. Appellant Clement pleaded not guilty to both charges. He was found not guilty of robbery and guilty of conspiracy "as charged in the second count of the information."

The first count, after charging robbery, further alleged that at the time of the robbery Turner was armed with a deadly weapon, and that at the time the defendants were arrested appellant was armed with a concealed deadly weapon. The second count charged conspiracy to commit the same robbery, alleging as overt acts: (1) Proceeding to the scene of the crime; (2) the arming of Turner with a revolver; (3) the robbery itself; and (4) that appellant acted as lookout. The information further alleged that the second count charged acts which were part of the same transaction and event described in the first count.

The court gave the jury a blank form of verdict finding the defendant guilty of robbery in the first degree. As to the second count no instruction was either given by the court or requested by appellant to the effect that the jury should designate the degree of any crime, in case they found the defendant guilty only of the conspiracy charge contained in the second count.

[1] It is appellant's claim upon this appeal that the verdict is void for uncertainty for failing to determine the degree of the crime. Pen. Code, § 1157, requires the jury to fix the degree of the crime whenever the defendant is found guilty of a crime which is divided into degrees. It is error to fail to do so in such a case. In re Colford, 68 Cal. App. 308, 229 P. 63. It has also been held that the wording of the information charging the degree of the crime will not cure the error of the jury in not finding the degree of crime, where it is required by Penal Code, § 1157. People v. Campbell, 40 Cal. 129, 130; People v. Coch, 53 Cal. 627; People v. Nichol, 34 Cal. 211, 217. But where the crime is not divided into degrees the requirements of the section do not apply. People v. Gilbert, 60 Cal. 108, People v. Sachan, 78 Cal. App. 702, 248 P. 960. The crime of conspiracy is not divided into degrees by any law, and hence section 1157 does not require the jury to find the degree of that crime. Without a definition of degrees, there is no way of saying what conspiracies would be of one degree and what ones of another. We are invited to say that the crime of conspiracy to commit a given felony, as defined in Pen. Code, § 182, subd. 1, is divided into degrees in the same way as the felony contemplated. Thus conspiracy to commit robbery would be first or second degree robbery, according to whether the robbery contemplated was first or second degree robbery, as defined in Pen. Code, § 211a. This suggestion must be rejected. Besides being legislation such a plan would not fail to produce its new crop of difficulties. One can easily imagine persons conspiring to commit robbery, burglary, or other degree-divided felonies, and even going so far as to commit overt acts, and becoming thereby punishable for the conspiracy; but where, nevertheless, neither their acts nor agreements would show whether a felony of one degree or of another was contemplated by them.

[2] For a like reason section 1157 did not require the jury to fix the degree of robbery which appellant conspired to commit. Appellant was acquitted of the direct charge of robbery, and was not found guilty of robbery by the verdict of guilty of conspiracy to commit robbery. The robbery need not have been fully accomplished by the appellant in order to warrant his conviction of conspiracy. There is, therefore, no statutory requirement that the jury in this case fix any degree either of robbery or of conspiracy.

[3, 4] Neither was it necessary to fix the degree in order that the term of imprisonment of appellant be known. Whether the robbery be first or second degree, the maximum term is the same, to wit, life. Pen. Code, § 213. The same maximum term, therefore, applies to conspiracy to commit robbery of either degree. By Pen. Code. § 182, a conspiracy to commit a felony is made punishable in the same manner and to the same extent as provided for the punishment of the commission of the said felony. The maximum term being fixed and definite, the indeterminate sentence law applies, and the prison board has power to fix the sentence of appellant under Pen. Code, § 1168. In re Lee, 177 Cal. 690, 171 P. 958; People v. Sama, 189 Cal. 153, 207 P. 893; People v. Wignall, 56 Cal. App. 423, 205 P. 881; In re Wignall, 193 Cal. 387, 224 P. 452.

No minimum term, however, is prescribed by the Penal Code, in either section 213 or section 182, for conspiracy to commit robbery without regard to degree. Robbery of the first degree is punishable by imprisonment for not less than five years, and of the second degree for not less than one year. Pen. Code, § 213. What the minimum term would be in such a case, and where, if at all, it is prescribed, we need not decide upon this appeal. This particular appellant's minimum term is fixed by Pen. Code, § 1168, if, as the evidence shows, he was armed with a concealed deadly weapon at the time of his arrest. The same section also states at what time the prison board may fix the term.

There is no merit in the claim that overt acts were not sufficiently proven. They were all proven. The appellant and his codefendant were sufficiently indicated and identified in the testimony to show that the two defendants on trial were the ones referred to by the witnesses.

[5] The district attorney was entitled in his argument to the jury to comment upon any of the statements contained in the confession of appellant, which was duly received in evidence.

The judgment and order appealed from are affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

COLLECTION SERVICE CORPORATION v. CONLIN. (Civ. No. 5124.) ★

District Court of Appeal, Second District, Division 2, California. Feb. 27, 1929.

Rehearing Granted March 29, 1929.

1. Partnership 🔑64—Name "Alles Printing Company," operated by Fred L. Alles, held not such fictitious name as to require publication (Civ. Code, § 2466).

Under Civ. Code, § 2466, requiring publication of certificate as to fictitious name where fictitious name is used or partnership is doing business, name "Alles Printing Company," operated by Fred L. Alles, was not such a fictitious name as required publication.

2. Partnership 🔑64—Testimony concerning operation of "Alles Printing Company" by proprietor, though using word "we" in testifying as to business, did not establish partnership requiring publication of name (Civ. Code, § 2466).

In action on open book account by assignee of "Alles Printing Company," use of pronoun "we" by proprietor in testifying as to his business, and testimony that son-in-law was partner at time of trial, but that he was proprietor during period of account and that proprietor was doing business as the "Alles Printing Company" at all times mentioned in complaint, did not establish partnership requiring publication of certificate of name, under Civ. Code, § 2466.

3. Appeal and error 🔑1071(1)—That complaint alleged account was assigned by Alles Printing Company and findings showed assignment by Fred L. Alles held immaterial, where company and individual were same.

In suit by assignee of "Alles Printing Company" on open book account, it was immaterial that complaint alleged account was assigned by Alles Printing Company and that findings showed assignment was by Fred L. Alles, where company and individual were the same.

4. Account, action on 🔑22—Creditor's testimony that debtor acknowledged correctness of book account and paid part thereof, though denied by debtor, was sufficient to support judgment for balance.

In action on open book account by assignee of creditor, testimony by creditor that he personally had conversation with debtor on subject of charges, and that debtor acknowledged correctness of book account in sum of $485.41 and thereupon paid $85.41, though denied by debtor, was sufficient to support judgment for sum of $400.

5. Appeal and error 🔑931(1)—Conflicting evidence must be resolved in support of judgment by appellate court and prevailing party's version considered correct.

District Court of Appeal must resolve conflicting evidence to support judgment and to consider testimony by prevailing party as correct one.

6. Account, action on 🔑22—Conflicting evidence whether payment was made on account or for new order authorized judgment against debtor on open book account.

In action on open book account by assignee of creditor, conflicting evidence as to whether debtor made payment on account or whether payment was for new order, which was admittedly given, and evidence showing new order was delivered, authorized judgment against debtor.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Action by the Collection Service Corporation against C. B. Conlin. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Wm. M. Morse, Jr., and E. R. Simon, both of Los Angeles, for appellant.

A. P. Michael Narlian, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. [1, 2] This is an action upon an open book account, the plaintiff suing as the assignee of "Alles Printing Company." The complaint alleges "that at all the times herein mentioned Fred L. Alles was doing business under the registered fictitious name of Alles Printing Company." Plaintiff received judgment for $497.70, and the findings are in accord with the allegation just quoted. There is no allegation, evidence, or finding in the case that that portion of section 2466 of the Civil Code which requires the publication of a certificate as to a fictitious name or the names comprising a partnership has been complied with. Defendant asks a reversal of the judgment, assigning this as error. However, there is no error, for the simple reason that the Code requires the publication only where there is a fictitious name used or where a partnership is doing business. There is no fictitious name used, and the finding to that effect is mere

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★Rehearing granted. 277 P. 749.

surplusage. Spreckels v. Grace Darling Hospital Ass'n, 28 Cal. App. 646, 153 P. 718; Andrews v. Glick (Cal. Sup.) 272 P. 587.

There is no partnership alleged, proven, or found. It is true that Mr. Alles made general use of the pronoun "we" in testifying as to his business, and also stated that his son-in-law was his partner at the time of the trial, but directly testified that he was the proprietor of the business during 1920. The books showed the first item on the account as under date of April 19, 1920. The trial court found that the last item on the account was under date of October 5, 1920. But he also testified, and the court found, that Fred L. Alles was doing business as "Alles Printing Company" at all times mentioned in the amended complaint. Of course, there is no occasion here for questioning this finding. See Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 513, 75 P. 106, upon the point that the use of the words "Printing Company" does not import a partnership. Under the authorities, Fred L. Alles in his individual capacity had a right to conduct his business under the name of Alles Printing Company without the registration and publication required by section 2466 of the Civil Code.

[3] Defendant also assigns as error the fact that the complaint alleges that the account was assigned by Alles Printing Company and the findings are that the assignment was by Fred L. Alles; but, as the two are the same, there is nothing to the point.

[4] The next assignment of error is under two designations, A and B, to the effect that there is no evidence sustaining the finding that the defendant is indebted to the plaintiff's assignor on an open book account for a balance in the sum of $497.70, all within four years prior to the date of filing suit: (A) In that there is no evidence that defendant ever gave any orders for the printing charged for, or (B) to the effect that the printing charged for was ever delivered to defendant. Fred L. Alles testified that he personally had a conversation with the defendant on the subject of the charges, and that defendant acknowledged the correctness of the book account in the sum of $485.41, and thereupon paid $85.41, so as to leave the account standing in the round figure of $400. At the same time, according to Alles' testimony, defendant gave a new order for printing amounting to $96. The testimony regarding the correctness of the book account makes it unnecessary to pursue the question of orders or delivery of the printing which was charged for in the books up to this point. In other words, this testimony, though denied by defendant, is sufficient to support the judgment for the sum of $400.

[5, 6] The payment for and the delivery of the printing for the new order must now be considered. The defendant admits the payment of the $85.41, but denies it was a payment on account. He claims it was a cash payment for the new order of printing. Here, of course, is a direct conflict in the testimony. Alles claims that the new order was for $96, which was not paid, and that the $85.41 was on the old account, while defendant claims the new order was not for $96, but was for $85.41, which he thereupon paid. Of course, we must resolve the question in favor of supporting the judgment, which compels us to consider Alles' version as the correct one. A new order was admittedly given, and we have seen that defendant even claims he paid for it. Defendant does not testify that it was never delivered. He does not ask for the refund of the money he claims he paid for it. It seems to us that this amounts to a concession that it was delivered. And this is further confirmed by the fact that much business was admittedly done between plaintiff's assignor and defendant over a period of several months.

The judgment appears to be for the sum of $1.70 too much. The judgment is modified by deducting therefrom the sum of $1.70, and as so modified it is affirmed. Respondent to recover costs on appeal.

We concur: WORKS, P. J.; CRAIG, J.

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97 Cal. App. 242

IVIE v. ENTERPRISE POULTRY FARM.

(Civ. 6648.)

District Court of Appeal, First District, Division 2, California. Feb. 27, 1929.

1. Automobiles 🔑244(10, 42)—Finding of negligence of defendant's agent approaching blind curve on wrong side of highway, and plaintiff's want of contributory negligence as to speed, held justified.

Finding of trial court of negligence of defendant's agent, and of plaintiff's want of contributory negligence, *held* sustained by evidence, in action for damages to plaintiff's automobile resulting from collision with truck while rounding blind curve on highway, where truck driver approached curve on wrong side of highway and claim was that plaintiff drove too fast.

2. Appeal and error 🔑174—Claim that plaintiff's insurance carrier became real party in interest held waived, where not asserted below.

That repairs to plaintiff's damaged automobile were paid for by plaintiff's insurance carrier was no defense to defendant on appeal after judgment for damages in plaintiff's favor, where no claim was made in trial court that there was an equitable assignment or subrogation making the insurance carrier the real party in interest, since such claim could be waived.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Suit by W. H. Ivie against the Enterprise Poultry Farm. Judgment for plaintiff, and defendant appeals. Affirmed.

Cooley & Gallagher, of San Francisco, for appellant.

W. F. Cowan, of Santa Rosa, for respondent.

NOURSE, J. Plaintiff sued for damages for injuries to his automobile resulting from a collision with a truck driven by an agent of the defendant. The cause was tried before the court sitting without a jury and resulted in a judgment for the plaintiff in the sum of $904.52. From this judgment the defendant has appealed upon typewritten transcripts.

[1] The two cars came into collision while rounding a curve on a public highway, the view of which was obstructed to some extent by willows which stood about 6 feet from plaintiff's right-hand side of the highway, which was paved to a width of 18 feet. Plaintiff, driving a sedan, endeavored to take the curve at a speed of about 15 miles per hour. The truck was being driven at a rate of about 12 miles, but was running on the left, or "wrong" side of the highway. As the cars collided the two right-hand wheels of plaintiff's car were entirely off the pavement and were running in the dirt portion of the road to the right of this 18-foot pavement, while the defendant's truck was running diagonally across the paved portion of the highway; the rear end of the truck being about 2½ feet from the westerly or left outer edge of the pavement.

The evidence of the negligence of defendant's agent in thus approaching a blind curve on the wrong side of the highway is unmistakable and fully supports the finding of the trial court. On the issue of contributory negligence (the speed at which plaintiff was traveling) the evidence was not contradicted except by the testimony of witnesses who were in no position to testify on the subject.

[2] The trial court found that $574.52 had been expended on plaintiff's behalf in the reasonable repair of his damaged machine, and this sum was included in the judgment. Defendant attacks this portion of the judgment on the ground that the repairs were paid for by an insurance company with which the plaintiff carried insurance. The point is without merit. Counsel for defendant argues, without citing any evidence to support it, that there was an equitable assignment or subrogation, and that the insurance carrier thus became the real party in interest and should have been joined as a party plaintiff. The point was not raised in the trial court, and, as it is an objection which might be waived by the defendant (Offer v. Superior Court, 194 Cal. 114, 119, 228 P. 11), the defendant has not presented any question of error occurring at the trial.

The cause was tried with extreme fairness and with all reasonable consideration for the interests of the defendant, who was so clearly the wrongdoer that his appeal is wholly without merit.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

97 Cal. App. 367

SHIPPY v. PENINSULA RAPID TRANSIT CO. (Civ. 6592.)*

District Court of Appeal, First District. Division 2, California. March 4, 1929.

Rehearing Denied April 2, 1929. Hearing Denied by Supreme Court April 29, 1929.

1. Judgment ⚷570(7, 8)—Dismissal at trial as to one defendant without agreement on his part does not operate as bar to maintenance of subsequent action.

In action for injuries against motorbus company and driver, dismissal of action as to driver, in usual form, signed by plaintiff and his attorneys, without agreement of driver, is not an adjudication of the cause on its merits, and therefore does not operate as bar to maintenance of subsequent action.

2. Judgment ⚷951(1)—There is no presumption that dismissal signed by plaintiff is given for consideration, so as to bar subsequent maintenance of action (Civ. Code, § 1614).

There is no presumption that dismissal signed by plaintiff is given for consideration, and therefore bars subsequent maintenance of action, on account of Civ. Code, § 1614, which makes written instrument presumptive evidence of consideration, since statute does not apply to dismissal.

3. Judgment ⚷695—Agent must be exonerated by judgment on merits in order to release principal.

Failure to obtain judgment on merits against agent does not release principal, but principal is released only by an exoneration of the agent by judgment on the merits.

4. Judgment ⚷695—Finding on facts of agent's freedom from negligence precludes judgment against principal based on negligence of agent.

Finding on the facts that agent has not been guilty of negligence precludes judgment against principal based on agent's negligence.

5. Judgment ⚷570(7, 8)—Motorbus company, sued for injuries resulting from negligence of driver, held not exonerated by dismissal of driver, joined as codefendant, where dismissal was not adjudication on merits; driver not being necessary party.

In action for injuries against motorbus company and driver of motorbus, dismissal as to driver, signed by plaintiff during the trial, *held* not to preclude plaintiff's recovery against company, under doctrine of respondeat superior, since the dismissal was not an adjudication of the case on the merits, and driver was

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

not a necessary party to the action, and motorbus company could in turn recover from driver, and was not prejudiced.

6. Automobiles 🔑227(5)—Last clear chance doctrine held inapplicable to prevent plaintiff's recovery for injuries sustained in collision between automobile and motorbus.

In action for injuries sustained in collision between automobile driven by plaintiff and motorbus operated by defendant's agent, last clear chance doctrine *held* inapplicable to prevent plaintiff's recovery, on ground that he could have avoided accident after becoming aware of situation of bus.

7. Trial 🔑260(8)—Refusal of instruction on plaintiff's failure to use reasonable care to avoid collision held not prejudicial, in view of instructions given.

In action for injury resulting from collision between motor vehicles, refusal of instruction preventing plaintiff's recovery if he could have avoided accident with reasonable care *held* not prejudicial to defendant, where jury was fully instructed on law controlling automobile drivers and with reference to want of ordinary care on part of plaintiff.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by William A. Shippy against the Peninsula Rapid Transit Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 240 P. 785.

John Ralph Wilson, of San Francisco, for appellant.

Cyril Appel, Ivores R. Dains, and Harry I. Stafford, all of San Francisco, for respondent.

NORTON, Justice pro tem. This action is for damages growing out of personal injuries sustained by the respondent, Shippy, in a collision between an automobile driven by him and a motorbus operated by appellant through its agent, the defendant Claus, in which respondent obtained a verdict and judgment against appellant.

[1] The action is predicated upon the negligence of defendant Claus, who was the driver of the motorbus; appellant being liable, if at all, under the doctrine of respondeat superior. During the trial respondent dismissed the action as to defendant Claus, the driver of the motorbus; the dismissal being in the usual form, signed by the plaintiff and his attorneys. This dismissal was first called to the attention of the trial court while the court was engaged in instructing the jury, at which time the court instructed the jury that the action had been dismissed as to defendant Claus.

Appellant's contention on this appeal is that the dismissal of the action as to defendant Claus was in effect a statement that Claus was not guilty of negligence, freed him from liability on account of the accident, and amounted to such an exoneration as must necessarily exonerate his principal under the doctrine of Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am. St. Rep. 171. Assuming that the action of plaintiff had the effect to dismiss this action as to defendant Claus, it is our opinion that such dismissal was not a judgment of res adjudicata upon the facts. It was not, so far as is shown by the record, in pursuance of agreement with or consent of defendant Claus, nor was it an adjudication of the cause upon its merits, and it therefore does not operate as a bar or estoppel to the maintenance of a subsequent action. Pierce v. Hilton, 102 Cal. 276, 36 P. 595; Stoutenborough v. Board of Education, 104 Cal. 664, 38 P. 449; Pyle v. Piercy, 122 Cal. 383, 55 P. 141; Campanella v. Campanella (Cal. Sup.) 269 P. 433.

[2] Appellant urges that the law presumes the dismissal was made for a consideration by virtue of the provision of section 1614 of the Civil Code that "a written instrument is presumptive evidence of a consideration." This section of the Code is applicable to writings contractual in their nature, which purport to express or carry out an agreement or meeting of the minds of the parties thereto, but not to a writing filed in court by a plaintiff in the process of the control and disposition of an action commenced by him.

Appellant's contention amounts to the claim that every written dismissal of an action by plaintiff is presumptively a bar to the subsequent maintenance of the action, a proposition which is contrary to the settled practice and law of this state. Defendant Claus was not a necessary party to the action. Appellant had not the legal right to compel his presence in the case, and, had the action not been dismissed as to him, would not have been injured, had the jury failed to find a verdict as to him. Bosse v. Marye, 80 Cal. App. 109, 250 P. 693.

[3, 4] It is not the failure to obtain a judgment on the merits against the agent which releases the principal, but the exoneration of the agent by judgment on the merits. The finding upon the facts that the agent has not been guilty of negligence precludes a judgment against the principal based on the negligence of the agent. Bosse v. Marye, supra.

[5] In the present case, respondent was under no legal obligation to maintain his action against Claus to judgment on the merits, and appellant has suffered no prejudice by the dismissal, nor been placed in any worse position than had the jury failed to render a verdict as to Claus. The record shows no release of defendant Claus, and no judgment on the merits in his favor. Appellant has not been deprived of its right to recover from its agent, if it chooses to exercise it. Nor have its rights in any way been affected by the

failure to retain its agent in the case to the conclusion of the trial, and it cannot complain of such failure.

[6, 7] Appellant further presents as error, which is claimed to justify a reversal of the judgment, the refusal of the trial court to give the following instruction:

"You are instructed that it is the law that when a collision occurs between two motor vehicles the driver who has the last clear opportunity to avoid the accident is considered solely responsible for the accident notwithstanding that the driver of the other vehicle has been guilty of negligence and if you find from the evidence in this case that the driver of defendant's motorbus had placed himself by reason of his negligence in a place of danger, yet if you further find that plaintiff was aware of this and that plaintiff in operating his automobile at the time of his injury could have avoided the accident by the use of ordinary care and that he failed to use such care, then your verdict should be for the defendant."

If this instruction be taken to present the rule known as "last clear chance" it is inapplicable in the present case. Dover v. Archambeault, 57 Cal. App. 659, 208 P. 178. If it is to be taken merely as an instruction that plaintiff was responsible for the collision if, realizing that there was a danger of a collision, he could with reasonable care have avoided it, refusal to give this instruction was not, in view of other instructions given by the trial court, prejudicial to the appellant. The jury was fully and clearly instructed not only as to the law controlling drivers approaching the intersection of two streets, but also in reference to want of ordinary care on the part of the respondent.

In our opinion, the instructions of the court fairly and adequately presented the law as applicable to the facts in this case, and the judgment should be affirmed. It is so ordered.

We concur: KOFORD, P. J.; STURTEVANT, J.

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97 Cal. App. 302

BONHAM v. LAUX et al. (Civ. 3718.)

District Court of Appeal, Third District. California. March 1, 1929.

1. Appeal and error 🔑911(3)—Court held presumed without jurisdiction to foreclose chattel mortgage on crops, in support of judgment foreclosing realty mortgage, under record not showing service on chattel mortgagors (Code Civ. Proc. § 442).

In action to foreclose mortgage on real estate, in which chattel mortgagee appeared for purpose of foreclosing chattel mortgage on crops growing on land, executed by other defendants as mortgagors, it must be presumed, in support of judgment foreclosing real estate mortgage, that court was without jurisdiction to enter any judgment in favor of chattel mortgagee, under record failing to show that summons was served on chattel mortgagors, as required by Code Civ. Proc. § 442.

2. Appeal and error 🔑704(1)—Finding that realty mortgage after foreclosure was superior to crop mortgage held not error, under record not showing crop mortgagors owned or possessed land.

Finding that real estate mortgage was superior to chattel mortgage on crops growing on realty from and after date of sale of premises under real estate mortgage, or after actual possession of premises by real estate mortgagee, was not erroneous, on ground that lien of crop mortgage was superior to real estate mortgage on crops maturing during period of redemption, where record did not show that chattel mortgagors were owners or in possession of land.

3. Appeal and error 🔑907(3)—Proceedings necessary to valid judgment will be presumed taken, on appeal on judgment roll alone.

On appeal on judgment roll alone, all intendments will be made in support of judgment, and all proceedings necessary to its validity will be presumed to have been legally taken.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Anna Bonham against Philipp Laux and others, in which defendant I. S. Chapman & Co., a corporation, filed a cross-complaint. Judgment for plaintiffs, and cross-complainant appeals. Affirmed.

Grant Holcomb, of San Bernardino, for appellant.

Best & Best, of Riverside, amici curiæ, for respondents.

FINCH, P. J. The plaintiff brought this action to foreclose a mortgage on real estate executed by defendants Philipp Laux and Katie A. Laux as mortgagors. The defendant I. S. Chapman & Co. filed a cross-complaint to foreclose a crop mortgage on the crop of citrus fruits growing on the same land, executed by defendants Thomas C. Armstrong and Mary E. Armstrong as mortgagors. All the defendants, except I. S. Chapman & Co., failed to appear, and their defaults were duly entered. The court made findings in favor of the plaintiff, and entered judgment foreclosing her mortgage and directing the sale of the mortgaged land. No judgment was entered foreclosing cross-complainant's crop mortgage. The cross-complainant has appealed on the judgment roll alone.

[1] Appellant contends that judgment should have been entered in its favor foreclosing its crop mortgage. The record shows that defendants Thomas C. Armstrong and Mary E. Armstrong were duly served with summons directing them to appear and answer plaintiff's complaint, and that their de-

faults were entered for their failure to appear. There is nothing, however, to show that summons was issued on the cross-complaint or served upon the Armstrongs, as required by section 442 of the Code of Civil Procedure. The findings and judgment recite that the cross-complainant appeared "for the purpose of endeavoring to establish the priority of a certain chattel mortgage which was made, entered and filed with the county recorder * * * after the making and filing of the mortgage of the plaintiff herein." It must be presumed in support of the judgment, under the facts stated, that the court was without jurisdiction to enter any judgment against the Armstrongs in favor of the cross-complainant.

The court found "that defendant and cross-complainant I. S. Chapman & Co., a corporation, have a valid and subsisting chattel mortgage on all the fruit grown on said premises up and until the time of sale of the said premises under a decree of foreclosure of this court or until the plaintiff obtains possession of said premises under her mortgage." The decree of foreclosure adjudges "that from and after the date of the sale of premises hereinafter described or from and after the actual possession of said premises by the plaintiff, the right and lien of the plaintiff by virtue of her mortgage is adjudged to be superior and prior to any lien which defendant I. S. Chapman & Co., a corporation, may have on said premises or any of the fruit growing thereon by virtue of its chattel mortgage or otherwise."

[2, 3] Appellant contends that the lien of its crop mortgage was superior to that of the real estate mortgage on crops maturing during the period of redemption, citing 8 California Jurisprudence, 692, where it is said: "The owner in possession of mortgaged lands has the right to retain and harvest the crops grown and ripened pending the time of redemption." But the record in this case does not show that the Armstrongs were the owners or in possession of the land. They may have been lessees or vendees under a conditional sale contract, terminable upon their failure to pay the amount due the plaintiff or the sale of the land under foreclosure proceedings prosecuted on account of such failure. It is unnecessary to speculate as to what proof would justify the findings and judgment of the court. It is sufficient to say that, in an appeal on the judgment roll alone, "all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken. * * * If any matters could have been presented to the court below which would have authorized the entry of this judgment, it will be presumed on this appeal, in support of the judgment, that such matters were so presented, and that the judgment was entered in accordance therewith." Caruthers v. Hensley, 90 Cal. 559, 560, 27 P. 411.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

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97 Cal. App. 253

PEOPLE v. PLUM. (Cr. 1069.)

District Court of Appeal, Third District, California. Feb. 27, 1929.

1. Indictment and information 🔑110(18)—Information charging grand theft in language of statute held sufficient (Pen. Code, § 952, as amended by St. 1927, p. 1043).

Information charging grand theft in violation of Pen. Code, § 952, as amended by St. 1927, p. 1043, in the language of such statute, *held* sufficient without allegation that the lumber taken was taken feloniously or with intent to steal.

2. Criminal law 🔑957(2)—Affidavit of juror is not competent to show his incompetency or to impeach verdict.

Affidavit of jurors cannot be considered to establish his incompetency or to impeach verdict in which such juror participated.

3. Criminal law 🔑1035(5)—Incompetency of juror is not available on appeal to defendant, who made no effort to ascertain incompetency on voir dire examination.

Defendant who made no effort to ascertain incompetency of juror upon his voir dire examination cannot object thereto on appeal.

4. Criminal law 🔑559—Jurors may conclude that it was in 1928 that witness saw lumber, where reference to 1927 in question and answer was clearly mistake.

In prosecution for theft of lumber, in which it was apparent that prosecuting attorney in asking witness if he had seen the lumber in 1927 intended to refer to year 1928, and witness answer without detecting error, jury had right to conclude that it was in 1928 that witness saw lumber.

5. Larceny 🔑65—Evidence held to sustain conviction for grand theft of lumber.

Evidence *held* to sustain conviction for grand theft of lumber, as against contention that defendant became owner thereof by assignment.

6. Criminal law 🔑1170(1)—Exclusion of evidence which would have been material only on theory not supported by defendant's evidence held not ground for reversal.

In prosecution for theft of lumber, exclusion of testimony as to quantity of lumber cut and piled at certain place for certain lumber company *held* not ground for reversal, where testimony would have been material only to show that lumber had been piled so near lumber owned by defendant's principal that defendant could have taken the lumber through error or confusion, and there being nothing in defendant's testimony to support such theory.

7. Criminal law 🔑1120(6)—Exclusion of testimony as to contract, not filed as exhibit or preserved in record, will not be considered on appeal.

Exclusion of evidence as to contract will not be considered on appeal, where contract was not filed as exhibit and was not preserved in record.

8. Larceny 🔑47—Testimony to statement by alleged owner as to ownership held admissible in theft prosecution.

In prosecution for theft of lumber, testimony as to statement by alleged owner as to his ownership of lumber was admissible to identify lumber pointed out by such owner and subsequently shipped by defendant, and testimony of witness that other lumber was piled in the yards at a different location and that he had not seen the lumber pointed out by such alleged owner for a long time before defendant had shipped it tended to weaken testimony, but its force and effect were for jury.

9. Criminal law 🔑1169(2)—Admitting evidence that defendant was told he had no right to ship alleged stolen lumber held harmless, in view of other evidence sustaining charge of theft.

In prosecution for theft of lumber, admitting testimony as to conversation between defendant and lumber dealer, wherein dealer had told defendant that he had no right to ship lumber, for taking of which he was being prosecuted, was harmless, in view of testimony showing sufficient title in third person to sustain the prosecution.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

C. D. Plum was convicted of grand theft, and he appeals. Affirmed.

Nathan C. Coghlan and E. H. Lomasney, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant appeals from a judgment of conviction had upon an information charging grand theft. The information is in the following words and figures, omitting title:

"The District Attorney of the County of Plumas, State of California, hereby accuses C. D. Plum of a felony, to-wit, grand theft, in that on or about the 3rd day of May, 1928, in the County of Plumas, State of California, he unlawfully took the property of A. Newhart, consisting of fifty thousand board feet, or thereabouts, of lumber, of the value of Nine Hundred Dollars in lawful money of the United States.

"Dated, June 6, 1928.
"S. C. Young,
"District Attorney of the County
of Plumas, State of California."

[1] While no demurrer was filed to the information, it is urged upon this appeal that the information does not state a public offense, in that it does not charge that the lumber taken was taken feloniously or with intent to steal. Section 952 of the Penal Code as amended in 1927 (St. 1927, p. 1043), in setting forth what shall be necessary to charge the crime of grand theft, reads: "In charging theft it shall be sufficient to allege that the defendant unlawfully took the property of another." An information charging theft in the language of section 952 of the Penal Code has been held sufficient, and any question in relation thereto we think foreclosed by the following cases in which the informations were identical with the one at bar: People v. Manchell (Cal. App.) 267 P. 718; People v. Plum (Cal. App.) 263 P. 862; People v. Plum, on petition for rehearing (Cal. App.) 265 P. 322. In the Manchell Case the information reads, so far as pertinent here: "Unlawfully took the property of Harley S. Tyler and W. H. Rice," etc.—language identical with the charge in the case at bar. We think a reference to the three cases just cited is all that is necessary to answer appellant's contention as to the insufficiency of the information.

[2, 3] Appellant's second contention is that he was convicted by an incompetent juror, in that it is shown by an affidavit of one of the jurors that at the time of the trial he had not been a resident of the county of Plumas for a period of one year immediately preceding his selection as a juror. The law is well settled that the affidavit of a juror cannot be considered to establish his incompetency or to impeach a verdict in which such juror participated. People v. Kady, 60 Cal. App. 661, 214 P. 293, and cases there cited. There is no showing in the record that appellant made any effort to ascertain the alleged incompetency of the juror Barlow upon his voir dire examination. Not having done so, no objection can now be urged to the competency of the juror, with whom the appellant appeared to be satisfied at the trial. The alleged objection cannot be raised upon appeal. People v. Mortier, 58 Cal. 266; People v. Sanford, 43 Cal. 29. Other cases might be cited, but the law is well settled in this state and needs no further comment.

In his assignment of errors the appellant sets forth eight specifications in which he contends: (1) That the facts found in the record are not sufficient to sustain the verdict. (2) That the court erred in preventing a full inquiry into the agreements between the several parties. (3) That the court erred in sustaining the objection of the district attorney to the following question of the defendant's counsel: "Q. You cannot give me any idea about it, whether it was fifty thousand or five hundred thousand feet?" (4) That the court erred in refusing, on objection of the district attorney, to allow the defendant on cross-examination to inquire of the witness Newhart as to a contract in which reference was made to the lumber yard at

Crescent Mills, and the payment of $150 a month rental thereof. (5) That the court erred in permitting the district attorney to introduce self-serving and hearsay statements of the witness Newhart as to the owner of the lumber in controversy. (6) That the court erred in permitting the witness Forgay to testify, over defendant's objection, that he had a conversation with the defendant with reference to the shipment of certain pine lumber belonging to Wolpert Lumber Company. (7) That the court erred in allowing, over objection, the witness Morris to testify in rebuttal to a tally of lumber in the yard at Crescent Mills, which the witness, on direct examination, stated occurred in the middle of May, 1927, but admitted, on cross-examination, occurred in March, 1927. (8) That the information does not state a public offense. The eighth assignment we have already answered.

The testimony set out in the record shows that during the year 1926 F. A. Newhart operated the Forgay Mills; that he was buying the mill under a contract from James Forgay and others; that during said time Newhart cut some lumber and piled the same in the yard at Crescent Mills. While controverted by the appellant, we think the record shows that Newhart did not transfer any lumber to the Wolpert Lumber Company, but sold to them only what rights he had under the contract with the Forgay Company relative to the lumber mill and the right to cut standing timber and mill the same. There is testimony in the record that Newhart had some 52,000 feet of measured lumber in the yard at Crescent Mills; that this lumber was of such a kind that it could be easily distinguished from other lumber; that it had been marked by Newhart; that this lumber was stacked in one pile, containing about 52,000 feet, and was of the species called fir; that this lumber was never sold by Newhart; that after the transfer of Newhart of his interest in the Forgay contract, this lumber remained piled in the yard at the Crescent Mills, and was last seen by him at the yard late in 1927; that, on May 4, Newhart went to Crescent Mills and did not find his lumber there; that Newhart searched for his lumber, and subsequently found it piled in a yard belonging to the North Sacramento Box & Lumber Company, at North Sacramento; that Newhart did not give permission to any one to ship the lumber. There is testimony in the record that during the latter part of the month of April, 1928, and to and including the second day of May, 1928, the defendant shipped the lumber in question from the Crescent Mills to the box factory at Sacramento. The testimony of Newhart is to the effect that the lumber was worth about $1,040. The testimony of Forgay is also to the effect that he knew that Newhart had lumber piled in the yard at Crescent Mills during the fall of 1926 and 1927. In this particular it is urged by appellant that Forgay subsequently testified that there was no lumber in the yard at Crescent Mills belonging to Newhart in May, 1927. This contention is based upon the following testimony:

"Q. (by Mr. Young for the People of Mr. Forgay): I would like to ask you now if, during the month of April, 1928, you saw any lumber in the yard at Crescent Mills belonging to Albert Newhart?"

After considerable discussion of objections interposed by the defendant, the witness Forgay answered: "In the fore part of April there was."

"Q. (by Mr. Young for the People): And what kind of lumber was that, Mr. Forgay? A. Fir lumber."

Mr. Young, for the prosecution, asked the following question: "And is that fir lumber that you saw there in the fore part of April, 1927, was that there in May, 1927, in the latter part of May?" To which the witness answered: "No, sir."

[4] It is evident from the foregoing testimony, where the witness had stated that the lumber in question was at Crescent Mills in April, 1928, that the prosecuting officer, in asking the final question in his attempt to show that the lumber had been taken away, used the figures, in his question, "1927" instead of "1928," and that the witness answered without detecting the error. The jury had a right, from the previous answer, to draw the conclusion that it was in April, 1928, that Forgay saw the lumber, and that in May of the same year it was not there. This conclusion is further strengthened by the testimony elsewhere found in the record showing that the fir lumber identified by Newhart as belonging to him, and found by him in Sacramento, was shipped from the Crescent Mills in 1928, as shown by the records of shipment made by railroad.

Appellant contends that, by reason of an assignment made by Newhart to the Wolpert Lumber Company, and by Wolpert Lumber Company to the appellant, the appellant became the owner of the fir lumber, for the taking of which the appellant was found guilty of grand theft. The agreement is set out in the transcript, and reads as follows:

"This agreement, made the 24th day of May, 1926, between the Forgay Lumber Company, a copartnership, of the county of Plumas, state of California, the party of the first part, and A. P. Newhart, of San Rafael, California, the party of the second part, witnesseth:

"That whereas, the party of the first part is the owner of certain timber situated and standing on what is known as the 'Forgay Ranch,' in Indian valley, Plumas county, California, together with a certain sawmill and logging equipment used in connection therewith, and the said party of the second part is desirous of purchasing the said timber, sawmill and equipment:

"Now, therefore, it is hereby understood and agreed that the party of the first part agrees to sell, and the party of the second part agrees to buy, the said timber, sawmill and equipment upon the following terms and conditions, to-wit: All merchantable standing timber, consisting of three trees at least 16 inches at butt, regardless of specie, is to be purchased by the party of the second part at the rate of four dollars ($4.00) per thousand feet, board measure, scaled in accordance with 'Spaulding Scale' upon delivery at pond. Said payment to be made on the fifth and twentieth day of each month for all logs delivered up to and including the first and fifteenth day of each month.

"It is further understood and agreed that the party of the second part shall have the use of said sawmill and equipment and shall pay as rental therefor a sum equal to one dollar for each one thousand feet of lumber cut or manufactured in said mill, said cut and payment to be based upon same scale and subject to same terms of payment as hereinabove specified in connection with payment for stumpage. It being expressly agreed, however, that the value of said sawmill and equipment is hereby fixed at the sum of seven thousand five hundred dollars ($7,500.00), and whenever the rental herein specified shall equal that amount the said sawmill and equipment shall become the property of the party of the second part, and the party of the first part hereby agrees to make, execute and deliver to him any proper and necessary bill of sale for the conveyance thereof. It being understood that the party of the first part shall at all times be considered and deemed the owner of all lumber manufactured at said mill and shall have full title thereto until the payments herein provided for have been made. All payments provided for in this agreement shall be made to the credit of the party of the first part at the Indian Valley Bank, Greenville, California.

"The party of the second part agrees, at his own cost and expense, to make all necessary repairs on said sawmill, and to keep the same in good repair and condition and pay all charges for electrical power, labor and other expense, and to keep and save harmless the said party of the first part from any charge or liability by reason of the claims of laborers, mechanics, or by reason of injury to or the death of any employee.

"It is further understood and agreed that the party of the second part will cut, remove, and manufacture the timber now standing on the premises of the party of the first part before cutting or manufacturing timber on other lands, and that the said sawmill shall not be removed from its present location until all the timber belonging to said party of the first part has been manufactured, or paid for, in accordance with the terms hereof.

"The party of the second part hereby agrees to enter into the possession of the said sawmill and commence the operation thereof on or before the 15th day of June, 1926, and to diligently continue the operation thereof thereafter, to the end that said sawmill shall be operated to the full capacity thereof. It being understood, however, that labor conditions, strikes or other conditions over which the party of the second part has no control shall not be a violation of this agreement.

"It is further understood that the party of the second part shall insure, or cause to be insured, all lumber piled or stored in an amount equal to that due the party of the first part, and that all policies of insurance shall be made payable to the said party of the first part as its interest may appear therein, and that the said sawmill shall be insured jointly by the parties hereto.

"In witness whereof the said parties have hereto set their hands the day and year first above written.

"Forgay Lumber Company,
"By J. A. Forgay, Manager.
"A. P. Newhart,
"Party of the Second Part.

"For value received I do hereby assign and set over to Wolpert Lumber Company the within agreement and all benefits thereunder.

"Dated: This sixth day of September, 1926.
"Al Newhart.

"Consent is hereby given to the assignment of the within agreement. Forgay Lumber Company, a Copartnership, by J. A. Forgay."

The record shows that after the assignment executed by Newhart to Wolpert Lumber Company the appellant went into the possession of the mill and property described in the agreement and proceeded to operate the mill and to cut and reduce to lumber the standing timber mentioned in the agreement. It will be observed, also, that in the assignment executed by Newhart to the Wolpert Lumber Company no lumber whatever was transferred by Newhart to the Wolpert Lumber Company. On May 9, 1927, the Wolpert Lumber Company executed and delivered to the appellant the following bill of sale:

"Know all men by these presents: That I, Fred C. Wolpert, doing business under the firm name and style of Wolpert Lumber Company, party of the first part, for and in consideration of the sum of one (1) dollar and certain other valuable consideration to me in hand paid by C. D. Plum, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents sell, assign and transfer unto the said party of the second part all lumber of whatsoever kind and nature, including ties, the property of the Wolpert Lumber Company, now located in the lumber yard at Crescent Mills, California, and all other lumber, right or claim for lumber, the property of Wolpert Lumber Company, which was removed from said lumber yard or from the mill known as Forgay Mill, Crescent Mills, California, without knowledge or consent of Wolpert Lumber Company or F. C. Wolpert; also all lumber of whatsoever kind or nature belonging to Wolpert Lumber Company located at said Forgay Mill aforesaid.

"Dated: May 9, 1927.
"F. C. Wolpert,
"Party of the First Part."

There is testimony in the record that after the execution of the bill of sale the appellant transferred his rights thereunder to his wife, but as that is immaterial, no further mention need be made thereof.

[5] Without further recital of the testimony in the record it is sufficient to say that there was ample testimony to justify the conclusion of the jury that Newhart had some 50,000 feet of fir lumber piled at the Crescent Mills belonging to him, in April, 1928, and that this lumber was taken possession of without permission of any one, by the appellant, and shipped to a box factory at Sacramento, of which the appellant was the manager.

The second assignment of error does not appear to us to require any separate consideration.

[6] The third assignment, relative to the quantity of lumber cut and piled at Crescent Mills by the Wolpert Lumber Company, whether it was 50,000 feet or 500,000 feet, was a question upon cross-examination. The direct examination had made no reference to any lumber cut or piled by the Wolpert Lumber Company, and was not cross-examination. No possible injury resulted therefrom, as the appellant had abundant opportunity to otherwise show the number of feet of lumber cut and piled by the Wolpert Company. Nor was it material whether the lumber cut by the Wolpert Lumber Company came from the same vicinity. The only material inquiry would be whether the Wolpert Lumber Company had piled fir lumber so near to the lumber owned by Newhart that the appellant, in shipping from the yard, might, through error or confusion, have erroneously taken the Newhart lumber. We do not find anything in the appellant's testimony which would support this theory. His testimony is that he took only the lumber belonging to himself.

[7] In relation to the fourth assignment of error with reference to a certain contract or lease of a lumber yard at Crescent Mills, in which there was a provision for the payment of $150 a month or $150 a year—the record leaves it uncertain as to the time specified—it is sufficient to say that the contract was not filed as an exhibit, is not preserved in the record, and is not presented to us in such a manner that we can say that the court erred in its rulings.

[8] The fifth assignment of error relates to the testimony of a witness who stated that he was going over the lumber yard with Newhart where the 50,000 feet of fir lumber claimed by Newhart was piled, and that Newhart pointed the same out to him. This witness also testified that the lumber was subsequently shipped by the appellant. So far as the statement of Newhart was concerned that the lumber belonged to him, it should have been stricken from the record, but for the purpose of identifying the pile of lumber pointed out by Newhart, and subsequently shipped by the appellant, it was admissible. It is true that the testimony of the witness that other lumber was piled in the yards at a different location, and that he had not seen the pile of lumber pointed out by Newhart for a long time before it was shipped by the appellant, tended to weaken the witness' testimony, but its force and effect were for the jury. We do not think that the hearsay portion of the testimony was prejudicial, or at least not sufficiently so to warrant interference with the verdict.

[9] The sixth assignment of error relates to a conversation had between the appellant and Mr. Forgay relative to the shipment of 9,000 feet of lumber, in which Mr. Forgay said to Mr. Plum that he had no right to ship that certain 9,000 feet of lumber because the Wolpert Lumber Company, for whom Mr. Plum was then cutting, had not paid for it, and that the witness Forgay told Plum that he had better ship the lumber in the name of the Forgay Lumber Company; that Plum did so, and that the check in payment of the lumber came back in favor of the Forgay Lumber Company. While this testimony had no place in the case, we do not perceive that it worked any prejudice to the appellant in this action. The record would indicate that the whole question involved was the shipping of the lumber before it had been paid for. There is testimony in the record to the effect that Newhart had paid for the lumber in controversy on the 6th day of September, 1926; but whether this is correct or incorrect, the testimony shows sufficient title to the lumber in Newhart to sustain this action. See People v. Cain, 7 Cal. App. 163, 93 P. 1037; 15 Cal. Juris. 899; Jones v. Jones, 71 Cal. 89, 11 P. 817. Other cases might be cited, but these cases show that one having the right of possession, and what we may call a qualified ownership, may allege as the owner of the property.

We may further add that there is testimony in the record to the effect that no lumber was ever assigned, transferred, or sold by Newhart to the Wolpert Lumber Company.

Some minor objections not touched upon herein have been urged by the appellant, but from an examination thereof, and also of the objections which we have considered, we find nothing justifying this court in interfering with the judgment of the trial court.

The order of the court overruling the appellant's motion to set aside the verdict on the grounds of the incompetency of the juror Barlow is sufficiently covered by what we have heretofore said in this opinion and does not require separate statement.

The order and judgment of the trial court are affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

97 Cal. App. 304

ELATERITE VARNISH & RUBBER CO. v. CHAMBERLIN METAL WEATHER STRIP CO. (Civ. No. 3719.)

District Court of Appeal, Third District, California. March 1, 1929.

1. Appeal and error ⊂⇒959(3)—Pleading ⊂⇒236(3)—Trial court has discretion in allowance of trial amendments, and its rulings will stand, unless discretion is abused (Code Civ. Proc. § 473).

While amendments to pleadings are favored under Code Civ. Proc. § 473, allowance or disallowance of amendment during course of trial is within sound discretion of trial court, and its rulings will not be disturbed, unless there has been an abuse of discretion.

2. Pleading ⊂⇒267—Refusal to permit second amendment to cross-complaint at trial one year and a half after filing pleadings was not abuse of discretion.

Refusal of trial court to permit second amendment to cross-complaint at trial after plaintiff's demurrer *held* not abuse of discretion, where one year and a half elapsed between the filing of the cross-complaint and the trial.

3. Sales ⊂⇒435(1)—Cross-complaint by buyer, alleging that waterproofing compound sold was defective and unfit for purposes represented by reasonably attempted use thereof, held insufficient (Civ. Code, §§ 1766, 1770, 3313).

In action to recover balance of price of waterproofing compound sold defendant, cross-complaint for breach of warranty, alleging that plaintiff represented the compound would be commercially pure and fit for supplying the market, and that none of materials was waterproofing compound of uniform standard, that material furnished was not according to samples furnished, but was faulty and defective, and that reasonably attempted use thereof did not result in compound, *held* insufficient to state cause of action for damages, under Civ. Code, §§ 1770, 3313, relative to damages for breach of implied warranty of fitness, or under section 1766, relative to sale of goods by sample, since there was no showing of particulars in which material was faulty, or of plaintiff's directions for its use, or of difference in value between material furnished and material as represented.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by the Elaterite Varnish & Rubber Company against the Chamberlin Metal Weather Strip Company, in which defendant interposed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

Lee Utley, of Los Angeles, for appellant.

Ernest B. Coil, of Los Angeles, for respondent.

PLUMMER, J. Plaintiff had judgment against the defendant for the sum of $645.65, the balance alleged to be due from the defendant to the plaintiff for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant at the latter's special instance and request. The defendant's answer admitted the purchase as alleged by the plaintiff, but as a defense to the action set forth a cross-complaint by which it sought to recover from the plaintiff the sum of $3,166.88.

Before taking up the consideration of the questions presented by this appeal it may be well to recite a few facts shown by the record, which, to some extent, may disprove the usual charge that courts are responsible for delays in litigation.

The transcript on appeal was filed on July 6, 1926. The appellant's opening brief was served and filed on the 25th day of August, 1926. This brief consisted of 3½ pages of printed matter. The respondent's brief, consisting of 14 pages, was filed on December 1, 1928, just two years, three months, and seven days after the receipt of a 3½-page brief.

[1, 2] At the trial of the action the plaintiff objected to any testimony which could be used to support the defendant's cross-complaint, on the ground that it did not state a cause of action. The objection being sustained, the defendant asked, and was granted, leave to file an amendment to its cross-complaint. Upon the filing of this amendment, the plaintiff demurred thereto, specially, raising the points which we will hereafter consider. This demurrer was sustained and the defendant denied the privilege of filing a further amendment to its answer, or further amended cross-complaint. The record shows that the complaint in this action was filed in April, 1924; that the defendant's answer and cross-complaint were filed on the 24th day of April, 1924; and that the action came on for trial on the 2d day of November, 1925. It is urged that the court abused its discretion in denying the appellant the privilege of filing a further amendment to its cross-complaint. The time elapsing between the beginning of the action, or even after the filing by the defendant of its answer and cross-complaint, until the day of trial, covering, as it did, a trifle over one year and a half, certainly afforded the appellant ample opportunity to study its pleadings and determine therefrom whether a cause of action was stated, and time enough to enable the appellant to be prepared with a good and sufficient answer if the facts existed to warrant the same, without causing a delay of the trial when the cause was called for hearing. A considera-tion of these facts is necessary in determin-

ing whether the court did abuse its discretion. While under section 473 of the Code of Civil Procedure amendments to pleadings are favored, it is likewise true that the allowance or disallowance of an amendment during the course of a trial is within the sound discretion of the trial court, and its rulings will not be disturbed, unless such discretion has been abused. Manha v. Union Fertilizer Co., 151 Cal. 581, 91 P. 393; Salmon v. Rathjens, 152 Cal. 290, 92 P. 733. Other cases might be cited, but these illustrate the rule. Considering the time elapsing between the filing of the pleadings and the time of trial we cannot say that the court abused its discretion. After having given the appellant an opportunity to amend its pleadings, it denied further time for it so to do when the application was made during the course of the trial.

[3] It appears from the record that the plaintiff was engaged in furnishing a certain waterproofing compound bearing the name of the plaintiff in this action, to wit, "Elaterite"; that the defendant, or rather the assignor of the defendant, made a proposition to the appellant, in writing, giving it the exclusive sales right to the territory included within the states of California, Washington, Oregon, Arizona, Nevada, and New Mexico; that the defendant was to act in distributing said compound; that the plaintiff was to fill all orders sent to it by the defendant, and if orders were sent to the plaintiff by others, within the territory named, the defendant was to receive a certain compensation therefor; that all the materials supplied should bear the joint label of both the plaintiff and defendant; that the plaintiff should carry in stock, or be prepared to furnish on reasonable notice, such quantity of the waterproofing compound as should be required to fill all orders; that the waterproofing compound should be of uniform standard in materials and proofing, the solid matter to be refined "Elaterite," 100 per cent. commercially pure, cut with mineral turpentine as per samples submitted for each grade; that the defendant would use its best efforts in the publicity and sale of the products under such trade brand as it might elect, provided, always, that the word "Elaterite" should be a part of said brand, and in all advertising and sales the plaintiff, as the manufacturer, should be mentioned. The proposition submitted by the assignor of the defendant contains other specifications, not material to be set forth herein, was accepted by the plaintiff and became the agreement between the plaintiff and the defendant in this action, or at least became the writing evidencing the relationship between the parties hereto.

After admitting the purchase of materials as alleged by the plaintiff in its complaint, the defendant, by way of cross-complaint, alleged, after reciting a portion of the writing which we have referred to, as follows: "That the design of said 'Elaterite' compound was to have various bonding purposes, and for waterproofing, as to stone, wood, plaster and other substances. That at the time of entering into said contract it was agreed that said compound should be used by the defendant for said purposes in supplying the market and any orders that the defendant might procure from customers or for whom work was done by the defendant in the use of said 'Elaterite' compound. That the plaintiff represented to the defendant and agreed in said contract that all of said 'Elaterite' should be commercially pure and fit for the purposes designed and as hereinbefore described in said original contract." The defendant then further alleges: "That none of the materials, to the extent as hereinafter defined, was waterproofing compound of uniform standard in materials and proofing, and that the solid matter in said compound was not refined 'Elaterite,' neither 100 per cent. or at all commercially pure; that the same was not cut with mineral turpentine, and that the material furnished to this defendant was not according to the samples furnished, in any particular; that the same was faulty and defective, and unfit for the uses hereinbefore referred to, and that the defendant attempted to use the same according to the directions and conditions imposed in said contract, but that the reasonably attempted use of the same did not furnish, or result in any waterproofing as to said material, nor did it result in any compound of said materials with various substances, and was wholly unfit for the uses represented to the defendant, by reason of being defective, unfit and incapable of use in the matters and in the regard referred to; that by reason of the 'Elaterite,' and the waterproofing compound being defective and unfit for use, which was delivered to this defendant, the defendant was caused to undergo unnecessary expense of the replacing of faulty material and of relaying and replacing all said defective material furnished by the plaintiff in and to the following extent and in the amounts named for each person as hereinafter described." The complaint then sets forth a table, giving the name, expense, labor, and material. One example will do for the whole table:

Name.	Expense.	Labor.	Material.
Chambers, 815 3rd Ave....	.10	5.40	2.00

A mere reading of the cross-complaint as amended shows that it fails to state a cause of action in many particulars. It appears therefrom that the plaintiff was the manufacturer of the compound, and therefore the provision of section 1770 of the Civil Code applies. This section reads: "One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose." Section 3313 of the same Code reads: "The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time." The cross-complaint is entirely silent as to any facts which would bring the cause within the provisions of section 3313, just quoted. Turning to the writing which constituted the agreement between the parties, we find that paragraph 7 reads: "You are to furnish me, within a reasonable time, technical data on the above products in support of such claims as you make for them." The cross-complaint does not set forth a single fact showing the claims made by the plaintiff as to the product in question. There is nothing showing any data whatever furnished by the plaintiff as to the uses of the compound, as to how it should be applied, or what it would be. Nor is there anything in the written agreement relative to work to be performed by the defendant, other than acting as a distributor of the compound. There is nothing in the cross-complaint showing in what particular the material furnished differed from the samples supplied the defendant by the plaintiff. The allegation simply reads: "That the material furnished to this defendant was not according to the samples furnished, in any particular." This is only a conclusion and is not a statement of any fact.

As to the expense alleged by the defendant to have been incurred in relaying material, etc., the cross-complaint is silent as to any particulars in which the material furnished by the plaintiff was faulty or defective; nor is there any allegation showing that the material furnished by the plaintiff was used in the manner, or applied in the manner as directed by the plaintiff, to render its use effective; nor is there anything in the cross-complaint from which it can be determined in what manner the compound was applied. All there is in the cross-complaint is the conclusion that the pleader "reasonably attempted to use the same."

There being no facts alleged in the cross-complaint showing in what particulars, if any, the goods sold by the plaintiff to the defendant differed from the samples furnished, section 1766 of the Civil Code has no application. Nor are there any facts alleged in the cross-complaint showing that the goods furnished were not sound and merchantable. Practically all the cross-complaint contains is the general conclusion of the pleader. Whether a cause of action for damages exists in favor of the defendant as against the plaintiff by reason of any representation as to the value and use of the compound cannot be determined from the pleading from the further fact that the cross-complaint is silent as to any directions given by the plaintiff or data given by the plaintiff as to the manner in which the compound should be used, and also the cross-complaint is silent as to whether the attempted use of said compound was made according to any directions given by the plaintiff; nor is there anything in the cross-complaint showing in what manner any of the work was performed or materials used that had to be reperformed or replaced, as alleged in the cross-complaint. In all these particulars the cross-complaint is uncertain and unintelligible as an action for damages, separate and distinct from the provisions of the Civil Code to which we have referred.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

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96 Cal. App. 465

LINDSEY v. BUTTE et al. (Civ. 3642.)

District Court of Appeal, Third District, California. Feb. 28, 1929.

Sales ⚷477(6)—Conditional seller waives right to declare forfeiture by accepting part payment of money overdue.

Vendor under a conditional sale contract waives right to declare a forfeiture by accepting part payment of money then overdue.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

On petition for rehearing. Petition denied. For original opinion, see 274 P. 428.

Page, Nolan, Rohe & Freston and Andrew J. Copp, Jr., all of Los Angeles, for appellants.

William A. Barnhill and Lewinson & Barnhill, all of Los Angeles, for respondent.

PER CURIAM. The appellants have filed a petition for a rehearing. They allege anew that a vendor under a conditional sale contract does not waive the right to declare a forfeiture by accepting part payment of money then overdue. An answer to this contention is found in Redd v. Garford Motor Truck Co. (Cal. Sup.) 270 P. 447. The plaintiff in that case had purchased a truck under a conditional sale contract. He paid only a part of the first installment and subsequently paid the whole of the second installment, leaving unpaid the balance of the first. Thereafter the defendant elected to treat the plaintiff's rights under the contract as forfeited and to repossess the truck. The plaintiff relied on a subsequent oral agreement and a waiver of the defendant's right to declare a forfeiture. The court, speaking through Mr. Justice Richards, said: "Since the trial court found in the plaintiff's favor upon the issues tendered in said action, we must assume that it not only accepted the plaintiff's version of said oral agreement, but also interpreted the acts of the defendants in accepting without objection the second installment due to them under the terms of the original agreement as a waiver of their right to insist upon a forfeiture because of the failure of the plaintiff to pay in full the amount of the first installment when due, at least until such time as they had notified the plaintiff of their insistence upon said forfeiture in the event that the latter failed to make prompt payment of said balance due after receiving such notice. We are of the opinion that the trial court was correct as to each and both of its foregoing conclusions."

The petition is denied.

97 Cal. App. 311

POTTER v. DRIVER et al. (Civ. 3672.)

District Court of Appeal, Third District, California. March 1, 1929.

1. Automobiles 🔑160(1)—Pedestrians and those driving vehicles have equal rights in public highway and reciprocal duties.

Pedestrians and those driving vehicles have equal rights on highway, and both are required to exercise degree of care and prudence which case demands; duties being reciprocal.

2. Automobiles 🔑160(1, 3)—Driver of automobile must keep proper lookout for pedestrians and maintain machine under control.

Driver of automobile, having unobstructed view, is under duty to see persons on road in front of machine, and must keep proper lookout and keep machine under control to avoid collision.

3. Automobiles 🔑244(6), 245(6)—Negligence of driver of automobile striking pedestrian while crossing at intersection held question for jury, and evidence sustained finding of negligence.

Whether driver of automobile striking pedestrian while crossing intersection was negligent in failing to see pedestrian *held* question for jury, in action for injuries, and evidence justified jury's finding of negligence.

4. Automobiles 🔑244(50), 245(72)—Contributory negligence of pedestrian struck by automobile while crossing at street intersection held question for jury, and evidence justified finding of absence of contributory negligence.

Contributory negligence of pedestrian struck by automobile while crossing intersection *held* question for jury, in action for injuries, and evidence that pedestrian looked both ways for approaching vehicles justified finding of want of contributory negligence.

5. Appeal and error 🔑1001(1)—Verdict supported by sufficient evidence is conclusive on appeal.

Verdict of jury on sufficient evidence is binding on appeal.

6. Trial 🔑89—Refusal to strike witness' statement relative to defendant's insurance, in action for injuries, held not error, where question was not designed to bring out that fact, and court instructed jury to disregard testimony.

In action against driver of automobile for injuries, refusal to strike out statement of witness regarding defendant's insurance *held* not error, where evidence was brought out in answer to questions tending to show defendant's acknowledgment of responsibility for accident, and where court instructed jury to disregard remarks relative to insurance.

7. Automobiles 🔑226(2)—Pedestrian was not precluded from recovering for injuries by negligently crossing street without observing approaching vehicles, unless such negligence proximately caused injury.

In action against driver of automobile for injuries to one struck by car while crossing at intersection, plaintiff was not precluded from recovering by negligent failure to continue to observe approach of vehicles, unless such negligence was proximate cause of injury and directly contributed to injury, and instruction which failed to require causal connection was properly refused.

8. Damages 🔑178—Evidence of plaintiff's worry through fear of inability to walk after statements of physician held admissible, in action for injuries.

In action for injuries, evidence of plaintiff's worry and mental distress through fear that he might lose ability to walk, after being informed by physician that he had water on his knee as result of accident, *held* admissible as tending to show effect of injuries on plaintiff's mental condition.

9. Damages 🔑132(7)—$3,750 to 56 year old plaintiff for injuries interfering with his walking and general health, and preventing performance of heavy work, and for pain and suffering, held not excessive.

$3,750 verdict for injuries to 56 year old plaintiff, in good health, for injuries consisting of contusion on head, injury to arm, eye, knee, back, and foot, resulting in pain and suffering and two months' confinement in bed, general failure of health, and inability to perform heavy work at date of trial, *held* not excessive.

10. Damages 🔑128—Verdict may not be disturbed as excessive, unless so grossly disproportionate as to shock sense of justice and raise presumption of prejudice or passion.

It is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock sense of justice and raise strong presumption of prejudice or passion that judge may disturb it.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by R. Grant Potter against Earl P. Driver and another. Judgment was entered for plaintiff against named defendant, and named defendant appeals. Affirmed.

Driver, Driver & Tade, of Sacramento, J. Hampton Hoge, of San Francisco, and Johnson & Lemmon, of Sacramento, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondent.

JAMISON, Justice pro tem. Respondent brought this action for damages for alleged injuries sustained by him when he was struck by an automobile operated by appellant. The trial was before a jury, and judgment was entered in favor of respondent for $3,750 against appellant only, the case having been dismissed as to the other defendant. From this judgment the said defendant Earl P. Driver has appealed.

Substantially, the facts are as follows:

On the 6th day of June, 1925, at about the hour of 8:30 p. m., plaintiff was crossing Nineteenth street, in an easterly direction, at its intersection with J street, in the city of Sacramento. While proceeding across Nineteenth street on the crosswalk used by pedestrians he was struck by an automobile driven by defendant, knocked down, and injured. J street runs in an easterly and westerly direction and Nineteenth street in a northerly and southerly direction. At about the same time that respondent started across Nineteenth street, appellant, driving north on said Nineteenth street, had come to a stop at the south line of the intersection of J and Nineteenth streets, to wait for two street cars to pass from in front of him on J street, one of said street cars going north on said J street and the other south thereon. That, when the passage of said street cars permitted, appellant drove across the intersection of said streets, and, when he arrived at the said crosswalk along the north line of the intersection of said streets, his automobile struck respondent. The only eyewitnesses to the accident were respondent and appellant. Respondent testified that before starting across said street he looked both ways for approaching automobiles, but saw none, and that he continued to look until the moment of the accident; that he first became aware of the approach of appellant's automobile when he saw its headlights just an instant before it struck him. Appellant testified that, when the street cars permitted him to proceed, he drove straight across the said intersection at a speed of not exceeding five miles an hour; that he did not see respondent, and was not aware that he had struck him until he felt a light jar of his automobile; that, when he felt the jar, he immediately stopped, and, on getting out of his automobile, found respondent on his hands and knees about a foot in front of his car trying to get upon his feet.

Appellant alleges four grounds for reversal of the judgment, namely: (1) Insufficiency of the evidence to justify the verdict; (2) that said verdict is against law; (3) excessive damages appearing to have been given under the influence of passion or prejudice; (4) errors in law occurring at the trial and excepted to by defendants.

We will first consider the question of the insufficiency of the evidence to justify the verdict. The evidence is to the effect, without contradiction, that, after both of the street cars had cleared the intersection of Nineteenth and J streets, appellant, who had stopped at the south line of said intersection, started his car in low gear, and proceeded north across said intersection. The night was clear, the moon was shining, and the headlights of appellant's automobile were lighted, and would throw a beam of light 60 or 70 feet ahead. There was nothing in front of appellant, after the street cars had passed said intersection, and after appellant started to cross it, that obstructed his view north across said intersection and beyond the crosswalk leading across Nineteenth street along the north line of said intersection. Appellant stated that he was on the east side of Nineteenth street, and that he went straight ahead on that side of the street, and that he did not see respondent before he was struck; that an instant before he struck respondent a passing automobile flashed a light in his eyes, blinding his vision, and at this moment his automobile struck respondent. He also testified that the part of his automobile that struck respondent was the right front fender. The evidence also shows, without contradiction, that, just as the street cars were passing the intersection, respondent started across the crosswalk on Nineteenth street along the northerly line of said intersection, walking rather rapidly, and just after he had crossed the center of said Nineteenth street, going east, he saw the lights of appellant's automobile within a few feet of him; that, before entering upon said crosswalk, respondent looked both ways for approaching automobiles, but saw none; that he continued to look for approaching automobiles as he proceeded to cross Nineteenth street, but saw none until suddenly he saw appellant's automobile almost upon him.

[1, 2] In the case of Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066, the court said: "The driver of an automobile has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate the presence of others." Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471. Foot passengers and those driving vehicles have equal rights in the public highway, and both are required to exercise that degree of care and prudence which the case demands. The duty cast upon both pedestrians and driver of a vehicle is reciprocal and equal, and neither of them has a superior right to the other. Mayer v. Anderson, 36 Cal. App. 740, 173 P. 174. It is the duty of the driver of the automobile, where the view is unobstructed, to see persons on the road in front of the machine. Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739; Warner v. Bertholf, 40 Cal. App. 776, 181 P. 808; Barker v. Savas, 52 Utah, 262, 172 P. 672. Even though the operator of an automobile may be rigidly within the law, he still remains bound to anticipate that he may meet persons at any point on the street, and he must, in order to avoid the charge of negligence, keep a proper lookout for them, and keep his machine under control, as will enable him to avoid a collision with another person using proper care and caution, and, if the situation requires, he must slow up and stop. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Rush v. Lagomarsino, supra.

[3-5] The jury, under the circumstances surrounding the accident, had the right to infer that, had the appellant looked ahead of him as he crossed the intersection, he would have seen respondent as he proceeded to cross Nineteenth street, for it is apparent that respondent must have passed in front of appellant's automobile, as he was struck by the right front fender. Nor, in the opinion of this court, was the respondent guilty of contributory negligence as a matter of law. On the contrary, so far as the evidence shows, he was upon the street at a point where he had a right to be, and where pedestrians were expected to cross, and did customarily cross, said Nineteenth street, and according to his testimony, in crossing the street, he had observed the care and caution for his own safety that an ordinarily prudent man would have observed under the same circumstances. That is to say, at the time he started to cross the said street, he looked both ways for approaching vehicles, and continued so to look until he was struck by plaintiff's automobile. The question of contributory negligence was, in this case, clearly a question for the jury, and the jury, by its verdict, having, upon sufficient evidence found, in effect, that respondent was not guilty of contributory negligence, the verdict upon that question is binding on this court.

[6] Appellant claims that the court erred in admitting testimony to the effect that appellant was insured, and in refusing, on motion of appellant, to strike out this evidence. The testimony regarding the matter of insurance was brought out when Anna L. Potter, the wife of respondent, was testifying as a witness for her husband. She testified that Dr. Igo was first called to attend upon respondent after he was injured; that later Dr. Igo had to withdraw from the case, as he was leaving Sacramento; that appellant and his brother called to see respondent, and she told them that Dr. Igo was going away, and that she asked them if it would be satisfactory for Dr. Stevenson to take charge of the case. They said that Mr. Henretty was the representative of the Security Company, and that they would ask him to see whether he wanted to call a doctor in for them, and that thereupon she said, "Well, you are insured, are you?" and they said, "Oh, yes, but if we were not insured we would take care of Mr. Potter just the same." Appellant moved the court to strike out this statement regarding insurance. This the court refused to do, but instructed the jury to disregard the remarks relating to the insurance, stating the question for the jury to decide was whether or not the defendants were liable for damages. In the case of Nichols v. Nelson, supra, the court, speaking of the admissibility of evidence of this character, said: "While it is true that evidence that a defendant in an action for damages is insured against loss is inadmissible and it is improper for counsel to endeavor to get such a fact before the jury by questions designed solely for that purpose, under the facts as here presented it cannot be said to constitute error. The question asked the juror was for the purpose of ascertaining whether or not he was a member of the automobile club which was the insurance carrier. Such questions have been held to be proper. Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646; Baldarachi v. Leach, 44 Cal. App. 603, 186 P. 1060." In the case of Nichols v. Nelson, supra, the court said: "Even conceding it to have been improper, it was not prejudicial where, as here, the court instructed the jurors to disregard it," and the court further said, "as this was admitted as tending to show an acknowledgment of responsibility by defendant for the accident, we think it was proper evidence." McPhee v. Lavin, 183 Cal. 264, 191 P. 23. In the case under consideration, this evidence regarding insurance was brought out in answer to questions tending toward showing an acknowledgment of responsibility by appellant for the accident, and not by questions designed solely for the purpose of getting the fact of insurance before the jury. With the instruction given to the jury as aforesaid, we are of the opinion that the court did not err in refusing to strike out this evidence.

[7] Appellant contends that the court erred in refusing to give to the jury the following instruction: "Defendant's instruction No. 4. The court instructs you that observation of ordinary care by a pedestrian who undertakes to cross the street is not fully performed by merely looking to the right or left as he steps upon the street, but the observance of that care is imperative upon him during all the time he is crossing. Therefore, if you find that the plaintiff looked only once to the right or south when entering upon Nineteenth street, and then continued to cross the street without making further observation, you will find him guilty of negligence and your verdict will be in favor of the defendant." The court very properly refused to give this instruction. In one important particular it fails to state the law, and that

failure consists in omitting to state that, before such negligence entitled the defendant to a verdict, the jury must further find that said negligence was the proximate cause of the injury to respondent; that it directly contributed to such injury. Rush v. Lagomarsino, supra; Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, 111 P. 530, Ann. Cas. 1912A, 642.

[8] Appellant also contends that the court erred in permitting respondent to testify that, when he was informed by his physicians that as a result of the accident he had water on his knee, he was worried and mentally distressed through fear that he might not again be able to walk. We are of the opinion that as tending to show the effect the injuries suffered by respondent had upon him mentally this evidence was admissible. In the case of Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93, 187 P. 2, the Supreme Court declared the law to be as follows: "Unquestionably the physical and mental condition of plaintiff resulting from the accident was material, and mental suffering occasioned by any reasonable apprehension of future disability or deformity resulting naturally and proximately from her injury was a proper element to be considered by the jury in assessing the damages."

[9, 10] Appellant further claims that the damage was excessive, appearing to have been given under the influence of passion or prejudice. It appears from the evidence that at the time of the accident respondent was 56 years of age, was in good health and was engaged in the harness, saddlery and leather goods business, to which he was giving his personal attention. His injuries consisted of a contusion on his head, injury to right arm, right eye, left knee, back, and big toe on right foot, and other bruises and abrasions; that he was confined to his bed for some 2 months, suffered a great deal of pain, and at the date of the trial, December 21, 1926, had not recovered from the effects of the injury, his arm, back, and his leg still paining him and rendering him unable to perform the heavy work of his business that he had been accustomed to handling before he received the said injuries; that his injured leg was much weaker than it was before the injury, and interfered with his walking, and that his general health had failed by reason of said injuries and the shock his nervous system had received therefrom.

In the case of Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, the Supreme Court laid down what it deemed the correct rule that should be followed by the appellate courts in determining whether or not the damages are excessive, as follows: "That it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts, as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury." Martin v. Shea, 182 Cal. 130, 187 P. 23; Grant v. Los Angeles Transfer Co., 45 Cal. App. 731, 188 P. 294; Anderson v. San Francisco-Oakland Rys., 61 Cal. App. 21, 214 P. 289.

In the case of Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672, 12 A. L. R. 1007, the court quoted with approval the following words used by the Supreme Court in the case of Hickey v. Coschina, 133 Cal. 81, 65 P. 313: "The court below had the power to, and no doubt did, carefully weigh and consider the evidence for the purpose of determining whether or not the verdict was the correct conclusion from all the testimony in the case. It had the power to set aside the verdict, even though the evidence was not conflicting, if convinced that it was unjust, or not in accord with the weight of the evidence. Here we have no such power. The presumptions are all in favor of the correctness of the verdict. To this presumption is added the sanction of the court below in denying the motion for a new trial."

We are of the opinion that the verdict of the jury is not so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice or raise a strong presumption that it was based on passion or prejudice.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

ISAACSON v. UNION TRUST CO. OF SAN DIEGO et al. (Civ. 3646.)★

District Court of Appeal, Third District, California. March 5, 1929.

Hearing Granted by Supreme Court April 29, 1929.

1. Limitation of actions ⟹37(2)—Action by trustee to adjudicate title to property held not barred as action for relief from fraud, notwithstanding allegations with respect to fraudulent pledge and sale of bankrupt's stock (Code Civ. Proc. § 338, subd. 4).

Action by trustee in bankruptcy to secure adjudication of ownership and title to property *held* not barred by Code Civ. Proc. § 338, subd. 4, as action for relief for fraud in respect to pledge and sale of stock, notwithstanding allegations of amended complaint that stock sought to be recovered was pledged by bankrupt with intent to defraud creditors, and that pledgee made pretended sale of the stock to himself for that purpose, where judgment merely adjudicated trustee's ownership.

★Hearing granted. 292 P. 448.

2. Corporations 🔑1—Fiction of corporate entity, when used to defraud creditors, will be disregarded.

Fiction of corporate entity will be disregarded, when it is attempted to be used to accomplish fraud, or as a means of defrauding creditors.

3. Bankruptcy 🔑303(5)—Judgment declaring assets of dummy corporation, organized to conceal bankrupt's property, to belong to trustee, held authorized by evidence, notwithstanding bona fide pledge of stock.

Judgment declaring all of property of corporation, used by bankrupt to transact business and conceal his assets, to be property of trustee in bankruptcy, *held* justified under evidence, notwithstanding good-faith pledge of stock to another, where pledgee purchased stock under the pledge with knowledge of true situation, and sale of stock under pledge was collusive and made for purpose of defrauding creditors.

4. Bankruptcy 🔑186(1)—One purchasing stock of dummy corporation, organized by bankrupt to conceal his assets, assumed risk of depreciation through loss of assets.

One who purchased stock of dummy corporation, organized by bankrupt debtor as vehicle for transaction of his business and concealment of his assets, must be held to have assumed risk of depreciation in value of stock on account of loss or deprivation of corporate assets.

Appeal from Superior Court, San Diego County; Frank C. Collier, Judge.

Action by J. A. Isaacson, as trustee in bankruptcy of the estate of J. C. Rice, bankrupt, against the Union Trust Company of San Diego, the J. C. Rice Company, M. Y. Wolf, and others. Judgment for plaintiff, and the two last-named defendants appeal from the judgment, and from orders denying a new trial and motion to vacate the judgment. Affirmed.

Superseding opinion in 273 P. 119.

L. E. Dadmun, of Los Angeles, for appellants.

Curtis Hillyer, of San Francisco, for respondent.

Rolland C. Springer, of San Diego, for defendants.

TUTTLE, Justice pro tem. An opinion was filed by this court in the above-entitled cause on December 20, 1928. 273 P. 119. Thereafter the court set aside the decision referred to and the action was resubmitted upon the briefs on file therein.

This is an action brought by plaintiff, as trustee in bankruptcy of the estate of J. C. Rice, a bankrupt, to secure an adjudication of the ownership and title to certain property, and to establish the interest of plaintiff, as trustee, in the same, and for an accounting and recovery of money. Judgment went for plaintiff, and defendants J. C. Rice Company and M. Y. Wolf now appeal from the same, and also from the order denying motion for new trial, and the order denying the motion to vacate and set aside the judgment and render judgment in favor of defendants.

The complaint alleges that plaintiff is the trustee in bankruptcy of the estate of J. C. Rice, a bankrupt debtor; that at the time of the filing of the petition in bankruptcy said J. C. Rice was the owner of an undivided one-half interest in certain lands situate in the county of San Diego, known as the "Lincoln Acres"; that heretofore the said J. C. Rice, acting in the name of the defendant J. C. Rice Company, entered into an agreement with defendant Rae Investment Company, whereby said defendant and said Rice became owners in common of the tract of land hereinbefore described, taking the title thereto in the name of defendant Rae Investment Company; that subsequent thereto said Rice and said defendant Rae Investment Company entered into an agreement with said defendant R. E. Harrison Company, under and by virtue of the terms of which said R. E. Harrison Company became the selling agents for the defendants Rae Investment Company and the said J. C. Rice in the sale of said tracts of land hereinbefore described; that a large number of parcels of land have been sold, and the contracts for the purchase of the same have been placed with the defendant Union Trust Company for the purpose of collection; that the defendant Union Trust Company has collected a large amount of money upon said contracts, as plaintiff is informed and believes, one-half of which is the property of the said bankrupt; that the said R. E. Harrison Company has entered into said contracts under its own name, but in fact as and for the defendants Rae Investment Company and the said J. C. Rice; that the plaintiff is informed and believes, and on such information and belief alleges, that said J. C. Rice Company, a corporation, was organized by the said J. C. Rice as a vehicle through which to transact and conceal his assets from his creditors, and that ever since its organization said J. C. Rice has used said corporation for that purpose, and that ever since its organization said J. C. Rice has been and now is the sole owner of the said J. C. Rice Company and all of its assets, and that the said J. C. Rice Company is in fact and always has been J. C. Rice, the bankrupt debtor; that, prior to the commencement of this action, the said court of bankruptcy duly made and filed its order in said bankruptcy proceedings, authorizing and directing plaintiff to commence and prosecute this action.

On information and belief plaintiff alleges that said defendant M. Y. Wolf claims to own 247 shares of the capital stock of said J. C. Rice Company, being all of the capital stock of said company except 3 shares, and that the claim of the said M. Y. Wolf to said stock is without any right whatever, and that in truth and in fact the said J. C. Rice, the bankrupt debtor, was the owner of all of the capital stock of the said J. C. Rice Company at the time of the filing of his petition in bankruptcy.

At the trial of the action an amended complaint, to conform to the proof, was filed under order of court. The allegations of this amended complaint are similar to those in the original, except that certain other lands are added. The following additional allegations appear: That certain other parcels of real property stand on the records in the name of defendant J. C. Rice Company, but that they were, at the time the bankruptcy petition was filed, owned by said J. C. Rice; that on November 21, 1918, and at a time when J. C. Rice was insolvent, he was the owner of all the stock of the defendant J. C. Rice Company, to wit, 250 shares; that for the purpose of hindering, defrauding, and delaying his creditors he, J. C. Rice, executed and delivered to defendant Wolf a promissory note for $21,458.79, and as security therefor pretended to pledge to said Wolf 247 shares of said stock; that on September 9, 1919, said Wolf made a pretended sale of said stock to himself, and credited a payment of $15,000 on said note; that prior to said sale a creditor of said Rice levied an execution on said stock, and that said pretended sale was made to assist said Rice in concealing his assets from his creditors, and that said sale was made with the secret understanding that it was to be held in trust by said Wolf; and that said Wolf now holds the same in trust for plaintiff as trustee in bankruptcy.

Appellants each filed separate answers, which are practically the same. They deny the essential allegations of the complaint. In addition, the statute of limitations is pleaded. As the entire appeal revolves around the sale of said stock, we quote, in part, the finding of the court upon this issue:

"That on the 21st day of November, 1918, the said J. C. Rice was indebted to defendant M. Y. Wolf in the sum of $21,458.79, and that on said 21st day of November, 1918, the said J. C. Rice did, in consideration of said indebtedness, sign, execute, and deliver to said defendant M. Y. Wolf his certain promissory note for the sum of $21,458.79, payable to the order of defendant M. Y. Wolf, five years after its date, with interest thereon at the rate of 7 per cent. per annum, payable at maturity, and said J. C. Rice did at said time pledge and deliver to said M. Y. Wolf 247 shares of the capital stock of said J. C. Rice Company, and also stock in other companies; among the stock so pledged being stock of the Central Mortgage & Investment Company, as collateral security for the payment of said note. That said note so signed, executed, and delivered by said J. C. Rice to M. Y. Wolf, and delivery of the said 247 shares of the capital stock of said J. C. Rice Company and stock of the other corporations to said M. Y. Wolf, as security for the payment of said $21,458.79 note, was a bona fide transaction, and made in good faith on the part of said J. C. Rice and M. Y. Wolf, and for valuable consideration. That the value of said stock so pledged was fixed in said note by said J. C. Rice and said Wolf in said note at the sum of $75,000. That said alleged pledgee's sale of said 247 shares of the stock of said J. C. Rice Company by the said M. Y. Wolf to himself on said 9th day of September, 1919, was made with the secret understanding and agreement between said J. C. Rice and said M. Y. Wolf that said M. Y. Wolf would hold said stock in trust for said J. C. Rice, and that said M. Y. Wolf does now hold said stock in trust for said plaintiff as trustee in bankruptcy of said J. C. Rice, and that the claim of said M. Y. Wolf to said stock of said J. C. Rice Company is without any right whatever as against this plaintiff."

The judgment does not mention the stock, but it is decreed that "plaintiff, as such trustee in bankruptcy, is the owner of said J. C. Rice Company, a corporation, and all its assets and property of every kind and nature."

[1] It is contended that the statute of limitations (section 338, subd. 4, Code Civ. Proc.), which applies to relief upon the ground of fraud, bars any relief in respect to the pledge and sale of the stock. After a careful analysis of the pleadings, findings, and judgment, we have arrived at the conclusion that it is not necessary to pass upon the question of the statute of limitations. Appellants' entire attack is centered upon the allegations with reference to the pledge and sale of said stock. As we view it, the complaint states but one cause of action, and that is to determine title to certain real and personal property. The allegations concerning the stock transaction are intended to be merely part of the said cause of action. The complaint does not ask any relief with reference to said stock. The judgment contains no adjudication upon that question. It is true the trial court finds the sale of the stock under the pledge to be void, but this finding is not translated into an adjudication, for the judgment is absolutely silent upon that point, nor can it, by implication or construction, be made to include this matter. As the judgment in this case now stands, defendant Wolf is the owner of said stock.

This is entirely in keeping with the contention of respondent, who does not attempt to argue that there are two causes of action, or that there is a separate cause of action relating to the stock transaction. The principal relief sought was to have certain property standing in the name of J. C. Rice Company, declared to be the property of J. C. Rice, the bankrupt. The judgment deprives the "dummy" corporation of all its assets and property, and declares the same to be the property of the bankrupt. This, we perceive, is the theory of the case as made out by plaintiff, and the one upon which the trial court proceeded, and we hold that theory of the case to be correct. As there was no cause of action based upon the fraudulent pledge or sale of the stock, and no adjudication in relation thereto, the contention of appellant in respect to the statute of limitations is without merit.

[2] Appellants very earnestly object to the foregoing view of the case. The court cannot, they assert, deprive the corporation of all its assets and property, and thus render his stock worthless. We will turn our attention to this aspect of the case. Plaintiff, as trustee in bankruptcy for defendant J. C. Rice, is adjudged to be the owner of certain realty, some of which stood in the name of defendant J. C. Rice Company. It is also adjudged that such trustee is the owner of certain bonds in Prudential Mortgage Company, and that he is the "owner of said J. C. Rice Company, a corporation, and of all its assets and property." No mention is made of the *stock* in the judgment. The evidence shows without question, and the court found that "defendant J. C. Rice caused J. C. Rice Company to be incorporated as a vehicle through which to transact business and conceal his assets from, and to hinder, delay, and defraud his creditors, and ever since its organization said J. C. Rice has used said corporation for that purpose, and ever since its organization said J. C. Rice has been and now is the sole owner of the said J. C. Rice Company and all its assets, and that said J. C. Rice Company is in fact, and always has been, J. C. Rice, the bankrupt debtor, and that said J. C. Rice then used, and for a long time prior thereto had used, said corporation as a vehicle through which to transact business and conceal his assets from his creditors."

It has been repeatedly held that the courts, both at law and in equity, will disregard the fiction of corporate entity, when it is attempted to be used as a means to accomplish a fraud or an illegal act. 14 C. J. 61, par. 22, and numerous cases cited. The fiction in regard to a corporation being a legal entity will be disregarded, when attempted to be used as a means of defrauding creditors. 14 C. J. 61, note c, and cases; 1 Fletcher, Cyc. Corp. p. 62.

[3, 4] It further appears from the evidence that at all times defendant Wolf had knowledge of the facts found by the court as above quoted. It follows that, though defendant Wolf be the legal owner of the said stock, the court was justified and authorized to enter a judgment which declared all of the property and assets of the corporation to belong to plaintiff as trustee for the creditors. While this judgment may render the stock of defendant Wolf worthless, the record shows that he was associated with Rice in a number of the latter's business ventures, and that he purchased the stock with full knowledge that the corporate entity of J. C. Rice Company was a mere fiction and vehicle for the perpetration of the fraud upon the creditors, and he cannot now be heard to complain. Nor will the fact that defendant Wolf acted in good faith when the stock was pledged aid him in retaining the assets of the corporation. The court further found, upon evidence which we hold to be sufficient, that the sale of the stock under the pledge was collusive, and made for the purpose of defrauding creditors.

Furthermore, defendant Wolf, when he purchased the stock, must be held to have assumed the risk of depreciation in the value thereof, on account of loss or deprivation of corporate assets. The sufficiency of the findings is attacked in many particulars. The "business" ventures of the bankrupt are spread over hundreds of pages of the transcript. His schedule of indebtedness was about $360,000. His assets were listed at $125, but claimed as exempt. At the time of the execution of said note to Wolf, his creditors were legion. Many of these were judgment creditors. Numerous corporations were organized by him, and the stock was traded back and forth. His gyrations in a corporate way are almost impossible to follow. Always, however, he was the whole corporation, the matter of control by a directorate being but a fiction. After the "sale" of said stock under the pledge, he continued just as he always did in the conduct of the corporation. The purported owner of the stock, for a period of some five years, shows by his testimony that he did not know what was going on, so far as the affairs of the corporation in which he held all the stock were concerned. We are satisfied that there is ample evidence in the record to support the findings.

A number of other objections are raised by appellants, but they all arise out of the pledge and sale of said stock. As we have pointed out, there is no adjudication of the title to said stock, and no injury was done to appellants in respect to the matters of which they complain.

The judgment of the trial court was eminently proper, and in keeping with the fundamental principles of justice and equity, and it is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

97 Cal. App. 264

REAY v. REAY et al. (Civ. 6533.)★

District Court of Appeal, First District, Division 1, California. Feb. 27, 1929.

As Modified on Denial of Rehearing March 29, 1929.

1. Executors and administrators 🔑85(5)—Administrator's complaint seeking recovery of deceased's property concealed and embezzled by defendants in violation of trust held to state equitable cause of action.

Complaint alleging that, prior to death of deceased, defendants came into possession of deceased's property as her agents and in trust, to hold it for her and deliver it to her on demand, and that in violation of their trust they secreted, concealed, and embezzled all of said property, and seeking return of property to deceased's administrator, and appointment of receiver, *held* to state an equitable cause of action, though it failed to state details as to nature or purposes of trust, as against contention that it stated cause of action at law, because only thing involved was right to recover personal property.

2. Executors and administrators 🔑85(1)—Recitals in answer, denying that decedent had any right, title, or interest to property involved, held not to change equitable cause of action into legal one.

Recitals in answer, denying that personal property sought to be recovered by deceased's administrator was property of deceased, or that she had any right, title, or interest therein at any time while property was in defendant's possession, and that one of defendants had exclusive adverse possession of property and proceeds thereof ever since she had become owner, *held* not to change plaintiff's equitable cause of action for defendants' violation of duties as trustees, to action at law.

3. Appeal and error 🔑930(4)—Appellate court must assume jury verdict for plaintiff was in response to second count of complaint, where court directed verdict for defendants on first count.

Where trial court instructed jury that plaintiff failed to make out case on his first cause of action, and that their finding must be in favor of defendants on that cause of action, appellate court must assume that jury, in finding for plaintiff, and that plaintiff was entitled to return from defendants of property described therein, with damages, obeyed instruction, and that verdict was in response to other count in complaint.

4. Trial 🔑179—Direction of verdict is decision by court on question of law which jury cannot disregard, and court may enter judgment irrespective of jury's action thereon.

Direction of verdict in favor of one party is decision by court on a question of law, and jury, in giving verdict on such an order, acts ministerially as instrument of court and is not at liberty to refuse obedience thereto, and court is empowered to enter judgment in such case, irrespective of whether jury returns any verdict, or if jury refuses to return verdict in compliance with instruction.

5. Trusts 🔑359(2)—Complaint, alleging son fraudulently induced mother to turn over her property to him, to deprive her and other sons thereof, held to state equitable cause of action.

Administrator's complaint, alleging that defendant, by fraud and undue influence, induced his mother, plaintiff's intestate, to turn over her property to him, representing that he would hold property until her death, and then give a third thereof to each of his brothers and retain a third for himself, and that he intended to deprive her of her property, and to prevent other sons from ever securing any portion thereof, *held* to state equitable cause of action.

6. Trusts 🔑91—Fundamental theory of equity in creating involuntary trust is to restore defrauded party to position he occupied before fraud was committed (Civ. Code, § 2224).

The fundamental theory on which equity acts in creating involuntary trust, under Civ. Code, § 2224, is that of restoring defrauded party primarily, and the fraudulent party as a necessary incident, to positions which they occupied before fraud was committed; and, assuming transaction should not have taken place, court proceeds as though it had not taken place, and returns parties to the situation.

7. Executors and administrators 🔑85(1)—Answer denying decedent's ownership of property sought to be recovered by administrator, held not to change equitable cause of action pleaded in complaint to legal one.

Answer denying that decedent was ever owner during her lifetime of property sought to be recovered by administrator and alleged to have been obtained from her by fraud and undue influence, or that she had any right, title, or interest therein at any time while property was in defendant's possession, though it put in issue the ownership of property during decedent's lifetime, *held* not to change character of action from one in equity to one at law, where at trial and throughout entire case it was admitted that decedent had owned property and case was tried on theory that defendant had secured it from her by means of gift brought about fraudulently through undue influence, or in trust.

8. Jury 🔑13(3, 4)—Right to jury trial under Constitution and statute does not apply to cases within equity jurisdiction (Code Civ. Proc. § 592).

The constitutional guaranty of a right to trial by jury and right of jury trial, provided for by Code Civ. Proc. § 592, have no application to cases within equity jurisdiction, and jury may not be demanded in such cases.

9. Pleading 🔑236(1)—Granting or denying leave to amend pleadings rests within court's discretion, but should not be arbitrarily denied.

Granting or denying leave to amend pleadings is a matter resting within court's discretion and this discretion should always be exercised to the end that a full and fair hearing may be accorded litigants, and, where any substan-

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★Rehearing denied.

tial showing is made, amendments should be permitted almost at any time, and if justice will be subserved by permitting amendment and rights of other parties are not prejudiced, court cannot arbitrarily deny motion to amend.

10. Pleading ⚷236(7)—Refusal of permission to amend complaint after trial had proceeded seven days, and which would have entirely changed theory of case, held not abuse of discretion.

After trial had proceeded about seven days, refusal to permit amendment of complaint which changed theory of case, and which did not merely conform pleadings to proof, and would have permitted resubmission of evidence which had properly been excluded under original pleadings, without any sufficient showing other than offer to amend, *held* not abuse of discretion, where action had been instituted more than a year before trial, with issue joined about same time, and amendments and new issues had been made and framed about six months before trial.

11. Appeal and error ⚷691—Without all evidence before it, appellate court cannot reverse for rejection of certain evidence.

Action of trial court in rejecting testimony cannot be reversed by appellate court, where all evidence in case is not before it, since appellate court may presume that the excluded testimony was elsewhere or otherwise admitted, if admissible.

12. Executors and administrators ⚷85(5¼)—Ex parte statements of decedent's son concerning intent to deprive brothers of share in estate would not be independent evidence of act carrying out intent.

In administrator's action against decedent's son and his wife to recover decedent's property claimed to have been obtained from her by fraud and undue influence and retained in breach of trust, ex parte statements of son concerning his intent to deprive his brothers of any share in mother's estate would not be independent evidence of any act carrying out that intent, and in absence of any evidence on his part indicating intent proof of statement would be wholly immaterial.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Joseph W. Reay, as administrator of the estate of Christiana G. Reay, deceased, against Dacia Bailey Reay, as administratrix with the will annexed of the estate of Wallace R. Reay, deceased, and another. From an adverse judgment, plaintiff appeals. Affirmed.

Robert Duncan, Marshall Nuckolls, and Monroe B. Kulberg, all of San Francisco, for appellant.

Dunne, Dunne & Cook, of San Francisco, for respondents.

PARKER, Justice pro tem. In this action after a trial by jury the court below determined that the action was one in equity, and, disregarding entirely the verdict of the jury, entered judgment for defendants, from which judgment the appeal is taken. At the outset, therefore, we are called upon to review the pleadings in some detail to the end that the nature of the controversy may be made clear and also the relief asked.

[1] The subject-matter of the action is certain personal property alleged to have belonged to Christiana G. Reay at the time of her death. It will be unnecessary to give any detailed description of this property other than to describe it as bonds and cash. The case went to trial on the first amended complaint. Subsequently plaintiff moved for permission to file a second amended complaint, which was denied. However, the plaintiff was permitted to amend in respect to the description of the property sought to be recovered; otherwise, the first and second amended complaints were practically identical. In the complaint upon which the trial was had the plaintiff sets up his cause of action substantially as follows: After pleading the death of Christiana G. Reay and plaintiff's capacity as the administrator of her estate plaintiff then alleges the representative capacity of Dacia Reay as administratrix with the will annexed of the estate of Wallace R. Reay, deceased. Then follows the following allegation: "That prior to the death of said deceased, Christiana G. Reay, the defendants Wallace R. Reay and Dacia Reay, his wife, came into the possession of certain property of said Christiana G. Reay as agents of the said Christiana G. Reay and in trust for her, to hold the same for the said Christiana G. Reay and to deliver the same to her upon her demand." Here follows a detailed description of the property, being personal property consisting of government and corporation bonds and preferred and common stocks, "and also the income and accumulations therefrom, which said property is alleged to be of a total value of $120,000 plus the income and accumulations therefrom."

Then follows this allegation: "That the defendants and each of them in violation of their trust concealed and embezzled all of said property, with the fraudulent intent to appropriate it to their own use, and did fraudulently appropriate the same to their own use." The complaint closes with the allegation of demand by plaintiff administrator that defendants deliver over to him all of said trust property and the refusal of defendants to so deliver.

It is the contention of appellant that the cause of action thus stated sounds wholly in law, as distinguished from an action in equity. He argues that it is an action in detinue as known to the common law, and that, while the forms of action have been abolished under our procedure, nevertheless we retain the general distinction between actions at law and proceedings in equity. The respondent with as much vigor contends that the action as stated is one of equitable cognizance, as being an action under an alleged trust, wherein an accounting is sought.

From a mere reading of the complaint it will appear that plaintiff claims that defendants came lawfully into the possession of the personal property "in trust for the decedent," to hold it for her and to deliver it up upon her demand, and that *in violation of their said trust* they secreted, concealed and embezzled all of the said property. The relief sought is a return of the property to the administrator, and the appointment of a receiver during the litigation.

At this point it will be well to note the manifest idea of the pleader with reference to the cause of action relied upon. This is apparent from the history of the pleadings. The original complaint was in one cause of action and in precisely the same language as we find in the second amended complaint before us. The original complaint is followed nearly a year later by a first amended complaint wherein the cause of action is again pleaded in the same language. These pleadings are referred to only to indicate the theory of plaintiff from the outset.

In Dillon v. Cross, 5 Cal. App. 766, 91 P. 439, the court says: "In the complaint before us, after alleging that plaintiff handed to defendant moneys to be kept, deposited and invested by him * * * for plaintiff, it is alleged that defendant did deposit in a bank $1,100 'of the said sums of money so received by him in trust for this plaintiff.' It is thus inferentially alleged that defendant received the money in trust for plaintiff. In * * * the complaint the money is repeatedly referred to as money held in trust for plaintiff. * * * It thus appears that plaintiff was attempting to charge defendant as a trustee; and while the complaint is uncertain for not alleging directly what is alleged inferentially, it is not a case of a total absence of allegations of essential facts going to charge a trust."

So here the complaint is uncertain and indefinite in that it omits all details as to the nature of the trust or the purposes thereof, or any facts concerning these features. The complaint fails to disclose in this cause of action the author of the trust or the source of the funds. The plaintiff in this first cause of action simply and directly says to defendants: "You have personal property which you obtained under a trust for Christiana G. Reay and which under your trust you were to deliver to her upon her demand. You have violated your trust by embezzling and secreting the said property, and we demand from you the return of that trust property." No matter how the language of this cause of action is turned about or construed it says no more than this but always the same. If the cause of action had gone into the minutest detail and alleged specifically the trust, its creation, purpose and scope as well as the beneficiaries, the result in its last analysis would have been the same. This cause of action was manifestly on the theory of a trust which had been violated. If this is not true then no cause of action at all was stated. If the latter is the true situation, then appellant has not been injured and cannot be heard to complain.

Appellant urges that the cause of action was one at law upon the theory that when the pleading is scrutinized and considered with the relief prayed, the only thing involved is personal property, specifically described, which plaintiff claims as property of his intestate, and the object of the suit is to recover the said property. From this standpoint he argues that the action is parallel with the old action of detinue, distinctively a common-law action. However the complaint does not in this cause of action allege ownership or right of possession in the plaintiff's intestate save and except as accruing by and through the trust. If we accept appellant's theory we go a long way towards destroying all equitable jurisdiction. In a vast majority of actions distinctively equitable the relief sought is the obtaining of property, real or personal, and to say that the result obtained must characterize the jurisdiction, without reference to the proceeding, would be to ignore entirely the purpose of equity jurisdiction. Tested by the theory of appellant an action for specific performance would be removed from the equity side because it was sought thereby to give plaintiff the ownership of certain lands, and that as the ultimate result would place plaintiff in possession of land, therefore the action was on the law side as an action in ejectment. We cannot accept this claim.

The pleadings in the present case were carefully prepared and amended. Able counsel gave time and industry to plaintiff's claim and its presentation. When these counsel submitted to the court their cause on the claim that a trust existed and had been violated, the term trust, which has a well-known, definite meaning in the law, was advisedly used, and intended necessarily to mean just that, namely, a trust with all of its essentials and characteristics.

[2] Appellant contends further that the nature of the action is not to be determined from the complaint alone, but that the issue as joined is to control. He claims that the defendants by their answer so made the issue that it became and was purely an issue at law. Defendant Wallace Reay, in his answer, denied that the personal property involved was the property of Christiana G. Reay, plaintiff's intestate, or that she had any right, title or interest therein or thereto *at any time while the same was in possession of the defendants.* (Appellant's italics.) The

defendant Dacia Reay in her answer admits and alleges that she has ever since been the owner and retained exclusive adverse possession of said property and the proceeds thereof in so far as they have been converted into other property. It is from these two recitals of the answers of the defendants that appellant claims that the action has been changed from one in equity to one purely at law. We are unable to follow appellant in his argument and reach his conclusion.

In denying the existence of the trust defendant denied that Christiana G. Reay had any interest in the property. This denial raises no new issue, and does not supply anything to the complaint or change the issue tendered. The cases cited by appellant are not applicable to the case at bar and in no wise determine or control the course of decision here. We deem it unnecessary to discuss this phase of the case other than to note appellant's claim. It is well settled that actions brought to establish and enforce a trust in personal property are proceedings in equity. Cauhape v. Security Savings Bank, 127 Cal. 197, 59 P. 589; Matter of Coburn, 165 Cal. 202, 131 P. 352; Schooler v. Williamson, 192 Cal. 479, 221 P. 195.

[3, 4] Before leaving this first cause of action there is another feature of the case which bears directly thereon. At the conclusion of the trial the court below gave the jury the following instruction, after detailing the averments of the first cause of action, and properly advising the jury as to the allegations thereof and where the burden of proof lay: "I now instruct you that there is no evidence in this case to establish such a trust as is referred to in such first count, or that the defendants, or either of them, came into possession of the property as such trustees or upon such understanding. In that state of the evidence it becomes my duty to instruct you, and you are instructed, that the plaintiff has failed to make out a case, and your finding must be in favor of defendants upon the first count or cause of action."

No question in respect of this instruction or its correctness is raised upon this appeal. On the record before us this instruction must be assumed to be supported and justified from the evidence or the lack of evidence. The verdict of the jury was a general verdict as follows: "We, the jury, find for plaintiff and that plaintiff is entitled to a return from defendants of the following described property and as damages for the taking and detention thereof as follows (describing property and damages)." We are bound to assume that in reaching this verdict the jury obeyed the instruction of the court and that the verdict was in response to the other count in the complaint.

Without pursuing this branch further it will suffice to say that the following cases illustrate the principle: Estate of Sharon, 179 Cal. 447, 460, 177 P. 283; Schudel v. Helbing, 26 Cal. App. 410, 147 P. 89. Quoting from the Sharon Case: "A verdict is directed by the court because the evidence is such that the court can say, as a matter of law, that no other verdict is reasonably possible. The direction to render a verdict in favor of one party is the decision by the court upon a question of law. Such decisions are within the exclusive province of the court. In giving a verdict upon such an order the jurors do not exercise discretion, but act ministerially as the instrument by which the court prepares the record which will support the only judgment that can lawfully be given. They are no more at liberty to refuse obedience than is the clerk, when he is directed to do the ministerial act of entering an order or judgment of the court."

From the doctrine of the Sharon Case it follows that the verdict of the jury here must be tied to the second cause of action, and that there is no verdict returned on the first cause of action. As the court was empowered to direct any one member of the jury to sign and return a verdict in compliance with the instruction, so also was the court empowered to enter judgment on that cause of action for defendants irrespective of whether or not the jury returned any verdict or if the jury refused to return a verdict in compliance with the instruction.

There being no sufficient record before us to review the court's action in this respect the judgment of the court on the first cause of action would be affirmed, irrespective of whether the action were one in law or equity, because the court would have the power to enter judgment in a case at law where directions to return a verdict were not followed. We have, however, not relied upon this view to uphold the action of the court below. Rather we have given separate attention to the first cause of action to the end that the case might be treated as a whole, and the exact nature of the first cause of action determined should we consider the action in its entirety. As has been sufficiently indicated, the complaint was in two counts. We will now take up the second cause of action.

[5] Plaintiff pleads at the outset the death of Christiana G. Reay and his capacity as administrator; likewise he sets up the capacity of Dacia Reay as administratrix of the estate of Wallace E. Reay, deceased. It is then alleged that during her lifetime Christiana G. Reay was the owner of certain personal property, being the same property referred to in the first cause of action, and that said property constituted practically the entire estate of the said decedent. The remaining allegations may be abstracted as follows:

The Christiana G. Reay was a widow from 1911 until her death in 1925, and had three sons, who were here sole heirs, and each of them was equally entitled to her bounty. At the time of the death of her husband she was of great age, to wit, of the age of 70 years, and was weak and infirm in body and mind, and was easily influenced and controlled by Wallace Reay from a time prior to the death of her husband up until her death. That she fully relied upon and implicitly trusted Wallace Reay in the management and control of her business affairs and property, and that he acted as her confidential adviser in and about and concerning the same. That Wallace Reay, with the object and intent of securing for himself alone all of the property of Christiana G. Reay and of depriving her thereof and of preventing his brothers from receiving any part thereof, made himself the constant and daily companion of his mother for years, and used acts and wiles and flattery upon his mother, and made false representations to her of and concerning his said brothers and the wives of said brothers, and poisoned the mind of the mother against them, and that thereby and by other means unknown to plaintiff Wallace Reay gained control and domination over the mind and affections of his mother, and gained an undue influence over the mind and affection of his mother. That said representations were false and that Wallace knew at all times that they were false. That while Christiana G. Reay was confiding and entrusting Wallace with the management of her property, and while Wallace was so managing and controlling the same, and while the mother was weak and infirm in body and mind and under the influence and control of Wallace he took advantage of such confidence and trust reposed in him, with intent to gain all of the said property of the mother for his own use and benefit and for the use and benefit of his wife, and to prevent his brothers from ever securing or receiving any of the said property as heirs or otherwise. That by the use and exercise of the control which he held over his said mother by reason of his handling, managing and controlling her said property, and by use of the trust and confidence so reposed in him, Wallace induced his mother to *turn over to him* all of her said property and estate, and Wallace thereby secured possession thereof, all in pursuance of his intention to deprive the said mother thereof and to prevent her other sons from ever securing any part thereof. That in order to induce his mother to turn over to him all of her property Wallace also represented to his mother that he would hold said property for her, and could thereby better control and manage the said property for her, and that he could and would thereby protect the mother from any demands or annoyances from the other sons concerning said property, and said Wallace also falsely represented to the mother that he would upon her death distribute and deliver over to each of the other two sons an equal one-third of said property. That he had no intention of so doing, but on the contrary he intended to keep the property for himself. That Wallace did not pay or give to his said mother anything whatsoever for said property, and the mother did not receive any consideration whatsoever for said property or any thereof. That the mother was induced to deliver and did deliver the property to Wallace solely by reason of the false representations and by reason of the undue and fraudulent influence exercised by Wallace over his mother and not otherwise. That the mother had no independent advice concerning the transactions relating to the delivery or turning over of the property to Wallace, nor concerning her rights in said property, nor the effect of her actions. That immediately *upon securing* the said property from his mother Wallace delivered and turned the said property over to his wife, defendant Dacia Reay, all for the purpose of defrauding his mother and his brothers thereof and for the purpose of concealing the property, but Wallace did not receive any consideration from his said wife, Dacia Reay, therefor. That the plaintiff had no knowledge that the mother had delivered or turned over to said Wallace any of the property until after the death of the mother, and Wallace concealed from him the fact that the mother had done so, and also the fact that Wallace had possession of the property. The defendant Dacia Reay assisted and aided Wallace in concealing the said property, and neither of them ever asserted any claim to the property until after the mother's death. That after the mother's death Wallace and his wife, Dacia, claimed for the first time that the mother had made a gift of the property to Wallace. That Wallace and his wife, in violation of their trust and in breach of the confidence reposed in them, hid and concealed the property and refused to divulge anything concerning the same until after the mother's death, and did then only make the claim of gift when compelled under process of court. That during all of the times mentioned Christiana G. Reay was under the complete dominance, influence, and control of the said Wallace; that she would do or refuse to do any act or thing only if the same met with the approval of Wallace. That she was for many years prior to her death suffering from a mental and nervous disease which rendered her easily subject to the influence, control, and domination of Wallace, and during said period she was being treated by physicians for said nervous and mental disorder.

The prayer of the complaint is for judgment against defendants and each of them for the said property, and for any other property into which said property or the proceeds have been converted, together with the accumulations, interest, dividends, and accretions from said property, and if any of said property cannot be returned, that plaintiff have and recover judgment for the value thereof, and for such other and further relief, either general or specific, legal or equitable, as plaintiff may be entitled to in the premises, together with his costs of suit, and for an order of the court appointing a receiver to take possession of the property and keep and preserve the same and the proceeds thereof pending the action.

Appellant urges that this cause of action is distinctly an action at law, while respondent as earnestly contends that, as stated and pleaded, it is a proceeding in equity. In support of his contention appellant argues that the test of whether any given action is of equitable cognizance is whether there is an adequate remedy at law, and, if adequate relief can be had at law, the right of plaintiff to proceed in equity is defeated. He further argues that in reality the true theory of this second cause of action is to recover personal property which is wrongfully in the possession of defendants, and that the primary right to be maintained, and the violation of which furnishes the cause of action, is in this case that of possession, and that this right is one cognizable in a court of law and needs no aid from a court of equity for its enforcement.

The second cause of action is taken up to a great extent with allegations of undue influence and fiduciary relationship. Appellant takes the position that these allegations are not the ultimate facts upon which he relied for relief, but are superfluous, and can be given no weight in determining the nature of the action. It appears from the record before us that prior to the commencement of this action Wallace Reay was examined in the probate court on a bill of discovery issued in the estate of Christiana G. Reay. It was learned from his testimony given at that time that Wallace claimed the property in controversy by virtue of various gifts from his mother. In appellant's brief we find this language: "And counsel for appellant in his professional zeal anticipated such a defense in answer to a complaint seeking recovery of the property." Nothing could be plainer than this. Appellant knew that respondent held the property under claim of gift, and brought his action to have it decreed that the gift was induced by fraudulent representations and the exercise of an undue influence.

The appellant again thus contends: "The salient point we wish to impress upon the court is that there is no allegation of a gift." He then proceeds: "And in the absence of an allegation of a gift the allegations as to undue influence and fiduciary relations must be treated as entirely irrelevant and as merely an immaterial narrative of the manner in which Wallace Reay and Dacia Reay acquired possession of the property sued for." The remainder of appellant's argument is based upon the assumption that the preceding contentions are true.

It will be unnecessary to again detail the allegations of this cause of action. Undue influence, the violation of a trust and confidence, the exercise of such undue influence for the purpose of depriving the mother of her estate, and the successful accomplishment of that intent are set out redundantly. In almost as many words a gift was alleged. If, as alleged, Wallace Reay already had possession of the property, as obviously follows from the allegation that he had the handling, management and control thereof, nothing further could be done towards giving him possession. Therefore, if the words "turn over" were to have any meaning, it was to convey the thought of a transfer. A transfer without consideration would, speaking generally, be a gift. Passing this, however, whatever its nature might have been, the pleading does affirmatively allege a transfer. In this connection it is alleged that Wallace fraudulently induced the mother to believe that he would hold the property until her death, and that he would then give a third thereof to each brother and retain a third himself. With mere naked possession this could not be done. That trusts are of exclusive equitable jurisdiction is not questioned. Bacon v. Grosse, 165 Cal. 492, 132 P. 1027. Again, we find the allegation, prefaced by the averments of fraud and undue influence, that Wallace induced his mother to turn over to him all of her said property and estate in pursuance of his intention to deprive her thereof and to prevent the other sons from ever securing any portion thereof. As respondent contends: "There can be no quibble about the pleader's meaning. He means to say that Christiana, in turning over all her property and estate, stripped herself of her estate and was left with nothing. In using the term 'estate' he used it for what it signifies—'the quantity of interest which a person has, from absolute ownership down to naked possession'" 1 Bouv. Law Dict. (Rawle's 3d Revision) p. 1075; Friedman v. Macy, 17 Cal. 230.

Summing it up, then, we have an action based either upon a gift unlawfully secured, or upon an express trust to hold and distribute after death. We consider this essentially and characteristically a proceeding in equity. The relief asked was a judgment for the property and its proceeds, with such further relief, legal or equitable, as plaintiff might be entitled to under the premises. In other words, the ultimate relief sought was a return of the property, to be effectuated through declaring invalid any transfer, or adjudging the existence of a trust therein existing in favor of plaintiff.

[6] The fundamental theory on which equity acts is that of restoration—of restoring the defrauded party primarily, and the fraud-

ulent party, as a necessary incident, to the positions which they occupied before the fraud was committed. Assuming that the transaction should not have taken place the court proceeds as though it had not taken place, and returns the parties to that situation. Gorham v. Gilson, 28 Cal. 483; Pomeroy's Eq. Jur. § 910, 4th Ed.; Broder v. Conklin, 121 Cal. 282, 53 P. 699; Bancroft v. Bancroft, 110 Cal. 374, 379, 42 P. 896; Espinosa v. Stuart, 52 Cal. App. 477, 481, 199 P. 66; Civ. Code § 2224. In Wheelock v. Godfrey, 100 Cal. 585, 35 P. 319, the court says: "The statement of appellant's counsel that the amended complaint contains matter which might have been omitted and that he demanded unnecessary relief, is in effect but a statement that a different cause of action sufficient for a recovery at law, with a demand for only such relief as a court at law could grant, might have been prosecuted. The answer must be, that the phraseology of the complaint was adapted to the relief sought." The pertinency of the quotation to the case at bar is apparent.

[7] Appellant finally urges that the nature of the action cannot be determined alone from the complaint but from the issues joined. To the extent the argument is presented we might agree. The defendant, answering specifically each and every allegation of the complaint, among other things pleads as follows: "Denies that Christiana Reay was ever the owner during her lifetime of any of the property referred to in plaintiff's complaint, or that she had any right, title, or interest therein or thereto at any time while the same was in the possession of Wallace R. Reay or Dacia Reay, or that Christiana Reay was ever the owner or ever had any right, title or interest in or to certain other property described," etc. It is claimed that the issue thus raised was solely one as to the ownership and right of possession. It is apparent, however, that the issue was not changed by the averments or denials of the answer. The denials were specific and followed categorically the allegations of the complaint. The particular denial quoted did, it is true, join issue on ownership of the property during the lifetime of Christiana Reay. However, the question of the ownership of Christiana G. Reay was merely preliminary to the main issue. Upon proof of such ownership during the lifetime of Christiana G. Reay the plaintiff would have been entitled to no relief in view of the other issues. At the trial and throughout the entire case it was admitted that Christiana G. Reay had been the owner of the property, and the theory of the case as a whole was, as indicated, that defendants had secured the same from her either by means of a gift brought about fraudulently through the exercise of undue influence, or in trust for plaintiff or the decedent.

Concluding this branch of the case, and as illustrating the theory of all sides as to the nature of the proceeding, it is noted that there was submitted to the jury the following question: "Was any transfer by Christiana G. Reay in respect to any property mentioned in the second amended complaint herein, if any such transfer was made, procured to be made by the exercise of any fraud or undue influence on the part of Wallace Reay?" We think this indicates clearly what the theory of the case was and what issues were joined. It may also be observed that the theory of this second cause of action was repeatedly throughout the trial stated by plaintiff to be fraud and undue influence. Both court and counsel so recognized it, and the record abounds with arguments of counsel for appellant wherein it is stated that "undue influence is the gist of the second cause of action." Not once, but many times, was this statement made, coupled with the claim that undue influence was a species of fraud, and that fraud and undue influence constituted the issues presented. At no time was the case treated as one in mere bailment.

Repeating, we hold the proceeding to be one in equity, and without further citation of authority, the cases heretofore noted will suffice. In view of the modern procedure, which provides for but one forum, wherein all relief is granted, the old lines have been somewhat obscured. Much general language has been used to the end that it is not always easy to demonstrate just where equity begins. Equity, however, does cling tenaciously to its jurisdiction over matters of conscience, this jurisdiction controlling particularly in issues of fraud and undue influence.

[8] The constitutional guaranty of a right to trial by jury has no application to cases coming within the equity jurisdiction, and a jury may not be demanded in such cases. 15 Cal. Jur. 331. The text is supported by innumerable decisions.

Appellant contends that section 592, Code of Civil Procedure, makes no distinction between actions at law and in equity, but lays down a uniform rule applicable to legal and equitable actions alike, and that under this section appellant was entitled to a trial by jury in the instant case, even though it is held to be a proceeding in equity. With this contention we do not agree. Koppikus v. State Commissioners, 16 Cal. 254; Vallejo R. Co. v. Reed Orchard, 169 Cal. 545, 147 P. 238; Cline v. Superior Court of Los Angeles County, 184 Cal. 331, 193 P. 929; Schooler v. Williamson, 192 Cal. at page 478, 221 P. 195; Pomeroy v. Collins, 198 Cal. 46 at page 70, 243 P. 657; People v. O'Connor, 81 Cal. App. 520, 254 P. 630.

[9, 10] It is next claimed by appellant that the court erred in denying him permission to amend his complaint after the commencement of the trial. We do not deem it necessary to detail again the allegations of the complaint nor those of the proposed amendment. Suffice it to say that the proposed amendment changed entirely the theory of the case from one

wherein lawful possession of defendants as alleged was turned into an allegation of unlawful possession. It is conceded here that plaintiff had not the absolute right to amend, but that it was a matter of the court's grace. Granting or denying leave to amend pleadings is a matter resting within the discretion of the court. It is well settled that this discretion should always be exercised to the end that a full and fair hearing might be accorded the litigants, and that where any substantial showing is made amendments should be permitted almost at any time. If justice will be subserved by permitting the amendment, and the rights of other parties are not prejudiced, a court cannot arbitrarily deny a motion to amend.

Justice in the abstract is an elusive thing and difficult to define. Justice, as we understand it, rests in law, and only through the due and regular processes of law can justice be secured. The trial of the instant case had proceeded through seven trial days when the amendment was offered. The amendment was not offered in an attempt to conform the pleadings with the proof. Appellant in his brief before us states that much evidence that had been properly excluded under the original pleadings could and would have been resubmitted under the new complaint. The trial court took the view that permission to amend would mean a recommencement of the trial, and the record here does not disclose that the fears of the court were groundless. The action had been instituted more than a year before, and issue joined about the same time. Amendments had been made and new issues framed about six months before trial. There was so showing made by plaintiff on the last offer to amend, being the one refused permission, other than the offer.

In the case of Rogers Bros. v. Beck, 43 Cal. App. 112, 184 P. 515, it is said by Justice Richards: "The next contention of the appellants is that the trial court committed an abuse of discretion in refusing the defendants leave to file an amended answer during the progress of the trial. * * * This action was commenced on January 3, 1915; the answer of the defendants was filed on March 5, 1915; the cause came on for trial on January 17, 1916. The amended answer was not proffered for filing until the trial of the cause had proceeded up to the point where the plaintiffs had fully put in their case. No sufficient reason was given for the defendants' delay in seeking to amend their answer, and this of itself would have been a sufficient ground for the court's refusal to permit the same to be filed."

In Scholle v. Finnell, 167 Cal. 102, 138 P. 751, it is said: "Without considering whether the proposed amendment embraced new causes of action, the order was justified on the ground that the motion was made too late. It appears that the facts upon which the proposed amendments were based were known to plaintiff for over a year. There was no satisfactory showing why leave to amend was not sought earlier, and it was within the discretion of the court to refuse to allow them for this unreasonable and unexplained delay." See, also, Emeric v. Alvarado, 90 Cal. 444, 27 P. 356, wherein the court says: "The refusal of a trial court to allow an amendment to a pleading is not, per se, error. Such matters are within the discretion of the lower court, and this court will not interfere, when such discretion has not been clearly abused." In view of the principles thus enunciated, the action of the trial court will not be disturbed in the case before us.

[11, 12] It is finally claimed by appellant that errors of the trial court in the rejection of certain evidence demand a reversal of the cause. We do not think that the rulings complained of warrant such action. The appeal is before us under the alternative method, and from those portions of the testimony presented in the briefs or supplements thereto it does not appear that all the evidence adduced is before us. For aught that appears we may presume that the excluded testimony was elsewhere or otherwise admitted if admissible. Dahlberg v. Dahlberg, 202 Cal. 295, 260 P. 290. The testimony offered and rejected consisted of oral statements alleged to have been made by the decedent Christiana G. Reay and by Wallace Reay, also deceased. The statements of the former were offered to show a state of mind and her intent with reference to her other sons and the disposition of her property. The statements of Wallace Reay were offered to show a preconceived intent on his part to deprive the remaining heirs of any share in the estate of the mother. In order to demonstrate our conclusion it would be necessary to review here the entire evidence, and this we decline to do. We have gone carefully through some thousand pages of transcript, and from the case as a whole we do not think the court erred in making the rulings complained of. Much evidence was allowed which bore upon the same questions and a wide latitude was allowed. Ex parte statements of Wallace Reay concerning his intent to deprive his brothers of any share in the mother's estate would not be independent evidence of any act carrying out that intent, and in the absence of some evidence on his part indicating the intent proof of the statement would be wholly immaterial.

Assuming that the court's rulings were erroneous in the instances complained of, no prejudicial error resulted therefrom, and the trial would result no differently were this testimony admitted. The error, if any, has not resulted in a miscarriage of justice. (Const. art. 6, § 4½.)

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

206 Cal. 653

HERMANCE et ux. v. BLACKBURN et al.
(L. A. 10189.)

Supreme Court of California. March 9, 1929.

1. Evidence 🔑314(1)—Testimony relating to survey, based on knowledge acquired by witness from field notes prepared by others, was incompetent as hearsay.

Testimony relative to survey, which was not made by witness personally, and without any knowledge except that gained from field notes prepared by others on completion of survey, was incompetent as being hearsay, in absence of showing that witness was present at time survey was made.

2. Boundaries 🔑37(3)—Evidence held insufficient to sustain finding that arch did not encroach on adjoining lot.

Evidence, in action concerning dispute as to boundary line, *held* insufficient to sustain finding that ornamental arch did not encroach on adjoining lot.

In Bank.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Russell E. Hermance and wife against John N. Blackburn and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Goodspeed, Pendell & Neff and G. Roy Pendell, all of Los Angeles, for appellants.

Cantillon & Hamilton and Cantillon & Sievers, all of Los Angeles, for respondents.

CURTIS, J. This action concerns a dispute as to the boundary line between lots 28 and 30 in block 72 of the city of Burbank, in the county of Los Angeles. The plaintiffs are the owners of said lot 30 and the defendants of said lot 28. The lots face easterly on Tajunga avenue, and are situated between Tenth and Eleventh streets of said city. Tajunga avenue runs in a northerly and southerly direction, and plaintiffs' lot is located to the south of and adjoining defendants' said lot. The claim of plaintiffs, as made by the pleadings, is that the defendants have encroached upon plaintiffs' lot to the extent of 1.87 feet. The evidence, plaintiffs contend, shows an encroachment of 1.85 feet. Defendants in their pleadings denied that they had encroached upon plaintiffs' lot to any extent whatever. The court found in favor of the defendants and entered judgment accordingly, from which the plaintiffs have appealed upon a bill of exceptions.

The specific charge of the plaintiffs is that the defendants constructed a dwelling house on said lot 28, and, as a part of said house, the defendants erected an ornamental arch and its supports; the northerly end of said arch joins and unites with said dwelling house, and the arch thence extends from said dwelling house southerly over to and beyond the boundary line of said lot 30, and is supported at its southerly end by a pillar which forms a part of said arch, and that said arch and the southerly pillar supporting the same extends over and on plaintiffs' said lot 28 to the extent of 1.87 feet. For the purpose of proving these allegations, the plaintiffs called three witnesses, all of them surveyors or engineers. Their evidence tended to show that the original survey of the city of Burbank was made in 1887. In 1911 the witness Edward M. Lynch, who was then city engineer of said city, made what he called a center line survey "for the purpose of locating the center lines of the various streets of said city, preparatory to the city entering upon a plan of street improvement." At that time a number of the streets were not open, but were covered with brush. Upon locating the intersections of the center lines of two streets, this witness testified that he drove 2x2 stakes at the intersecting points of the center lines, which he buried all the way from one to two feet underground, depending upon the character of the ground, so as to preserve those particular points for future use. Two years later cement curbs were put in, running from First street to Tenth street, and, while the cement was still fresh, he drove nails into it, one at each of the four corners at street intersections, and these nails served as "monuments" or "witness points," and are also referred to as "reference points." This witness gave no testimony as to the boundary line between said lots 28 and 30, but plaintiffs' other two witnesses, one T. R. Mini, city engineer of said city, the other David Gustavson, a civil engineer in the employ of said city, each testified that, using a copy of the field notes of Mr. Lynch made by him at the time of his survey, they jointly located the boundary line between said two lots, and that the southerly end of the ornamental arch constructed by defendants was over on the land of the plaintiffs a distance of 1.85 feet. Three witnesses testified for the defendants. They also were engineers. A joint survey of the premises of the parties hereto was made by two of these witnesses, John N. Nelson and William F. Alston. They each testified that the archway constructed by the defendants protruded onto the lot of the plaintiffs. Nelson was asked if they in their said survey made "any determination with reference to that archway at Mr. Blackburn's house. A. Well, when I had the instrument on the hub that I set on the southeasterly corner of lot 28 I couldn't see the stake that I had on the southwesterly corner, because the archway was over somewhat. Q. You didn't determine how much that archway was over in your survey? A. No. Q. It was over, though, was it, on the lot line? A. Yes. Q. But how much you don't know? A. No."

Upon this point Alston testified: "I was sent around to the southwest corner of the lot where we had set the hub as we came up Tajunga; but the line of sight was interrupted by the projecting of the arch on the south side of the house on lot 28. Q. That is an arch projecting from lot 28 over to lot 30? A. Yes, sir. Q. Did you look through the transit? A. No, sir, I didn't. Q. And Mr. Nelson simply told you, then, that he couldn't get the two points—he couldn't see from point to point, as established by you as being on the southerly line of lot 28, on account of the archway that was there, which was connected with the house on lot 28, which was Mr. Blackburn's? A. Yes, sir."

[1, 2] It is evident that there is nothing in the testimony of either of these witnesses to controvert or negative the direct testimony offered on behalf of the plaintiffs that said archway was over on plaintiffs' lot 1.85 feet. The only other witness in the case was Fred G. Beckner, called by the defendants. He testified that he also made a survey to determine the boundary line between lots 28 and 30, and, when asked in reference to the "arch on that house, how far did that protrude over the lot line as you established it, over the boundary line between lot 28 and lot 30 as you established it for Mr. Hermance?" answered, "Why, I would say approximately a little under three inches." Ordinarily the evidence of this last-named witness might be accepted as sufficient to show that the protrusion of said arch upon plaintiffs' lot was exceedingly slight, and under the facts and circumstances shown in this case the doctrine of de minimus non curat lex might well have been applied by the trial court. But this witness, however, further testified that the survey concerning which he was testifying was not made by him personally, but by men in his employ, and that he was present only ten or fifteen minutes at the commencement thereof and for the purpose of giving his men reference points from whence to begin or start the survey. It was shown that the survey consumed between six and seven hours. The evidence of this witness was received over the objection of the plaintiffs that it was incompetent on the ground that it was hearsay. There was no showing that this witness was present at the time the boundary line between said lots was run or that he had any knowledge of the location of said arch except that gained by him from the field notes prepared by his men upon the completion of said survey. It might also be said that the men who actually made the Beckner survey were not called as witnesses. Under this state of facts we are of the opinion that it was error to admit the evidence of Beckner as to the location of said arch, and that without his testimony there was no substantial conflict in the evidence that the arch protruded over and upon plaintiffs' lot, to the extent testified to by plaintiffs' witnesses, that is, 1.85 feet. Both Nelson and Alston, who made the survey for the defendants, expressly stated that the arch was on the plaintiffs' lot. Their testimony corroborated that of plaintiffs rather than controverted it. We would expect, as they made the survey for the defendants for the express purpose of locating the arch in reference to the boundary line between the two lots, that in case they found the arch was only a trifle over the line they would have so reported and testified. The reasonable inference from their testimony is that they not only found the arch to be constructed upon the plaintiffs' land, but that it protruded thereon substantially to the extent claimed by the plaintiffs. As we view the evidence, there is no conflict therein as to the location of the arch upon the plaintiffs' lot. The court having made contrary findings, they must be set aside as without any evidence to support them.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

206 Cal. 661

RATTO v. RATTO. (S. F. 12771.)

Supreme Court of California. March 9, 1929.

Appeal and error ⚷1011(1)—Findings on issues of partnership and accounting on conflicting evidence cannot be disturbed on appeal.

Findings of trial court on issues of partnership and accounting pursuant to conflicting evidence cannot be disturbed on appeal, on the ground of insufficiency of evidence to support findings.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Andrew J. Ratto against G. B. Ratto. Judgment for plaintiff, and defendant appeals. Affirmed.

Harry H. Baier, of San Francisco, for appellant.

Raymond D. Williamson, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the plaintiff in an action to dissolve a partnership and for an accounting. The court found the existence of the partnership and on the accounting taken entered judgment for the plaintiff in the sum of $441.58 as his share of the profits. In support of the appeal it is contended that the evidence is insufficient to support the findings on the main issues of the partnership and accounting. There is substantial conflict in the evidence as to these matters, and the judgment may not be disturbed on that ground.

The partnership business was the sale of soft drinks, cigars and tobacco, and light lunches. The defendant further urges that the evidence shows that the parties were engaged, in part, in the illicit sale of intoxicating liquors at their place of business, and that therefore no relief should have been granted either party. The evidence on this point was sharply in conflict, and the showing against the contention of the defendant was sufficient to the support the findings of the court.

The judgment is affirmed.

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206 Cal. 648

PEVONAK v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 12805.)★

Supreme Court of California. March 8, 1929.

Rehearing Denied April 1, 1929.

Street railroads ⚷117(9)—Whether permitting two street cars to simultaneously pass group of persons standing between tracks was negligence, held question for jury under evidence.

In action for injuries on two street cars simultaneously passing group of persons standing between tracks, resulting in several persons of group, including plaintiff, being knocked down, whether defendants were guilty of negligence in permitting two street cars to thus simultaneously pass group of persons in narrow space between cars *held* question for jury under the evidence.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Lillian Murphy Pevonak, formerly Lillian Murphy, against the City and County of San Francisco and another. Judgment for defendants, and plaintiff appeals. Reversed.

Walter Christie and Bronson, Bronson & Slaven, all of San Francisco (H. R. McKinnon, of San Francisco, of counsel), for appellant.

John J. O'Toole, City Atty., of San Francisco, for respondent City and County of San Francisco.

Wm. M. Abbott, K. W. Cannon, and Cyril Appel, all of San Francisco, for respondent Market Street Ry. Co.

PRESTON, J. The judgment is reversed, and in so ruling we assign the following grounds:

Appellant asserts that the record shows the following facts: "The action is one for damages for personal injuries arising out of an accident which occurred on August 31, 1923, at the intersection of Kearny and Market streets, in San Francisco. At this point on Market street there are four parallel street car tracks, the inside tracks being operated by the respondent Market Street Railway Company (hereinafter called the Market Street Company) and the outside tracks being operated by the respondent City and County of San Francisco. (The latter tracks will be referred to hereinafter as the 'Municipal tracks.') On the evening of that day, about 5:30 o'clock p. m., the appellant arrived at the safety zone at said intersection for the purpose of taking a No. 21 car of the Market Street Company outbound toward her home. There was, according to the testimony, somewhat of a tie-up, and quite a number of people were waiting in the safety zone. A No. 21 car approached on the Market Street Company tracks, and as it did so a group of people estimated at ten or twelve, walked across the Municipal tracks to a position between the Market Street Company tracks and the Municipal tracks for the purpose of boarding said No. 21 car. Appellant was one of this group, being the person on the extreme right thereof. The No. 21 car began to slow up, but was motioned on by a Market Street Company starter, who was standing near the group of prospective passengers. In obedience to said signal the No. 21 car passed by the safety zone and the intersection of Kearny street without stopping. As it passed through the safety zone it was closely followed on the Market Street Company tracks by a No. 8 car. As this No. 8 car approached the safety zone there approached, along the Municipal tracks and practically abreast with the No. 8 car, a 'K' car, operated by respondent City and County of San Francisco. So closely behind the No. 21 car came this No. 8 car and 'K' car, that when the No. 21 car had been motioned past the intersection without stopping, there remained no opportunity for the group of ten or twelve persons to recross the Municipal tracks to the position from which they had started. In case the '8' and 'K' cars should persist in coming on together, therefore, the only means of safety which this group would have would be to stand between the two outbound pairs of tracks. There is barely room for a person of ordinary physique to stand between cars on the two pairs of tracks; there is room if such person stands sidewise between the two tracks, but not if he stands at right angles. The position of greatest danger is when a person is standing between the center sections of the two cars, for the 'K' car is wider by 1 foot 7 inches at the center than it is at the ends. The evidence indicates that both the '8' and 'K' cars came on at a rapid rate of speed and did not slow up at all as they began to pass the group. (One witness

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★Rehearing denied.

testified that the '8' slowed up slightly, but that the 'K' came through without changing its speed at all.) Of the group of ten or twelve persons, appellant was standing on the extreme right, i. e., in the most westerly position (toward Twin Peaks). She was standing slightly apart from the others. The others were grouped together closely. Observing that the two cars were going to try to pass simultaneously, they huddled together, side by side, their shoulders, however, overlapping. About four feet of the '8' car had passed appellant, according to her testimony, and the front end of the 'K' car was just about opposite her when appellant was struck violently by the person immediately to her left (a Mrs. Essener) and thereby hurled against the side of the passing '8' car. She was thrown in turn by the '8' car back against the 'K' car, then back from the 'K' car against the '8', and then thrown by the '8' car onto the pavement, so that when the 'K' car stopped appellant was lying under the 'K' car with her shoulder against the front pair of wheels of the rear truck. When the '8' car stopped, its rear platform was opposite appellant. Several other persons of the group had been knocked down. Mrs. Essener was lying across plaintiff's shoulders, and a man across plaintiff's knee. Appellant testified that she watched the two cars as they approached, and that she thought there was room for the cars to pass herself, but not room for them to pass the group to her left. No one could testify which one of the group was hit first, nor by which car."

This statement we find to be correct, with the exception that respondents both emphasize the fact that the front of the car had passed plaintiff without injuring her, and the further fact that no evidence was adduced by plaintiff from which it could be inferred that the car of either respondent actually struck any one at the time and place in question. The court below, after denying a motion for nonsuit, later, at the close of the evidence, directed a verdict for respondents. Plaintiff has appealed.

Under this record, we think that the issue of liability rested upon a question of fact and not upon a question of law.

We agree with appellant that the jury would have been warranted in finding either that one or more of the group of persons so standing between the tracks were negligently struck by one or the other or both of the cars of respondents, and that the injury to appellant was the direct consequence of such negligent operation of said car or cars or that the situation was such that it was a negligent act on the part of respondents in attempting to pass a group of people in this narrow space at a rapid rate of speed, which, by reason of the existing situation of the intended passengers, caused jostling and confusion among them, which in turn caused some of the group to be knocked down, in turn causing plaintiff to be struck and to receive as a result thereof the injuries complained of.

In other words, it is our view that it was a question of fact for the jury whether or not these two cars should have simultaneously traversed their respective tracks when a group of ten or twelve persons were crouched together in such a narrow space, there being also ample evidence that the crowd had been placed in this position without fault upon their part, having crossed said municipal tracks for the purpose of boarding a car which the agent of respondent Market Street Company did not allow to stop and having been prevented from retracing their steps to a place of safety by the oncoming of the two other cars.

The position of these tracks is at best a menace to life and limb, and, to our mind, it was certainly a question of fact whether or not the operating companies used ordinary care under the circumstances. The question of whether the front end of the car had or had not passed plaintiff is not controlling, nor is it of controlling importance that it cannot be said whether the injury resulted from a car striking some one of the group of persons or whether from fear or confusion. Lewis v. Young Men's Christian Ass'n (Cal. Sup.) 273 P. 580.

The presence or absence of negligence cannot be determined alone by legal precedents. It is determined by the related and relative facts and circumstances, and, of course, is usually determined as a fact, for the evidence is rarely in such a condition that a court may safely grant a nonsuit or direct a verdict as a matter of law.

We need not consider the contention that plaintiff in fact became a passenger and was entitled to claim a higher degree of care on the part of the Market Street Company. We hold that upon this record an issue of fact arose which would sustain a verdict for plaintiff upon the ground that ordinary care was absent; hence the conclusion first above announced.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

206 Cal. 669

PERRIN v. MOUNTAIN VIEW MAUSOLEUM ASS'N et al. (L. A. 9095.)

Supreme Court of California. March 12, 1929.

1. Injunction 🔑102—Equity cannot be resorted to for prevention of criminal acts, unless property rights are involved (Civ. Code, § 3369).

Courts of equity are not concerned with criminal matters, and cannot be resorted to for prevention of criminal acts, except where property rights are involved, under Civ. Code, § 3369.

2. Nuisance 🔑32, 48—Property owner held not entitled to enjoin operation of mausoleum, or recover damages under complaint merely alleging defendant's violation of ordinance, which failed to show nuisance or exceptional damage (Civ. Code, §§ 3369, 3479).

Adjoining property owner *held* not entitled to injunction and damages in suit to restrain maintenance and operation of mausoleum for interment and burial of dead bodies, under complaint merely alleging that defendants, in operating the mausoleum, had been convicted of violating county ordinance, and that defendants intended to continue such violation, with resulting depreciation in value of plaintiff's property, in view of Civ. Code, § 3369, since plaintiff failed to state facts showing mausoleum was a nuisance, under section 3479, or that plaintiff suffered exceptional damage, other than that suffered by public generally in that community.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Charles O. Perrin against the Mountain View Mausoleum Association and another. From a judgment of dismissal, plaintiff appeals. Affirmed.

J. Marion Wright, of Los Angeles (Charles J. Wendland, of Los Angeles, of counsel), for appellant.

Hewitt, Crump & Penn and Hewitt, McCormick & Crump, all of Los Angeles, for respondents.

LANGDON, J. This is an appeal from a judgment dismissing an action brought to secure a permanent injunction restraining defendants from continuing to construct, maintain, and operate upon property owned by the defendant association tombs, crypts, and niches for the interment and burial of bodies of dead human beings, and for the recovery of $5,000 damages alleged to have been caused to the adjoining property of plaintiff, because of the partial erection of a mausoleum upon the property of said defendant association. Objection was made to the introduction of any evidence on behalf of the plaintiff, on the ground that the complaint did not state a cause of action, and after this objection was sustained the court dismissed the action.

An examination of the complaint reveals that plaintiff pleads certain ordinances of the county of Los Angeles purporting to establish a residence district in Altadena, where the property of both the plaintiff and defendant, involved here, is situated; that defendants have been convicted in a criminal prosecution against them of violating these ordinances by the erection in such district of the mausoleum referred to and that, notwithstanding such conviction, the defendants intend to continue to violate said ordinances; and that the acts constituting such alleged violation have injured plaintiff by depreciating the value of his property. It thus appears that, primarily, plaintiff is seeking the enforcement of the ordinances referred to by injunctive proceedings.

[1] Section 3369, Civil Code, provides: "Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case." This statutory enactment is but the expression of the fundamental rule that courts of equity are not concerned with criminal matters and they cannot be resorted to for the prevention of criminal acts, except where property rights are involved. 5 Pomeroy's Equity Jur. (2d Ed.) pp. 4291, 4292. The text just cited, at pages 4294, 4295, thereof, contains the following pertinent language:

"It is a general principle of law that an individual cannot maintain a suit to abate or to recover damages for a public nuisance unless he suffers some exceptional damage different and other from that suffered by the rest of the community. * * * Where the injury resulting from the nuisance is, in its nature, irreparable, as when loss of health, loss of trade or destruction of the means of subsistence or permanent ruin to property will inure from the wrong act or erection, courts of equity will interfere by injunction in furtherance of justice and the violated rights of property. Thus a party exceptionally injured may enjoin the maintenance of a house of ill fame, although it be a crime to use property for such a purpose. Likewise, a person who would suffer a special injury by an explosion, may obtain an injunction to restrain the criminal storage of nitroglycerine within the limits of a city. Again, an injunction will be granted to a person expressly injured to prevent the removal of a wooden building from outside to within the fire limits of a town in violation of an ordinance, or to restrain the erection of such a building within the fire limits where the act, if carried out, would amount to a nuisance; but the mere violation of the ordinance is no ground for relief unless the acts themselves actually constitute a nuisance."

[2] A nuisance is defined by our Civil Code, § 3479, as follows: "Anything which is in-

jurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." In the case of Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446, the court said:

"The jurisdiction of courts of equity, in proper cases, to restrain the erection or maintenance of nuisances, public or private, is undoubted. But the defendant was not about to erect a nuisance. If it is unlawful for him to erect the building in question, it is made so by the ordinance alone. Without the ordinance, no one can successfully dispute his right to do so. The question is, therefore: Will a court of equity enjoin an act which would otherwise be lawful, but which is made unlawful by a village ordinance or by-law? We find the principle stated in several very respectable authorities, that equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, restraining an act, unless the act is shown to be a nuisance per se [citing authorities].

"None of the cases to which we have been referred by the counsel for the plaintiffs holds that an injunction can properly issue under such circumstances, and we have been unable to find a case holding that doctrine. To hold that an injunction can properly issue in this case, would be to overturn all of the authorities on the subject, and to interpolate into the law a new rule or principle of equity jurisprudence. This we have no right or authority to do. We may not make the law, but only declare it as we find it. We must hold, therefore, that, under the averments of the complaint, no injunction can properly be issued to restrain the defendant from proceeding with the erection of his building, and that the village authorities can only resort to their legal remedies in that behalf."

In the case of Incorporated Town of Rochester v. Walters et al., 27 Ind. App. 194, 60 N. E. 1101, it was said: "It is perhaps true that a municipality might restrain the erection or maintenance of anything within the corporate limits that was in and of itself a nuisance, or if the erection of the building would work special and irreparable injury to the municipality or to its property. But in the case at bar the erection of the prohibited building within the fire limits was not a nuisance per se, and the injunction was asked simply because the contemplated act was a violation of the ordinance. A city ordinance has to the people within its reach all the force and effect of a legislative enactment. The ordinance in question provides a penalty for its violation, and neither the municipality nor a private citizen can ask a court of equity simply to enforce the ordinance by injunction. The reasoning that would permit such a proceeding would authorize a court of equity to restrain by injunction the violation of a criminal statute. In the cases of Village of St. Johns v. [McFarlan], 33 Mich. 72, 20 Am. Rep. 671; President, etc., v. Moore, 34 Wis. 450, 17 Am. Rep. 446, and Mayor of City of Manchester v. Smyth, 64 N. H. 380, 10 A. 700, it was held that a court of equity has no jurisdiction to restrain the threatened violation of an ordinance, unless the threatened act would, if carried out, be a nuisance. It is seen that in the above cases the injunction was sought by the municipality or its officers. Whether or not these cases intend to deny the right of an individual to maintain such an action under certain circumstances, although the threatened act may not be a nuisance per se, it is held in this state that an individual may maintain the action if he shows an express violation of the ordinance, although the act is not a nuisance per se, and shows in addition that the threatened act will work special and irreparable injury to him and to his property [citing authorities]."

It has been held in this state that a cemetery is not a nuisance per se. In the case of County of Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 P. 153, 71 Am. St. Rep. 75, it was said: "From the opinion of the learned judge who sat in the case (printed in the record), it is manifest that he regarded the establishment of a cemetery for the interment of human bodies 'as an avocation which may be well presumed to have an injurious tendency.' It is not so stated, but the opinion proceeds, I think, upon the assumption that a cemetery is a nuisance per se, or at least may be so regarded in measuring the extent of the police power to regulate it. We cannot concur in this view, nor can we concur in the position that the business of conducting a cemetery is an avocation presumably having an injurious tendency."

In the case of Hume v. Laurel Hill Cemetery (C. C.) 142 F. 552, it was said: "If the cemetery in question has never been, and will not become, a nuisance, and is not dangerous to life or detrimental to the public health, it is not within the constitutional powers of the municipality to suppress it [citing authorities]. For the purpose of this hearing, the Laurel Hill Cemetery has not been, and is not now, indecent to the senses, or offensive, or an obstruction to the free use of property. The offensiveness must, as a rule, consist in actual physical discomfort, or a violation of the sense of decency. Mere undesirableness by reason of social or other prejudices is not sufficient, not even if it leads to a depreciation of property."

Without going into the controverted question as to whether or not a mausoleum is a cemetery within the meaning of the ordinances pleaded by plaintiff, and assuming for the present purposes that it is, we reach a conclusion that the violation of the ordinances alone would not permit plaintiff to secure the relief prayed for and that the complaint has not stated facts with relation to the operation or conduct of the mausoleum which would constitute it a nuisance per se, nor has it stated facts which would indicate that plaintiff has suffered some exceptional damage, other than that suffered by the public generally in that community due to the depreciation in value of residence property therein.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

206 Cal. 662

CITY OF LOS ANGELES v. ANDERSON et al. and seven other cases. (L. A. 8981.)

Supreme Court of California. March 11, 1929.

1. Navigable waters ⟹44(3)—Evidence sustained finding that accretion resulted from foreign materials lodging against government breakwater, and it therefore retained its character as public tideland (St. 1911, p. 1256).

In actions by city of Los Angeles as grantee from state of tidelands in trust for purposes of navigation and commerce under St. 1911, p. 1256, to recover possession of land asserted to be reclaimed tideland, and to which defendants claimed title by adverse possession, evidence *held* to sustain finding that accretion had formed on tideland because of falling and dumping of material into water from neighboring bluffs, which lodged against government breakwater and not from ordinary wash of ocean, and that, therefore, such parcel did not attach as alluvion to ownership of upland, but retained its character as public land.

2. Navigable waters ⟹44(3)—Statute held not to abrogate common-law rule that land gained from sea by natural causes belongs to upland owner (Civ. Code, § 1014).

Civ. Code, § 1014, applying to rivers and streams within state the common-law rule that land which from natural causes and by small and imperceptible degrees is gained from sea or formed on banks of rivers and streams either by alluvion or dereliction belongs to owner of upland or of bank, respectively, does not, by failure to treat of alluvion forming on seashore, warrant inference that common-law rule has to that extent been abrogated in state.

3. Navigable waters ⟹44(3)—Upland owner is not entitled to accretions, unless they result from natural causes; accretions from artificial causes belonging to state or its grantee.

For owner of upland to be entitled to accretions, such accretions must have resulted from natural causes and been of gradual and imperceptible formation; and, where accretions result from artificial means, such as erection of a structure below ordinary high-water line, a case of purpresture or encroachment is made out, and the deposit of alluvion caused by such structure does not inure to benefit of upland owner, but right to recover possession thereof is in state or its successor in interest.

4. Adverse possession ⟹7(2)—No title to tidelands or other property held by state or its subdivisions in trust for public use can be acquired by adverse possession.

Property *held* by state or any political subdivision thereof in trust for public use cannot be gained by adverse possession, and statute of limitations does not apply to action to recover such property from one using it for private purposes not consistent with public use; hence no title to tidelands could be acquired by adverse possession against state or its grantee.

5. Navigable waters ⟹37(8)—State's grant to city of tidelands for public navigation and commerce held accepted by city (St. 1911, p. 1256).

State's grant of tidelands to city of Los Angeles by St. 1911, § 1256, in trust for purposes of public navigation and commerce, *held* accepted by city, in view of provisions of its charter and ordinances evidencing such intent.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Separate actions by the City of Los Angeles against A. E. Anderson and others, against Oscar Norman and others, against G. P. Carroll and others, against J. N. Hite and others, against John Doe Packer and others, against George H. Day and others, against W. W. Kitchen and others, and against Jacob Jensen and others, which were consolidated for trial. Judgments for plaintiff, and defendants appeals. Affirmed.

S. C. Schaefer, of Los Angeles, and Henry G. King, of Culver City, for appellants.

Jess E. Stephens, City Atty., and Joseph T. Watson, Deputy City Atty., both of Los Angeles, for respondent.

WASTE, C. J. By the institution of the several above-numbered actions, which were consolidated for purposes of trial and appeal, the city of Los Angeles sought to recover possession of a triangular shaped strip or parcel of land approximately three-quarters of an acre in extent, and asserted to be reclaimed tideland. Defendants, by virtue of their occupancy of portions of the land for varying periods, pleaded as a defense that they had acquired title by prescription. Judgment was entered for the plaintiff city, and the defendants have appealed.

[1] From the evidence it appears that in the year 1908 the United States government, for fortification purposes, had caused a survey to be made of the shore line of the ocean in the vicinity of the land here in dispute. D. E. Hughes, the government engineer who made the survey, was called as a witness for

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes the plaintiff, and identified a map, Plaintiff's Exhibit No. 5, as being an accurate representation of the mean or ordinary high tide line of a part of San Pedro Bay, now Los Angeles Harbor, as platted by him upon completion of his survey. Examination of the exhibit discloses that the property involved in these actions lies below the mean or ordinary high tide line as it then existed. In other words, in the year 1908 the property which the plaintiff city now seeks to repossess formed a part of the tidelands of San Pedro Bay. A breakwater theretofore constructed by the federal government approached within approximately 1,800 feet of the shore line. It was subsequently extended landward, the construction work bringing it in touch with the shore being completed in 1912. The triangular shaped strip of land which is the subject of these actions is situate between the present mean high tide line and the mean high tide line as it existed in 1908, and has as a base the side of the breakwater as extended. It is plaintiff's contention that this parcel of land, though resulting from accretions, was not of such imperceptible formation as to constitute alluvion belonging to the owner of the upland, but was, in fact, created and formed by artificial means, namely, the deposit of foreign substances against the breakwater, and therefore retains its character as tideland, title to and possession of which remains in it as successor to and grantee of the state (Stats. 1911, p. 1256), subject only to certain trusts for the public use. On the other hand, the several defendants insistently urge that accretions occurring on the shore line of the ocean belong, under the authorities, to the owner of the abutting upland, thus precluding the plaintiff city—it having neither title to nor interest in the upland—from successfully prosecuting these several actions for possession of accretions thereto.

The witness Hughes, above referred to, established his familiarity with and observations of the locality, and testified that, until the completion of the breakwater in 1912, he had not noticed any change in the mean or ordinary high tide line as he had platted it in 1908; that in the fall of the year 1912 and shortly after the extension of the breakwater to the mainland, he "noticed a small accretion at the root of the breakwater at the southerly side"; that there was much "speculation as to whether there would be an accretion or not, and [he] noticed with much interest that there was a caving of the bluff to the south some five or six hundred feet south of the breakwater; * * * the prophecy was made that that stuff, * * * would reach to and lodge against the breakwater; and in the course of a few days it began to arrive there, all that slide; the major portion was dissolved, and made roily water for weeks, but that which was not dissolved [was] driven by the incessant little wedges and lodged in the gravel making a small fraction of an acre of accretion, and that was * * * in 1912"; that the shale so deposited "came from that slide * * * noticed a few weeks earlier * * * some 500 feet south of the root of the breakwater"; that this accretion was subsequently increased by the addition of material dumped over the neighboring bluffs, and which thereafter found lodgment against the breakwater; that his study and observation of the action of the water with reference to the forming of accretions on the seashore led him to believe that the reason or cause for the formation of these accretions was the "presence of the obstruction made by the breakwater"; that, if the obstruction offered by the breakwater had not been present when portions of the neighboring bluffs had broken off, these accretions would not have formed, for the material "would have been driven farther and farther north, so that most of it would have been worn out in transit, and it would finally lodge perhaps a fourth of a mile north of the root of the breakwater * * *"; that in his opinion all subsequent accretions were due entirely to the presence of the breakwater and "to furnishing material by artificial means, * * * material that was dumped by some contractor over the bluff. * * *" The testimony of the witness in this regard was neither materially shaken upon cross-examination nor weakened upon the presentation of defendants' case, for, in the main, the several defendants satisfied themselves with testifying as to their occupancy, for varying periods, of portions of the land formed by the accretions mentioned, and as to the character and value of the improvements placed thereon by them during such occupancy.

In complete accord with the evidence, the trial court, among other things, found that what was originally tide and submerged land was "added to by accretions: that said tideland was thus covered and filled in by such successive operations; that prior to the connection of said breakwater with the mainland no material had been washed up on said tideland, and no appreciable amount of accretions had formed on said tideland; that said tideland was so covered with rocks, gravel, sand and earth by such artificial means—was caused by said breakwater." As matter of law, the court concluded that "said tideland, filled in the manner found in the Findings of Fact, still retains its character as tideland, and is now reclaimed or filled-in tideland; that the owner of the upland, by reason of such ownership, gained no title to such reclaimed or filled-in tideland thus formed; that said reclaimed or filled-in tideland is public land impressed with the public use for purposes of commerce, navigation and fishery, to which defendants, by their occupancy, no matter how long continued, could not gain title by adverse possession." In seeking support for the quoted finding of fact one need only examine the evidence hereinabove briefly narrated. The principal and primary questions requiring determination is whether the conclusion of law deduced from the findings by the court below finds justification in the authorities.

[2, 3] At common law, when land was from natural causes and by small and imperceptible degrees gained from the sea or formed upon the banks of rivers and streams, either by alluvion or dereliction, it belonged and went to the owner of the upland or of the bank, respectively. 2 Blackstone's Commentaries, 262. Section 1014 of our Civil Code definitely applies this common-law principle to rivers and streams situate within our state boundaries, but the section contains no express reference to the rule of alluvion as it affects the seashore. However, this court, in the case of Strand Imp. Co. v. Long Beach, 173 Cal. 765, 770–773, 161 P. 975, 978, declared that the failure of the section to treat of alluvion forming upon the seashore did not warrant an inference or conclusion that the common-law rule had been, to that extent, abrogated in this state, for this "would make an omission to say anything on a subject operate as an affirmative declaration repealing an existing law on the subject not mentioned." The right of the upland owner to additions to his land by alluvion, where the land abuts upon the ocean, as recognized in the early case of Dana v. Jackson Street Wharf Co., 31 Cal. 118, 120, 89 Am. Dec. 164, was thereupon affirmed, and the enactment of section 1014 of the Civil Code was held not to alter the common-law rule in that respect. In giving application to this rule, the authorities have consistently declared, in conformity with the common-law acceptation thereof, that, for the owner of the upland to be entitled to the accretions thereto, such accretions must have resulted from natural causes and been of gradual and imperceptible formation. Strand Imp. Co. v. Long Beach, supra, page 771 of 173 Cal. (161 P. 975); Curtis v. Upton, 175 Cal. 322, 334, 165 P. 935. Where, however, the accretions have resulted, not from natural causes, but from artificial means, such as the erection of a structure below the line of ordinary high water, there is made out a case of purpresture, or encroachment, and the deposit of alluvion caused by such structure does not inure to the benefit of the littoral or upland owner, but the right to recover possession thereof is in the state or its successor in interest, as the case may be. Dana v. Jackson Street Wharf Co., supra, pp. 120, 121 of 31 Cal.; Forgeus v. County of Santa Cruz, 24 Cal. App. 193, 200, 140 P. 1092; Patton v. City of Los Angeles, 169 Cal. 521, 525, 147 P. 141. The formation of the triangular shaped piece of land here in controversy having resulted, as found by the trial court on abundant evidence, not from natural causes and by imperceptible degrees, but from the deposit and lodgment of foreign materials, as distinguished from the ordinary wash of the ocean, against the artificial obstruction offered by the government breakwater below the mean high tide line, such parcel does not attach as alluvion to the ownership of the upland, but retains its character as public land, being in the nature of reclaimed or filled-in tideland. This being so, the trial court's conclusion of law above quoted was proper under the circumstances of these cases, and the plantiff city may properly prosecute actions for the recovery of its possession.

[4] It has long been settled doctrine in this jurisdiction that property held by the state or any political subdivision in trust for public use cannot be gained by adverse possession, and the statute of limitations does not apply to an action to recover such property from one using it for private purposes not consistent with the public use. People ex rel. State Board of Harbor Com'rs v. Kerber, 152 Cal. 731, 733–734, 93 P. 878, 125 Am. St. Rep. 93; Cimpher v. City of Oakland, 162 Cal. 87, 88–90, 121 P. 374; City of Oakland v. Wheeler, 34 Cal. App. 442, 454, 168 P. 23. The contention that the respective defendants had, by prescription, obtained title to portions of the controverted strip of land, is therefore without merit.

[5] The demurrers of the respective defendants were properly overruled, for the amended complaint filed in each action contained all the allegations necessary to the statement of a cause of action in ejectment. 9 Cal. Jur. 1004, § 22. Nor do we find any merit in the contention that the plaintiff city had failed to accept the grant of tidelands. On May 1, 1911, the Legislature passed an act (Stats. 1911, p. 1256) granting to the city of Los Angeles all the right, title, and interest of the state in all the tide and submerged lands within the city boundaries, as then constituted, which included the tideland (now reclaimed or filled-in) in controversy here, in trust for certain enumerated uses and purposes which, in general terms, may be described as the uses and purposes of public navigation and commerce. In Patton v. City of Los Angeles, supra, at page 524 of 24 Cal. App. (147 P. 141), it is stated that, by virtue of said grant, "the city of Los Angeles had succeeded to the title of the state." Again, in Los Angeles v. Pacific Coast S. S. Co., 45 Cal. App. 15, 17, 187 P. 739, 740, it is declared: "The trusts upon which the city of Los Angeles received its title to said premises were the identical public trusts upon which the state had originally received and held said lands up to the time of its said grant of the same to said city. These trusts being for public uses were essentially governmental in their character, and the city of Los

Angeles, in taking over from the state the title to said lands for the purpose of fulfilling these trusts, was merely acting as one of the subordinate governmental agencies of the state, and as such it was by the terms of said act invested with the full title to said premises for the purpose of administering such trusts. This being so, it became possessed of all of the power which the state formerly held in relation to said lands and all of the rights to the ownership and possession thereof which the state had prior to said grant. * * *" These authorities are sufficient to dispose of defendants' contention, and, in addition thereto, the plaintiff city quotes from section 176 of the charter of the city of Los Angeles, as amended in April, 1913 (Stats. 1913, pp. 1629, 1639), and Ordinance No. 27118 (N. S.) of the Los Angeles city council, approved March 14, 1913. There is clearly evinced therein an intention to accept the state's grant of tide and submerged lands within the city boundaries.

The judgments are, and each is, affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

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206 Cal. 677

STERRETT v. CURTIS CORPORATION.

(Sac. 4129.)

Supreme Court of California. March 13, 1929.

1. Sales ⟹176(3)—Buyer, not reporting weight and grades of olives within contract time, cannot complain of seller's delay in objecting to report.

Buyer, taking no steps to weigh and grade olives and send report to seller until long after contract time therefor, *held* estopped to complain of seller's failure to make written objection to such report within ten days, as required by contract, at least in absence of express notice of intent to hold him to strict compliance with such provision.

2. Sales ⟹166(1)—Seller's violation of buyer's instructions to pick olives in boxes or pails did not defeat recovery for sound olives.

Seller's violation of buyer's written instructions to pick olives in boxes or pails, instead of bags or sacks, to avoid bruises, did not defeat seller's right to recover for all sound olives, especially where buyer did not repudiate contract in toto on such ground.

3. Sales ⟹176(3)—Seller could recover for weight of sound olives, where buyer's only statement showed grades and weight after deterioration because of treatment directed by buyer.

Where only statement of weight and quality of olives furnished by buyer, as required by contract, showed grades and weight after large proportion thereof had deteriorated because of strong salt solution, in which seller barreled them at buyer's direction, seller was entitled to introduce evidence, and recover on basis, of weight of olives when sound.

Department 1.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by F. E. Sterrett against the Curtis Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Everts, Ewing, Wild & Everts, L. W. Young, and A. W. Carlson, all of Fresno, for appellant.

H. B. McClure, of Visalia, for respondent.

SEAWELL, J. Plaintiff, F. E. Sterrett, an olive grower, and defendant, the Curtis Corporation, engaged in the business of processing and canning olives and other fruits and vegetables, entered into a written contract on August 31, 1925, whereby plaintiff agreed to sell to defendant and defendant to buy the entire crop of Sevillano olives grown during the 1925 season on plaintiff's ranch, situate near Lindsay, at the price of $300 a ton. One truckload of olives from plaintiff's ranch was received at defendant's packing plant at Long Beach in November, and two truckloads in December; the last delivery being received on December 23. Defendant claimed that it was not liable for more than 3,806 pounds of the total crop of olives delivered to it, on the ground that the balance, totaling more than 12,000 pounds, was frosted and bruised and not in a condition fit for canning. Plaintiff claimed that at least 90 per cent. of the crop was in good condition and met the requirements of the contract, and sued to recover for said 90 per cent. at the contract rate of $300 a ton. The court below upheld plaintiff's contention and entered judgment for him for $2,314.50, from which defendant takes this appeal.

The case involves a question as to the effect to be given a provision of the contract between plaintiff and defendant which was as follows: "For the purpose of ascertaining the amount to be paid, the sorting and grading and weighing of olives sold under this agreement shall be done by the company at its factory, or at a branch thereof. The company agrees to send written report to the grower upon ascertaining the weight and quality of olives received under this agreement, and the company's report so sent shall be conclusively deemed correct, as to the quantity and quality, unless the grower within ten (10) days after the sending of such report notifies the company in writing of his dissent, specifying the particulars wherein he dissents. But the grower or his representatives shall be given free access to the grading, sorting and weighing rooms of the company at such times as olives sold under this agreement are being graded, sorted cr weighed."

The contract also provided that the grower should follow the direction of the company in caring for and packing the olives.

Mr. Rowe, the manager of the fruit and vegetable department of defendant, testified that he wrote to plaintiff concerning the poor condition of his olives in December, and plaintiff called at the plant shortly thereafter, but he (Rowe) did not see him. The olives were weighed and graded in March or April. According to Rowe, a written report showing the weights and grades of the three deliveries, from which it appeared that more than three-quarters of the olives were below standard and unfit for use, was mailed to plaintiff on May 7, 1926. Plaintiff admitted having read said report, and stated that he received it either directly from the defendant corporation or from said corporation through his attorney. On June 19, defendant mailed a check for $428.17 to plaintiff's attorney in payment of three-fourths of the contract price of all olives meeting the requirements of the contract according to defendant's report of May 7. Said check was returned to defendant in a letter from plaintiff's attorney dated June 23, in which said attorney stated that inasmuch as defendant's letter of June 19 indicated that there was no prospect of a satisfactory adjustment of the account, Mr. Sterrett had instructed said attorney to commence suit.

[1] It is defendant's contention that plaintiff cannot here be permitted to dispute the correctness of the report of May 7, for the reason that the evidence shows that plaintiff did not dissent in writing or at all from defendant's said report until June 23, and this date was far beyond the ten-day period within which plaintiff was required by the terms of the contract to object in writing or be bound by said report as a conclusive statement of the quantity and quality of the olives. The contract also provided that one-fourth of the purchase price of said olives was to be paid within 60 days after the last delivery of olives and an equivalent amount every 60 days thereafter until the entire amount was paid, from which it would follow that it was defendant's obligation to weigh and grade the olives to eliminate those which were not up to the standard required by the contract and to determine the total price within 60 days after the date of the last delivery, which was on December 23, and that defendant was in default in failing to send a statement of qualities and weights to plaintiff until May 7, 1926, more than 2 months after the 60-day period had elapsed. Having itself violated the obligation imposed upon it by not sending the report to plaintiff until it was long overdue, defendant was not in a position to insist upon a strict compliance with the provision of said contract under which plaintiff forfeited his right to dispute the correctness of said report unless written objection thereto was made within 10 days. In failing to take steps to weigh and grade the olives and send a report to plaintiff until long after the time therefor had elapsed, defendant must be deemed to have consented to allow plaintiff a similar indulgence in the matter of objecting to said report, at least in the absence of express notification that it intended to hold plaintiff to a strict compliance therewith, and is estopped from complaining of said delay. If it was impractical to weigh and grade the olives until a later date, defendant should have stipulated for a longer time in the contract or thereafter have negotiated for an extension.

Having concluded that plaintiff is not bound in this action to accept the report of May 7 as a conclusive statement of the weight and quality of the olives for which he is entitled to be paid, the question remaining for consideration is whether there is support in the evidence for the court's finding that plaintiff used great care in picking, sorting, and packing the olives and in shipping the same; and if said olives were injured or unfit for canning when they reached defendant's plant, such injury was caused by the acts of defendant. Defendant cannot claim a reduction in the amount due plaintiff on account of olives which it rendered unfit for use.

Employees at defendant's plant testified that they found the olives, upon arrival at the plant, soft, wrinkled, shriveled, rotten, and in a very bad condition, which gave every indication that they had been bruised and affected by frost. Plaintiff and witnesses who testified on his behalf stated that there had been no frost sufficient to cause injury to the olives, and that the olives were picked carefully and packed properly and in excellent condition, showing no indication that they had been bruised or frozen, from which it would follow that if the olives were in a deteriorated condition when they arrived at the plant, plaintiff was not responsible therefor. The olives were transported in trucks hired by defendant corporation.

[2] Although some of the olives were picked in bags or sacks, rather than in boxes or pails, in violation of defendant's written instructions given to plaintiff, there was no departure from defendant's instructions in any other particular, and there was evidence that it was possible to pick olives in bags without bruising them, and that plaintiff's olives were not bruised. If said olives were not in fact bruised, the failure to comply with said regulation, established to insure a freedom from bruises, would be immaterial to plaintiff's right to recover for all sound olives. Besides the contract was not repudiated in toto by appellant on the ground that sacks rather than boxes were used as picking containers.

[3] Defendant supplied plaintiff with the salt to be used in the solution in which the olives were packed in barrels, also supplied by defendant, and plaintiff followed the instructions of defendant as to the use of said salt. Plaintiff introduced evidence sufficient to prove that the olives would be rendered commercially valueless if barreled in a salt solution as strong as that in which plaintiff placed his olives at defendant's specific direction. While witnesses for defendant denied that there was any permanent injury due to an excess of salt, there was at most a conflict in the evidence, which was resolved in plaintiff's favor by the trial court.

Defendant having failed to furnish any statement of the weight and quality of the olives except the statement showing grades and weights after a large proportion of the olives had deteriorated by reason of the treatment given them at the direction of defendant, plaintiff was entitled to introduce evidence as to the weight of the olives when sound and to recover on the basis of said weight. The sum which plaintiff sued for and recovered in the court below allows for a 10 per cent. deduction to cover the percentage of culls normally found in a shipment of sound olives.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

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206 Cal. 592

HELLMAN COMMERCIAL TRUST & SAVINGS BANK v. ALDEN et al.

(L. A. 9094.)

Supreme Court of California. Feb. 27, 1929.

1. Appeal and error 🔑157—Plaintiff, acquiescing in order substituting guardian of incompetent payee for drawer on latter paying money into court, cannot thereafter complain of such order (Code Civ. Proc. § 386).

Where, in action by holder of cashier's check issued to payee who had been adjudged incompetent against drawer and indorsee of check, court, pursuant to Code Civ. Proc. § 386, ordered guardian of incompetent payee to be substituted in place of drawer of check on drawer depositing amount of check in court, and plaintiff by its subsequent acts voluntarily complied with terms of such order and expressly waived its claim against drawer by omitting it in all its subsequent pleadings as a party defendant, *held* that plaintiff cannot complain of order discharging drawer from all liability.

2. Appeal and error 🔑157—Party cannot appeal from order after voluntary compliance with its provisions.

A party cannot prosecute an appeal from an order after a voluntary compliance with its terms and provisions.

3. Interpleader 🔑21—On determination in interpleader that person in possession of fund or property is mere stakeholder, he is discharged on depositing fund or property in court.

The purpose of a proceeding in interpleader is first to determine liability of person in possession of fund or property which is subject of contest, and, if it be determined that he is mere stakeholder and has incurred no independent liability, he is discharged as party to action by depositing fund or other property in court, after which remaining parties litigate among themselves as to their respective claims to such fund or property.

4. Interpleader 🔑43—On substitution of guardian of incompetent payee of cashier's check in place of drawer on latter depositing money in court, held plaintiff holder could not prosecute claim to fund on independent liability of drawer to plaintiff (Code Civ. Proc. § 386; Civ. Code, § 3142).

Where, in action by holder of cashier's check issued to payee who had been adjudged incompetent, against drawer and indorsee of check, court, pursuant to Code Civ. Proc. § 386, ordered guardian of incompetent payee to be substituted in place of drawer of check on drawer depositing amount of check in court, *held* that plaintiff could no longer prosecute its claim to fund on alleged independent liability incurred by drawer under Civ. Code, § 3142, in issuing check whereby it admitted capacity of payee to indorse it, since such independent liability would not give plaintiff any right to recover fund deposited.

5. Insane persons 🔑99—Ordinarily finding that one is unable unassisted to care for himself or property because of weakness of mind will not warrant conclusions that specific contract is void for lack of mental capacity.

Ordinarily finding to effect that one is unable unassisted to properly care for himself or his property, by reasons of old age or weakness of mind, will not warrant conclusion that specific contract is therefore void for lack of mental capacity, and, in absence of adjudication of incompetency, it is necessary to allege and prove that transaction was void for lack of understanding of its nature and effect.

6. Insane persons 🔑1—Term "unsound mind" is equivalent to "non compos mentis."

Term "unsound mind" is equivalent to term "non compos mentis," which includes all degrees of mental incompetency known to law.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Unsound Mind; Non Compos Mentis.]

7. Insane persons 🔑72—One regularly adjudged incompetent becomes incapable of making valid contract, because decree is notice to world of incapacity.

When court has regularly adjudged one incompetent, he thereby becomes incapable of making valid contract, and it is deemed to be void, not because he is unable unassisted to properly care for property or lacks understanding of nature and effect of particular transaction, but because decree of incompetency is notice to world of his incapacity to make valid contract.

8. Insane persons ⚿26—Adjudication of mental incapacity applies to both insane and "incompetent" persons, regardless of character or degree of derangement, and is sufficient evidence of incapacity (Civ. Code, §§ 38, 40; Code Civ. Proc. § 1764).

Adjudication of mental incapacity applies to both insane and incompetent persons, regardless of character or degree of mental derangement, and is sufficient evidence of incapacity under Civ. Code, § 40, providing that, after incapacity has been judicially determined, person of unsound mind can make no contract, and section 38, providing that person entirely without understanding has no power to contract, by virtue of Code Civ. Proc. § 1764, authorizing appointment of guardian of person in state of insane person and also of one who is merely incompetent; "incompetent" including insane and those less seriously afflicted.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Incompetent; Incompetency.]

9. Insane persons ⚿99—Finding that cashier's check was indorsed by indorser adjudicated incompetent held tantamount to finding transaction was void for incapacity.

Where court found that cashier's check was indorsed while indorser was laboring under adjudication of incompetency, *held* effect of this finding was tantamount to determination that transaction was void for incapacity.

10. Insane persons ⚿77—Rescission held not exclusive remedy for avoiding effect of indorsement and transfer of cashier's check by one adjudicated incompetent (Civ. Code, § 39).

Where indorser, under adjudication for incompetency, transferred cashier's check to indorsee, who deposited it in bank and secured funds, rescission provided by Civ. Code, § 39, *held* not only remedy, since, where affirmative relief is not sought, defense to action on contract may be made by setting up fraud or undue influence or mental incapacity.

11. Insane persons ⚿77—Restoration of money paid by bank to indorsee held not necessary to rescission, where court found indorser was incompetent and received nothing of value for indorsement (Civ. Code, § 1691).

Where court found that indorser of cashier's check, who had been adjudicated incompetent, received nothing of value for indorsement, it was not necessary for administratrix of indorser's estate to restore money paid indorsee, since, where no consideration is received as indorsement for execution of contract, no offer to restore is necessary, under Civ. Code, § 1691.

12. Insane persons ⚿73—Indorsement by incompetent held not binding on estate, although at time appeal from adjudication of incompetency was pending (Civ. Code, § 40; Code Civ. Proc. §§ 1049, 1765, 1908, 1911).

Transfer by indorsement of cashier's check by one adjudicated incompetent *held* not valid and binding on estate of indorser because at time of transfer appeal from adjudication of incompetency was pending under Civ. Code, § 40, providing after incapacity has been judicially determined person of unsound mind can make no contract by virtue of Code Civ. Proc. §§ 1049, 1765, 1908, 1911; rule being that judgment is not competent as evidence to prove facts therein recited, but that such rule does not affect inherent effect of judgment.

13. Insane persons ⚿26—Decree adjudicating indorser incompetent, affirmed on appeal before action was brought on indorsed check, held competent evidence of indorser's incapacity.

Where decree adjudging indorser to be incompetent was affirmed on appeal and became final before offered in evidence in action on indorsed cashier's check, *held* that it was competent evidence of indorser's incapacity.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the Hellman Commercial Trust & Savings Bank against Greeley Kolts and others, in which the Security Trust & Savings Bank, a party defendant in a petition of interpleader pursuant to Code Civ. Proc. § 386, procured the substitution of Lena Alden, administratrix of the estate of W. L. Bundy, deceased, as a party defendant. From that part of the judgment in favor of the administratrix, the plaintiff appeals. Affirmed.

Superseding opinion in 268 P. 688.

Page, Nolan, Rohe & Hurt, Page & Hurt, Dean Edgerton, Henry S. Dottenheim, and Rohe & Freston, all of Los Angeles, for appellant.

Thomas B. Leeper, of Sacramento, for respondent.

Jennings & Belcher, of Los Angeles, amici curiæ.

CURTIS, J. On January 15, 1919, a petition was filed in the superior court of the county of Sacramento to have W. L. Bundy declared an incompetent person, and for the appointment of a guardian of his person and estate. Upon due notice to the said W. L. Bundy and after proceedings duly had, said court on or about the 6th day of March, 1919, made and entered its judgment adjudging that said W. L. Bundy was, on the 15th day of January, 1919, and for a long time prior thereto had been, and was at the date thereof, by reason of old age and weakness of mind, unable unassisted to properly care for himself or his property, and by reason thereof was likely to be imposed upon by designing and artful persons, and appointing M. P. Barnes guardian of his person and estate. On March 18, 1919, Barnes qualified as such guardian and remained such until the death of said W. L. Bundy. The day after the order adjudicating Bundy incompetent (that is, on the 7th day of March, 1919) the Security Trust & Savings Bank of Los Angeles, for

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

a valuable consideration, issued and delivered to Bundy a cashier's check for the sum of $10,000. Said check was signed by the cashier of said bank, and was made payable to the order of the said W. L. Bundy. Thereafter W. L. Bundy appealed from the order adjudicating him to be an incompetent person. On August 5, 1919, and after taking said appeal, Bundy wrote his name on the back of said cashier's check and delivered the same, without receiving anything of value therefor, to Kolts & Stearns, who indorsed and delivered said cashier's check to the plaintiff herein, the Hellman Commercial Trust & Savings Bank. In consideration thereof, the plaintiff gave said firm of Kolts & Stearns a credit of $10,000 upon their account with said bank, and thereafter and before the check was presented for payment to the Security Trust & Savings Bank said plaintiff permitted the sum of $5,000 to be checked out of said account by said firm of Kolts & Stearns. The following day during regular banking hours said check, indorsed by plaintiff, was presented for payment to the Security Trust & Savings Bank, and payment was refused. Thereupon the Hellman Commercial Trust & Savings Bank brought suit to recover the sum of $5,000 against the Security Trust & Savings Bank, W. L. Bundy, and Kolts & Stearns, a copartnership. An answer to the complaint in said action was interposed by M. P. Barnes, as guardian of the person and estate of W. L. Bundy, an incompetent person. Thereafter the court, upon the application of the Security Trust & Savings Bank purporting to act under section 386 of the Code of Civil Procedure, made its order substituting M. P. Barnes as guardian of the person and estate of W. L. Bundy, an incompetent person, in the place and stead of the Security Trust & Savings Bank; that plaintiff be permitted to amend its complaint by asking for judgment for $10,000 and interest instead of $5,000; that the Security Trust & Savings Bank deposit the sum of $10,023.24, the amount of said cashier's check with interest, with the clerk of said court, and that upon such deposit it be discharged from further liability. Thereupon and on September 15, 1919, the plaintiff filed an amended complaint in which it asked for judgment in the sum of $10,000 and interest against W. L. Bundy, Kolts & Stearns, a copartnership, Greeley Kolts and B. J. Stearns; the two last-named defendants being the individuals composing such copartnership. The Security Trust & Savings Bank was not made a party defendant in this amended complaint, and in the prayer thereof no judgment was asked for against said bank.

On February 8, 1920, W. L. Bundy died, and on November 4, 1921, Lena Alden was appointed administratrix of his estate. Thereafter, and on August 1, 1923, by leave of court first had, the plaintiff filed what it designated as "Amended and Supplementary Complaint on Cashier's Check." The persons made party defendants in said pleadings were "Lena Alden, as administratrix of the estate of W. L. Bundy, deceased, Greeley Kolts, B. J. Stearns and Kolts & Stearns, a copartnership." Judgment against these defendants was asked in the sum of $10,000 and interest. These defendants made separate answers to this amended and supplemental pleading, and the action came on for trial, as recited in the findings, "upon the issues raised by the plaintiff's amended and supplemental complaint and the answers thereto of the defendants." In the answer of defendant Lena Alden, as administratrix, besides making denial of certain allegations in plaintiff's amended and supplemental complaint, she set forth certain affirmative matters and in the prayer to her answer, among other things, she asked that she have judgment for the amount of money deposited in court. The trial court found the facts as hereinbefore set forth, and held that plaintiff could not recover any part of said fund for the reason that the judgment of incompetency against Bundy was in full force and effect at the time of his indorsement of said check, but that plaintiff was entitled to judgment against Kolts & Stearns for the amount of money drawn out by them from the plaintiff bank, after the deposit of said check by them with plaintiff. The judgment as rendered by the trial court was in favor of the plaintiff and against the defendants Greeley Kolts and B. J. Stearns for the sum of $5,000 and interest and costs of suit, "that plaintiff take nothing by this action as against the defendant Lena Alden, as administratrix of the estate of W. L. Bundy, deceased; that said defendant Lena Alden as administratrix of the estate of W. L. Bundy, deceased, do have and recover of and from the plaintiff her cost of suit, hereby taxed at $———; that there be paid to said defendant Lena Alden, as administratrix of the estate of W. L. Bundy, deceased, the moneys deposited in court in the above entitled action by the Security Trust and Savings Bank, with the interest accrued thereon by reason of the deposit thereof in the Pacific-Southwest Trust & Savings Bank." The plaintiff has appealed, but only from that part of said judgment in favor of the defendant Lena Alden, as administratrix of the estate of W. L. Bundy, deceased, and being the portion of said judgment just quoted. The appeal is before us on the judgment roll alone. Long prior to the trial of this action, the appeal of Bundy from the order adjudicating him to be an incompetent person, and appointing a guardian of his person and estate, had been decided adversely to Bundy, and said order affirmed. The date of the decision affirming said order was November 28, 1919. In re Bundy, 44 Cal. App. 466, 186 P. 811. The trial of the present action was held in December, 1924.

On this appeal the contentions of appellant may be stated as follows:

(1) Appellant is entitled to judgment against the Security Bank upon the warranty of said bank as to Bundy's capacity to indorse said check at the time the same was made and delivered to him by said bank.

(2) If the Security Bank was legally discharged from its liability to appellant, still appellant may press its claim against said fund based upon the liability originally incurred by the Security Bank.

(3) That the judgment is not supported by the findings, for the reason that the court failed to determine that Bundy was incompetent, or that he did not comprehend the nature or effect of the indorsement and transfer of the check, or that the transaction was void.

[1, 2] First. Plaintiff relies upon the provisions of section 3142 of the Civil Code in support of its claim that the Security Bank was originally liable to it on said cashier's check. This section of the Code provides that the maker of a negotiable instrument "admits the existence of the payee and his then capacity to indorse." It is appellant's contention that by issuing said cashier's check to Bundy the Security Bank guaranteed or warranted that Bundy at the time of the issuance thereof had the legal capacity to indorse said check; that this was a continuing guaranty and was in full force and effect up to and including the time of the indorsement of said check by Bundy and the delivery thereof by him to Kolts & Stearns, and that, if Bundy was incompetent at the time of such indorsement, then the Security Bank was liable on its said guaranty and warranty to appellant. As we have already stated, the trial court by its order discharged the Security Bank from all liability to either the appellant or the Bundy estate. Appellant now contends that the trial court erred in ordering the discharge of the Security Bank. Assuming the above contentions of appellant to be well taken, we are of the opinion that the appellant is now in no position to avail itself of this error. While the record may not show that the appellant expressly consented to said order of substitution, as claimed by respondent, it does show, we think, conclusively, that by its subsequent acts appellant voluntarily complied with the terms of said order and expressly waived its claim against the Security Bank by omitting it in all its subsequent pleadings as a party defendant to this action. It is recited in this order of substitution that the plaintiff asked leave to amend its complaint by praying for the whole sum of $10,000, represented by said check, instead of $5,000, the amount for which it asked judgment in its original complaint. After ordering the substitution of Barnes, as guardian, as a defendant in the place of the Security Bank, the order proceeds: "That upon amendment of the complaint by the plaintiff by such substitution of defendants and by claiming the full amount of said check, $10,000.00, with interest, * * *" the bank deposit in court the amount thereof with accrued interest, and that upon such deposit it be discharged from further liability to any of the parties to the action. Three days thereafter, and on September 15, 1919, the plaintiff did so amend its complaint so as to conform to said order of court, and, by the prayer of said amended complaint, judgment was asked for the full amount of said check against all of the parties who were originally made defendants in said action, except the Security Bank. Still later appellant filed its amended and supplemental complaint, and again the Security Bank was entirely omitted therefrom as a party to this action. It is clear from the foregoing that the appellant, if it did not expressly consent to the order substituting the Bundy estate as a defendant in the place and stead of the Security Bank at the time of the making thereof, did thereafter not only acquiesce in said order of substitution, but so amended its pleadings as to make effective said order, and from that date on in all of its pleadings it omitted the Security Bank as a party defendant to this action. It is well settled that a party cannot prosecute an appeal from an order after a voluntary compliance with its terms and provisions. Buckeye Refining Co. v. Kelly, 163 Cal. 8, 124 P. 536; Bank of Martinez v. Jahn, 104 Cal. 238, 38 P. 41. We think there is little question but that the order of substitution might have been reviewed on an appeal from the judgment (Camp v. Oakland Mortgage & Finance Co. [Cal. Sup.] 270 P. 685) except for the subsequent action of appellant in acquiescing in said order and conforming to the requirements thereof. The Security Bank having been discharged from all liability to the parties to this action by said order, no judgment could thereafter be legally entered against it.

[3, 4] Second. But appellant makes the further contention that, even if the Security Bank was legally discharged from all liability to all of the parties to this action, nevertheless appellant still has the right to prosecute its claim to the fund deposited in court on the independent liability to appellant incurred by the Security Bank in the issuing of said cashier's check whereby it admitted the capacity of Bundy, the payee therein named, to indorse the same. In other words, the appellant contends that, when the court substituted the Bundy estate as a defendant in the place of the Security Bank, it did not deprive the appellant of its right to recover upon the cause of action alleged in the complaint precisely as though the Security Bank were still a party defendant to the action. We find no authority to support this contention, and in our opinion it is without merit. The purpose of a proceeding in interpleader is twofold: First, to determine the liability

of the person in possession of the fund or property which is the subject of the contest. If it be determined that he is a mere stakeholder and has no interest in the property involved, and has not incurred any independent liability to either or any of the other parties to the action he is discharged as a party to the action by depositing the fund or other property in court. After this has been done, the then remaining parties to the action litigate among themselves as to their respective claims to the fund or property which has been deposited in court. S. F. Savings Union v. Long, 123 Cal. 107, 55 P. 708. The present proceeding, although prosecuted in pursuance of the provisions of section 386 of the Code of Civil Procedure, is not strictly speaking an action of interpleader. It was instituted by the appellant, one of the persons making claim to the fund in dispute against the Security Bank, who had possession of said fund. The Security Bank then applied under the provisions of the first sentence of said section, which in no way relates to actions of interpleader, for an order substituting in its place as defendant in said action M. P. Barnes, guardian of the estate of W. L. Bundy, an incompetent person, who also made claim to said fund. The court granted its application and made the necessary order. From there on the proceeding was between the contesting claimants to the fund deposited in court, and would be governed by the same rules that apply to actions of interpleader. As stated above, "the then remaining parties to the action litigate among themselves as to their respective rights to the fund or property which has been deposited in court." The fund in this instance was the $10,000 and accrued interest, originally due from the Security Bank on its cashier's check issued to Bundy. It is conceded that, if Bundy at the time he indorsed this check to Kolts & Stearns was mentally incompetent to manage his affairs, and therefore had not the capacity to indorse said check, the appellant acquired no right to said check or the money it represented, and neither Bundy nor his estate thereby lost any right to said check or the money it represented by reason of the attempted indorsement and transfer thereof by Bundy. On the other hand, if Bundy at said time was possessed of the requisite mentality to make a legal indorsement of said check, then his act of indorsement bound him and his estate in so far as the rights of the appellant were involved, and appellant had the right to recover said fund, or at least a portion thereof equal to the amount it paid Kolts & Stearns, on the strength of the indorsement of Bundy. This is the only condition under which it can recover any part of said fund. The liability of the Security Bank to appellant incurred by reason of any undertaking on its part, implied or express, that Bundy had the mental capacity to make a legal indorsement of said check, would not give to appellant any right to recover any part of said fund. This right of action was against the Security Bank, not for the whole or any portion of said fund, but was simply a right to recover a personal judgment against the bank, and it would be entitled to recover said judgment, if said liability existed, even though the bank would have been required to pay to the Bundy estate the full amount of said check by reason of Bundy's mental incompetency at the time said check was issued. The appellant, therefore, after the order of court discharging the Security Bank as a party to this action, had no legal right, in its effort to recover said fund or any portion thereof, to rely upon its original claim against the Security Bank on the latter's alleged liability to appellant by reason of its issuance of said check, nor was the burden of defending said fund against the claim of appellant, based upon the independent liability of the Security Bank to appellant, cast upon the Bundy estate by said order of substitution. This is so for the reason, as we have just stated, the establishment by appellant of its claim against the Security Bank on the latter's alleged independent liability to the appellant, would not show any right in appellant to said fund or any part thereof. In fact, appellant could only recover on its claim against the bank in case Bundy were found incompetent, and if Bundy were found incompetent then the Bundy estate would be entitled to the whole of the fund. The only issue between appellant and the Bundy estate was as to the state of Bundy's mind at the time he indorsed the check. If Bundy were incompetent, then his estate lost nothing by his indorsement, and would, of course, be entitled to all of said fund. If he were competent, then the estate would be bound by his indorsement, and the appellant could recover against the fund. It was this issue and this issue only that was submitted for decision after the court, acting under the provisions of said section 386, dismissed the Security Bank, and substituted the Bundy estate as a party to the action in place of the bank.

Third. The third contention of appellant is that the judgment is not supported by the findings, for the reason that the court failed to determine that Bundy was incompetent, or that he did not comprehend the nature or effect of the indorsement and transfer of the check, or that the transaction was void. This same contention was made by appellant before the District Court of Appeal when this action was before that court.

In an opinion written by Justice Pro Tempore Thompson, concurred in by Presiding Justice Koford and Justice Nourse, the legal questions arising out of this contention of appellant were fully considered by the members of said court. We are in agreement with the views therein expressed and with the conclusion reached by said court. We accordingly adopt that part of said opinion of the District Court of Appeal which gives consideration to these questions as the opinion of this court, which is as follows:

[5-9] "The court failed to specifically find that the incompetent lacked understanding of the nature or effect of the endorsement and transfer of the check in question, or that the transaction was void. But the court did find that 'W. L. Bundy received nothing of value for his endorsement of said check,' and that, 'about the 6th day of March, 1919, said court made and entered its judgment, adjudging that the said W. L. Bundy was, on the 15th day of January, 1919, and for a long time prior thereto had been, and was at the time of said hearing, by reason of old age and weakness of mind, unable, unassisted, to properly care for himself or his property, and by reason thereof was likely to be imposed upon by designing and artful persons.' The court further found that a guardian of the person and estate of said incompetent was thereupon appointed and duly qualified, that an appeal from said adjudication of incompetency was perfected, and that the judgment was affirmed by the District Court of Appeal on January 26, 1920. The respondent elected to rest her claim of the invalidity of the endorsement and transfer of the check in question solely upon a finding that an adjudication of incompetency had been duly made and was in force at the time of the transfer of the check. Ordinarily a finding to the effect that one is unable, unassisted, to properly care for himself or his property, by reason of old age or weakness of mind, will not warrant the conclusion that a specific contract is therefore void for lack of mental capacity. In the absence of an adjudication of incompetency, it is necessary to allege and prove that the transaction was void for lack of understanding of its nature and effect. In the case of Carr v. Sacramento C. P. Co., 35 Cal. App. 439, 442, 170 P. 446, 448, the late Justice Burnett said: '* * * The test is: Was the party mentally competent to deal with the subject before him with a full understanding of his rights? Union Pacific Ry. Co. v. Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003. Did he actually understand the nature, purpose, and effect of the contract?' One may be incompetent to some extent and yet have sufficient mentality to comprehend the nature and effect of a transaction and therefore execute a valid contract. An 'unsound mind' has been defined by the Standard Dictionary to include one which is weak, diseased, abnormal, or defective. It is equivalent to the term 'non compos mentis,' which includes all degrees of mental incompetency known to the law. Jacks v. Estee, 139 Cal. 507, 73 P. 247. A contract which is challenged on the ground of incompetency is ordinarily not void, but merely voidable. Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276; 6 Cal. Jur. 33, § 14; 9 Cal. Jur. 117, § 21; 1 Black on Rescission, 672, § 254. The author of Norton on Bills and Notes (4th Ed.) 295, says: 'A man of weak mind, if not a lunatic or fool, can contract. An epileptic or imbecile mind has been held competent to convey property, * * * and no mere want of business capacity or even monomania will, in the absence of fraud, prevent a party from being bound upon a bill, note, or endorsement. The mental incapacity to avoid such a contract must amount to an inability to understand the nature of the contract and to appreciate its probable consequences.' It is the settled law of California that an adjudication of the incompetency of a testator is merely prima facie evidence of his incapacity to make a valid will. 1 Alexander on Wills, 449, § 335; Estate of Johnson, 57 Cal. 529; Estate of Johnson, 200 Cal. 299, 252 P. 1049. Section 1767, Code of Civil Procedure, defines 'incompetent', 'mentally incompetent', and 'incapable' to mean 'any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and care for himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful and designing persons.' When, however, a court has regularly adjudged one to be incompetent, he thereby becomes incapable of making a valid contract, and it is deemed to be void, not because he is unable, unassisted, to properly care for his property, or lacked understanding of the nature and effect of the particular transaction, but because the decree of incompetency is notice to the world of his incapacity to make a valid contract. Section 40, Civil Code, provides that: 'After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. * * *' Likewise, it is provided in section 38, Civil Code, that: 'A person entirely without understanding has no power to make a contract of any kind, * * *' It is contended that section 40, Civil Code, supra, applies only to insane persons since the latter portion of the section permits the discharge and restoration to competency by means of a certificate from the medical superintendent of the asylum to which the patient has been committed. But evidently this section of the code was not intended to be so restricted. Section 1764, Code of Civil Procedure, authorizes the appointment of a guardian of the person and estate of an insane person, and also of one who is merely incompetent. It seems evident that the term incompetent is intended to include not only the insane, but also those who are afflicted with less serious derangements of the mind. The adjudication of mental incapacity therefore applies to both

the insane and the incompetent, regardless of the character or degree of the mental derangement. No further evidence of mental incapacity is required under our statute while such a decree remains in full force and effect. The proof of the adjudication of incompetency presupposes a lack of mental capacity to understand the nature and effect of a contract. While the court has not specifically found that the endorsement and transfer of the cashier's check which is involved in the present case was void for lack of understanding, it did find that the act was performed while Bundy was laboring under an adjudication of incompetency. The effect of this finding was tantamount to a determination that the transaction was void for incapacity.

[10, 11] "The appellant contends that the indorsement and transfer of the check in question could be avoided only by means of a proceeding for rescission, and that the transaction could not be rescinded without first offering to restore the money which it expended. Rescission is a proper remedy by means of which to avoid a contract which is the product of an unsound mind. Section 39, Civil Code, provides that: 'A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission. * * *' But this is not the only remedy. Where affirmative relief is not sought, a defense to an action on a contract may be made by setting up fraud, undue influence, or mental incapacity, without the necessity of resorting to the equitable action of rescission. Simon Newman Co. v. Lassing, 141 Cal. 174, 74 P. 761; California Packing Corp. v. Larsen, 187 Cal. 610, 203 P. 102; Mundorff v. Ramm, 66 Cal. App. 553, 567, 226 P. 820; 12 Cal. Jur. 786, § 52. When the remedy of rescission is resorted to, it is necessary to show reasonable diligence, and, except where one is subject to duress or mental disability, it is necessary to offer to restore everything of value which has been received. Section 1691, Civ. Code. But in the present case it was not necessary for the respondent to offer to restore the money paid by appellant. The court found that 'W. L. Bundy received nothing of value for his endorsement of the check. Where no consideration is received as an inducement for the execution of a contract, no offer to restore is necessary. McNeese v. McNeese, 190 Cal. 402, 405, 213 P. 36; Simmons v. Briggs, 69 Cal. App. 447, 231 P. 604; Mundorff v. Ramm, supra; Anglo-Californian Bank v. Ames (C. C.) 27 Fed. 727, 730. * * *

[12] "Finally, the appellant contends that the transfer of the check by Bundy was valid and binding upon his estate, because at the time of the transfer, an appeal from the adjudication of incompetency was pending and the judgment was therefore not final. In other words, it is asserted that the appeal suspended the effect of the decree of incompetency, and that Bundy was presumed to be capable of executing a valid contract until the judgment was affirmed on appeal. This presents the question as to whether section 40, Civil Code, which provides that, 'After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract,' refers only to a final adjudication of incompetency.

[13] "Section 1908, Code of Civil Procedure, provides that a judgment or decree is conclusive with respect to the personal relation or condition of an individual. The rule is that a judgment is conclusive as to all issues which appear upon its face to have been determined, or which were actually and necessarily included therein. Section 1911, Code Civ. Proc. While it is true that 'An action is deemed to be pending from the time of its commencement until the final determination upon appeal' (section 1049, Code Civ. Proc.), this does not mean that a decree which directly passes upon the personal status of an individual and determines him to be non compos mentis is suspended and nullified in its effect pending an appeal therefrom. The general rule regarding the effect of an appeal upon a judgment is expressed in 2 Freeman on Judgments (5th Ed.) § 722, as follows: 'The effect of an appeal, with proper bond to stay proceedings, is merely that it suspends the right to execution, but leaves the judgment, until annulled or reversed, binding upon the parties as to every question directly decided.' This rule is modified in the jurisdiction of California, to the extent that a judgment is not competent as evidence to prove the facts therein recited until it has become final. But this is a mere rule of evidence, and does not change the inherent effect of the judgment. It is the undisputed rule in California that a judgment is not admissible in evidence to prove incompetency, or any other facts therein recited, until it has become final. Fry v. Baltimore Hotel Co., 80 Cal. App. 415, 424, 252 P. 752; Baker v. Eilers Music Co., 175 Cal. 652, 166 P. 1006; 2 Cal. Jur. 412, § 177. But in the present case this rule of evidence is not involved, for the decree adjudging Bundy to be incompetent was affirmed on appeal and became final January 26, 1920, when the remittitur was filed, and this judgment was not offered in evidence until the time of the trial in the present case on December 2, 1924. It was therefore competent evidence of his incapacity. Where a decree has been duly rendered in a proceeding instituted for the express purpose of determining the mental capacity or legal status of a person, it becomes constructive notice to the world of his incapacity, and he is thereafter incapable of making a valid contract or conveyance of property under the provisions of section 40, Civil Code, even pending

an appeal from the judgment, at least if the judgment eventually proves to have been a valid one. In 2 Freeman on Judgments, supra, § 902, it is said courts regard a '* * * statutory proceeding for the appointment of a guardian for the person and property of a lunatic or mentally incompetent person as a proceeding in rem, designed to determine the legal capacity of the alleged incompetent to make contracts and to manage and dispose of his estate; * * * the appointment of a guardian determines his status in this respect as against the whole world, and is ordinarily conclusive. * * *' Kellogg v. Cochran, 87 Cal. 192, 196, 25 P. 677, 12 L. R. A. 104. In the case of Dulin v. Pacific W. & C. Co., 98 Cal. 304, 307, 33 P. 123, 124, discussing the office of the writ of supersedeas, the court says: 'There are many judgments, however, which are self-executing, or which have an intrinsic effect, upon which there are no proceedings to be stayed, and which will not be affected by an appeal therefrom. A judgment * * * determining the status of an individual, etc., * * * are instances of such judgments. In Walls v. Palmer, 64 Ind. 496, a judgment had been rendered suspending the petitioner from practicing as an attorney, and it was urged that an appeal therefrom had the effect of restoring him to his right to practice during the pendency of the appeal. The court, however, held that to give that effect to the appeal would be to reverse the judgment of the suspension before the appeal was judicially decided. * * * The only effect of an appeal to a court of error, when perfected and while pending, is to stay execution upon the judgment from which it is taken. * * * The appeal suspends its force as a conclusive determination of the rights of the parties, but the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment itself, and does not destroy or impair its character.' In support of its contention that an appeal from an adjudication of incompetency has the effect of restoring the incompetent to normal capacity and validating his contracts and acts pending the appeal, the appellant relies chiefly upon the case of Coburn v. Hynes, 161 Cal. 685, 120 P. 26. That case involved an application for a writ of supersedeas to prevent a guardian who had been appointed by the court from taking charge of the property of the ward pending an appeal from the decree. The question of suspending the effect of the adjudication of incompetency was not involved in that case. The court merely held that, since the statute did not authorize a guardian to take charge of the estate pending an appeal, he had no such power. But the powers of a guardian as a trustee appointed by law are purely statutory, while the status of an individual with respect to his legal capacity to execute a valid contract is quite another thing, and depends upon the formal adjudication of a court. The suspending of the effect of such a decree pending an appeal would be likely to result in great damage and injustice to the incompetent and his estate. Recognizing this fact, and the necessity for statutory authorization for a guardian to take charge of an estate pending an appeal, section 1765, Code of Civil Procedure, which defines the powers of a guardian, was amended to authorize him, in the discretion of the court, to take charge of both the person and estate of an incompetent person, pending an appeal from the order appointing the guardian. We are of the opinion that the endorsement and transfer of the cashier's check after the adjudication of incompetency and pending the appeal was therefore void, and that the court's finding of the existence of this adjudication of incompetency was equivalent to holding that the transaction was void for lack of capacity."

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.

206 Cal. 657

SALVETER v. SALVETER. (L. A. 10238.)

Supreme Court of California. March 9, 1929.

1. Divorce 🔑249(1)—In divorce action, court, on proper averments, may determine status of property of spouses, regardless of which is title holder (Civ. Code, §§ 82–148).

In an action for divorce, trial court, on proper averments and under express provisions of Civ. Code, §§ 82–148, regulating actions for divorce, is vested with full power to determine status of property of both or each of the spouses, regardless of the name of either in which title to property stands.

2. Divorce 🔑253—In determining status of property of spouses in divorce action, recitals of transfers between them are merely prima facie evidence of ownership.

In determining status of property of both or each of parties to divorce action recitals of whatever transfers there may have been between spouses regarding properties, or in transfers thereof to one or other of them, are merely prima facie evidence of ownership, raising only disputable presumptions as to whether properties are separate or community property of parties to transfers.

3. Husband and wife 🔑264—Finding that property in wife's name was community property held sustained by husband's uncontradicted evidence to that effect.

Uncontradicted evidence of husband in action for divorce, that he transferred realty to wife solely for protection of his family and with understanding that it should remain community property, *held* sufficient to support trial court's finding that it was community property, and interlocutory decree determining status of such properties, based on that finding, will not be disturbed on appeal to Supreme Court.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action for divorce by Maud E. Salveter against Harry D. Salveter, wherein defendant filed a cross-complaint. From that portion of an interlocutory decree which declared certain property of parties to be community property, plaintiff appeals Affirmed.

Hugh A. McNary, of Los Angeles, Hahn & Hahn and Allyn H. Barber, all of Pasadena, and Carroll Searls, of New York City, for appellant.

Taylor & Forgy, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal by plaintiff from that portion of the interlocutory decree in an action for divorce which purported to declare certain property of the spouses to be community property and to make certain dispositions thereof accordingly. The property consisted of a house and lot in the city of Pasadena, called the "home place," where the parties had for some years resided, and of a 99-year lease upon certain business property in the city of Los Angeles, known as the "market property." Each of these properties had for several years prior to the institution of the action for divorce been in course of acquisition by payments therefor upon installments, and this appears still to be the status of these properties. In her complaint for divorce upon the ground of cruelty, the plaintiff does not mention these properties for a reason which later in the course of the pleadings appears. The defendant in his answer to the complaint also omits mention of these properties, but in a cross-complaint, also setting forth a ground of divorce based upon the alleged cruelty of the plaintiff, the defendant refers to said properties as having been conveyed by him to his said wife some years previously for the better protection of the family, but with the intention that they should remain community property, and in the prayer to his cross-complaint he asks the trial court to so declare. It was stipulated that the aforesaid averments of the cross-complaint should be deemed denied by plaintiff. The cause came on for trial upon the issues as thus framed.

Upon the question of divorce, the trial court's decision was in the plaintiff's favor on her complaint, and against the defendant upon his cross-complaint. Upon the issue of the status of the aforesaid properties the trial court found the same to be the community property of the parties to the action. From the record presented upon this appeal it appears that upon the trial of the cause there was introduced in evidence two transfers in writing of the aforesaid properties, executed by the defendant to the plaintiff, in each of which it was recited that the property transferred by each of these was to be "the sole and separate property" of the wife. The husband, who was the grantor in these conveyances, however, testified that at the time of making the same he was engaged in the endeavor to keep up the payments upon these properties; that he was involved in debt and was fearful of losing his interest in said properties, and of thus leaving his family without protection or support; and that solely for the protection of his family, and of the mutual interest of himself and his wife in said properties, and with the full understanding that the same would be taken and held by her as their community property, and without other consideration or intent, he had made the transfers thereof above referred to. The plaintiff did not take the witness stand to contradict the defendant's aforesaid testimony, but rested her claim to said properties as her sole and separate property upon said trial, as she now does upon this appeal, solely upon the recitals in said transfers thereof.

The trial court evidently believed the husband's uncontradicted testimony as to the circumstances under which such transfers were made, and found accordingly that the averments of the defendant's cross-complaint to the foregoing effect were true, and that said properties, and each of them, were community property, and were thereafter to be held under the control of the plaintiff as such, but subject to such further orders as the court, retaining full jurisdiction thereover, might thereafter make upon the application of either of the parties to the action. The interlocutory judgment followed the findings of the trial court in the foregoing regard, and it is from that portion thereof that the plaintiff is prosecuting the present appeal. The respondent has filed no brief herein, alleging in a letter from his counsel his inability by reason of poverty to provide counsel fees or costs for the purpose of so doing. We are, however, satisfied from the brief which the appellant has filed herein, and from such further investigation as we have been able, otherwise unaided, to make of this case, that the portion of the interlocutory judgment and order of the trial court herein appealed from should be affirmed.

[1, 2] In an action for divorce between two discordant spouses, the trial court, upon proper averments and under the express provisions of those sections of the Civil Code (sections 82–148) regulating actions for divorce, is invested with full power to determine the

status of the property of both or each of the spouses, regardless of the name of either in which the title to such property stands, and the recitals of whatever transfers there may have been between such spouses regarding such properties or in transfers thereof to the one or other of them, are merely prima facie evidence of ownership, and raise only disputable presumptions as to whether such properties are the separate or community property of the parties to such transfers. Hamilton v. Hubbard, 134 Cal. 603, 65 P. 321, 66 P. 860, and cases cited; Alferitz v. Arrivillaga, 143 Cal. 646, 77 P. 657.

[3] The uncontradicted evidence of the husband herein as to what was the real understanding and intent of the parties in the making and receiving of such transfers would, however, if believed by the trial court, be sufficient to overcome this presumption, and since the same was believed by the trial court, and since its finding to the effect that such properties constituted the community property of the parties to this action, and its interlocutory decree in dealing with such properties was based upon its foregoing finding of fact, it follows that its judgment to that effect will not be disturbed upon this appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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206 Cal. 635

MUCHENBERGER et al. v. CITY OF SANTA MONICA et al. (L. A. 9258.)

Supreme Court of California. March 8, 1929.

1. Evidence 🔑8—It is common knowledge that tide lines fluctuate.

It is matter of common and judicial knowledge that tide lines fluctuate.

2. Boundaries 🔑46(3)—Agreed boundary becomes true line after acquiescence for statutory period, or under circumstances causing substantial loss from change.

Where owners of adjoining property, uncertain as to true boundary, agree on its location, mark it, occupy on each side up to place fixed, and acquiesce in location for statutory period of limitations (Code Civ. Proc. § 318), or under circumstances that substantial loss would be caused by change, such line becomes in law the true line, regardless of accuracy of agreed location.

3. Boundaries 🔑46(1)—Municipality may by agreement determine boundary line of its property.

Municipality, as well as any other owner, may by agreement determine boundary line of its property.

4. Navigable waters 🔑37(8)—Under statute granting tidelands to city on certain trusts, lands may be used for establishment of harbor and maintenance of structures for protection of lands; "groynes" (St. 1917, p. 90).

Under St. 1917, p. 90, granting tidelands to city of Santa Monica on certain trusts, lands may be used for establishment, improvement, and conduct of harbor, and for construction and maintenance of structures for protection of lands, such as "groynes," which are structures to arrest shifting sands and hold them, thereby stabilizing high-tide line, notwithstanding that, in adapting tidelands for such use, it was necessary or advisable to cut off portions of them from access to waters of harbor.

5. Appeal and error 🔑1008(1)—In suit to compel carrying out of trust under which city acquired tidelands, plaintiffs on appeal could not complain that private owners were benefited, in view of findings (St. 1917, p. 90).

In suit to compel city to carry out terms of trust on which tidelands were conveyed to city by St. 1917, p. 90, plaintiffs cannot complain on appeal that action of city in managing lands has resulted in benefit to private owners of upland, where court found that city acted within scope of powers, and did not violate trust imposed on it by grant of tidelands from state.

6. Navigable waters 🔑37(8)—Joint quitclaim deed by city and land company to establish boundary held not unlawful transfer of tidelands by city (Const. art. 15, § 3).

Execution of joint quitclaim deed by city and land company to determine boundary between their adjoining lands, was not transfer by city of tidelands to land company, in violation of Const. art. 15, § 3, since such instrument did not operate as conveyance, but only as agreement to fix boundary line.

7. Appeal and error 🔑122, 123—Party may appeal from specific part of judgment, but not from findings.

No appeal lies from findings in whole or in part, but party may appeal from specific part of judgment.

8. Municipal corporations 🔑992—Equity may enjoin municipal corporation's act exceeding jurisdiction, but not legislative or governmental acts within scope of authority.

Courts of equity may, and sometimes do, interfere and enjoin action of municipal corporation, acting or proposing to act in excess of jurisdiction and without authority, but there is no authority to interfere with legislative or governmental acts within scope of authority.

9. Municipal corporations 🔑224—In suit to compel carrying out of trust under which city received tidelands, judgment requiring city to accept conveyance of groynes and strips of land held erroneous (St. 1917, p. 90; Civ. Code, § 1158).

In suit to compel carrying out of trust on which tidelands were granted to city of Santa Monica by St. 1917, p. 90, judgment ordering land company to deed to city and ordering city to accept certain groynes and land on which they were located, *held* erroneous on appeal by city, under Civ. Code, § 1158, providing grants to political corporations or governmental agencies for public purposes shall not be accepted for recordation without grantee's consent, since acceptance of strips of land and groynes, and subsequent maintenance by city, were unquestionably powers of municipality.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Suit by Leo J. Muchenberger and another against the City of Santa Monica and others, to compel the carrying out of the terms of a trust. From the judgment, plaintiffs and certain defendants appeal. Reversed in part, and affirmed in part.

James Westervelt and Black, Hammack & Black, all of Los Angeles, for plaintiffs.

Chester L. Coffin, City Atty., of Santa Monica, for defendants city and its officers.

Newlin & Ashburn, of Los Angeles, for defendant Santa Monica Land Co.

WASTE, C. J. Respondents, as citizens of the state of California, and as residents and citizens of the city of Santa Monica, claiming to act in their own behalf and on behalf of others similarly situated, instituted an action in equity against the city of Santa Monica, a municipal corporation, and its officers, and against the Santa Monica Land Company, a corporation, to compel the city, as trustee, to perform the terms of the trust contained in the "Act granting certain tidelands and submerged lands of the state of California to the city of Santa Monica upon certain trusts and conditions," approved April 10, 1917, and in particular to require the city to cancel a deed and certain permits issued to the land company pertaining to a portion of the tidelands alleged to belong to the city. The trial court made voluminous findings and conclusions of law, and entered judgment, the general effect of which is to sustain the position of the defendant city, but directing that certain remedial steps be taken in relation to a portion of the lands in question. The plaintiffs and the city of Santa Monica and its officers have appealed. The defendant land company is satisfied with the judgment.

The facts are taken from the findings of the trial court. The boundary of the city of Santa Monica on the west is a line three miles westerly of the line of the mean high tide of the Pacific Ocean. Between the upland of the westerly shore of the city and the line of mean low tide there lies a strand of sand and beach, or tideland, existing along the whole water front of the city, and between the upland and the line of mean high tide, wherever that line may be, lies the land involved in this controversy. Prior to the year 1917 the title to the tidelands was in the state of California. On the 10th day of April, 1917, the Legislature passed an act granting "the tidelands and submerged lands of the state of California" within the city of Santa Monica to the city upon certain trusts. Stats. 1917, p. 90.

According to the terms of the act, these lands shall be used by the city for the establishment, improvement, and conduct of a harbor, for the establishment and construction of bulkheads or breakwaters for the protection of lands within its boundaries, or for the protection of its harbor, and for the construction, maintenance, and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures, and appliances necessary or convenient for the promotion or accommodation of commerce and navigation "and the protection of the lands within said city." The absolute right to fish in the waters of the harbor, with the right of convenient access to its waters over the tidelands for that purpose, is, by the terms of the act, reserved to the people of the state of California.

A public highway, known as Palisades Beach Road, runs southerly, and generally parallel with the shore line of the ocean, from the northerly boundary of the city of Santa Monica to the southerly line of the city. The distance between the highway and the existing shore line changes, from time to time, and varies, from place to place, the distances ranging from approximately 150 feet to approximately 350 feet, and the average distance is in excess of 190 feet. In the year 1921 the defendant Santa Monica Land Company owned a strip of upland bounded on the east by the Palisades Beach Road and on the west by the mean high-tide line of the ocean. Since that date much of this land has been sold by the land company to numerous persons, who, in due time, have taken possession of their holdings and, in many instances, have placed homes and other valuable improvements on their lots. These persons are not parties to this action.

On or about the 4th day of February, 1921, the defendant Santa Monica Land Company filed with the city a petition requesting the city to grant a permit to the company to erect certain structures, known as "groynes," partly on its own property and partly on the tidelands lying between its property and the ocean. The officers of the city and the city council deemed it to be for the best interests of the city that the construction of these groynes should be permitted as a means of protecting the harbor, and of protecting the lands of the city and carrying out the terms of the grant from the state; but the shifting of the tide line from day to day, due to the action of the tides and waves, caused an uncertainty to exist as to the true location of the mean high-tide line, and as to the exact boundary line between tidelands and the privately owned upland, including that of the land company.

For the purpose of removing the uncertainty, the city caused surveys to be made, as the result of which a line was laid out by the city engineer, and adopted and designated by the city, by means of an ordinance duly passed, as representing the mean high-tide line along its westerly shore. This line was arrived at by means of readings taken by the surveyor at stations located five hundred feet apart, and checking with other surveys. It was based on the fixed datum plans established by the United States Coast and Geodetic Survey, and the line was made straight in an endeavor to attain the average of a mean high-tide line. While the line, so established by the survey ordered by the city, did not exactly coincide with the mean high-tide line as it varied from day to day, the trial court finds that it is a fair average line, located 190 feet from the Palisades Beach Road, and, as established, it is for the best interests of the city that the same "be upheld and maintained." The mean high-tide line thus located was accepted by the city and by the land company as fixing and making definite and certain the boundary line between the tidelands of the city and the property of the land company, and for the purpose of protecting the city against any claims which might thereafter be made, or which might otherwise be made by the land company or its successors, that it or they had acquired title by accretion to any land which might be subsequently built up by the maintenance of the groynes and the action of the ocean.

Following the establishment of the mean high-tide line, the city of Santa Monica and the Santa Monica Land Company, by agreement, executed a joint quitclaim deed, the city purporting to convey to the land company the interest of the city in and to all lands lying between the line established by the ordinance and the Palisades Beach Road, and the land company purporting to convey to the city all interest it might have in and to all lands lying westerly, or seaward, of the line established by the ordinance. The land company then proceeded to construct the groynes in accordance with the terms of a permit issued to it by the United States War Department. These structures, approximately 2,300 feet apart, are located partly upon upland belonging to the Santa Monica Land Company, partly upon tidelands to the west of its holdings, and partly in deep water beyond the low-tide line.

Since the construction of these groynes, a large amount of accretion has formed north of each of them, and the fluctuating physical high tideland has, at these points, and by virtue of these accretions, moved seaward for substantial distances, extending over long parcels of shore line from north to south. These accretions have inured to the benefit of the city by creating a considerable amount of new upland. The groynes erected by the land company are found by the trial court to be permanent structures, and to constitute partial obstructions to the free use of the tidelands; but the obstruction is not greater than was considered by the city as necessary for the protection of its harbor and the protection of lands within the city, except that the outer 30 feet, or seaward end, of the south groyne is found to be unnecessary for the protection of the harbor or lands. The court also found that the construction of the groynes was permitted to be made at the expense of the land company as a means of enabling the city to provide necessary protection for its harbor and land within its limits.

As conclusions of law from the many facts contained in the voluminous findings, the trial court decided that the permits granted the land company for the construction and maintenance of the groynes were acts which were authorized and performed for the purpose of protecting the harbor of the city of Santa Monica and the protection of lands within its boundaries, and were and are proper and lawful means of carrying out the purpose of the grant of the state of California of the tidelands to the city, and that the groynes are not nuisances or purprestures, and that the plaintiffs were not entitled to have them abated or removed, except that the westerly 30 feet of the south groyne, hereinbefore referred to, should be cut off. But the trial court went further, and, apparently because the groynes in a measure interfere with the approach to and free use of the beach west of the mean high-tide line which had been adopted, and for the purpose of permitting passageways to be constructed on each side of the groynes from the beach to the Palisades Beach Road, directed that the land company convey by quitclaim deed to the city, and the city accept from the land company, said groynes and the strips of land on which they are located. Judgment was entered in accordance with the findings and conclusions of law.

The plaintiffs appeal because of the failure of the lower court to cancel the deed from the city to the land company, and to cause the removal of the groynes. The city of Santa Monica and its present officers appeal from that portion of the judgment whereby the Santa Monica Land Company is ordered to deed to the city, and the city is ordered to accept from the land company, the groynes and the land on which they are located, and from that portion of the judgment which orders the destruction of the 30 feet of the south groyne. The city also contends that it has been prejudiced by a finding, claimed to be without the issues, to the effect that the city is the owner of the lands formed north of the groynes by accretion.

[1] No authorities have been cited by the appealing plaintiffs to the effect that, on facts such as are here found to exist, it is not permissible for a municipality to cause surveys to be made and to arbitrarily fix a line to be accepted as the mean high-tide line. The evidence fully supports the finding that the mean high-tide line to the west of the land company's holdings is a shifting, uncer-

tain line. It is also a matter of common and judicial knowledge that tide lines fluctuate. In Strand Imp. Co. v. Long Beach, 173 Cal. 765, at page 770, 161 P. 975, 977, this court, speaking through Mr. Justice Shaw, said: "California has more than one thousand miles of seashore to which land is continually being added by alluvion, and from which land is continually being taken away by reliction. The actual line of mean high tide, as it existed when the state was formed, or as it was in 1872, when the Civil Code was enacted, has never been surveyed, and in places where relictions or alluvions have changed the shore line, the original line is unknown and cannot be ascertained with any degree of certainty."

[2, 3] When owners of adjoining property, being uncertain of the true boundary between their lands, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place so fixed, and acquiesce in such location for a period equal to the statute of limitations (Code Civ. Proc. § 318), or under such circumstances that substantial loss would be caused by a change of its position, such line becomes in law the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements. Young v. Blakeman, 153 Cal. 477, 481, 95 P. 888; Silva v. Azevedo, 178 Cal. 495, 499, 173 P. 929.

We see no reason why a municipality, as well as any other owner, may not by agreement determine the boundary line of its property. It seems to be well established by ultimate authority that it may. The Legislature of a state "may * * * with great propriety define the bounds of high and low water, * * * for the purpose of regulating a public right, so as not to conflict with private interests, and to prevent private rights from being exercised to the prejudice of public interests." Philadelphia Co. v. Stimson, 223 U. S. 605, 630, 32 S. Ct. 340, 349 (56 L. Ed. 570). The city, in this case, as a trustee holding the title to the tidelands, has the same power that the state had to do everything necessary to the execution and administration of the trust. Until the adoption of the ordinance by the city, and the delivery of the quitclaim deed, uncertainty existed as to the true location of the mean high-tide line and as to the exact boundary line between the city's tidelands and the privately owned uplands.

The findings quite clearly indicate that, for that reason, the city council and the city attorney deemed it was essential that the line of mean high tide be permanently fixed, in order to protect the rights of the city, particularly against any claim the Santa Monica Land Company might assert to any alluvion which might be formed by reason of the construction and maintenance of the proposed groynes, or jetties. The court further finds and concludes that the city, in entering into the agreement with the land company, for the purpose of setting at rest any and all questions relating to the location of the boundary line between their respective properties, acted for the advantage and best interests of the city. Not only does the evidence appear to support the findings, but the trial judge made a personal inspection of the water front, which we must assume further convinced him of the correctness of his views.

[4] As to the maintenance of the groynes, it appears from the evidence and from the findings that these particular structures constitute a well-recognized and generally favored method of protecting the uplands against erosion and other action of the sea and its storms. The primary purpose of their erection is to arrest the shifting sands and hold them, thereby stabilizing the high-tide line. There is evidence that the two here in question were properly placed for the purpose of, and with a view to, protecting the shore line in front of Santa Monica. While the absolute right to fish in the waters of the harbor, with convenient access to its waters over the tidelands for that purpose, is, by the terms of the grant from the state, reserved to the people, the lands may also be used for the establishment, improvement, and conduct of a harbor, and for the construction and maintenance of structures for the protection of lands within its boundaries.

If, in so adapting the tidelands for this use, it is found necessary or advisable, in aid of the use, to cut off portions of them from access to the waters of the harbor, that may be done. People v. California Fish Co., 166 Cal. 576, 597, 138 P. 79. Therefore, the right of access to the tidelands must be taken in conjunction with the right of the city to protect and improve the harbor and the lands within the city. The trial court has found that the erection and maintenance of the groynes, except as to the outer 30 feet of the southerly structure, and certain obstructions on the groynes, such as fences and signboards, are in keeping with the powers and duties of the city in the administration of its trust, and that they are necessary and proper for the protection of the interests of the city and its inhabitants, and any obstruction of free access to the waters of the harbor, caused by their maintenance, is not greater than the city council deemed necessary for the protection of the harbor and lands.

[5] The plaintiffs, while admitting that the action of the city was "unquestionably taken with the best of faith," decry what they assert to be the practical effects of a transaction amounting to a violation of the terms of the trust upon which the city of Santa Monica holds the tidelands within its borders, and characterize the contentions as "sophistry." The appellation is not supported by the record. The fact that the action of the city may have resulted in benefit to the private owners of the upland, and in a manner or to a degree that may not have been foreseen by those

charged with the affairs of the city, falls aside the mark in the light of the trial court's findings that the city acted within the scope of its powers, and did not violate the trust imposed on it by the grant of the tidelands from the state.

[6] Another contention of the plaintiffs is that the city has transferred property to the land company, in violation of the provision of the Constitution that tidelands within cities and fronting on waters used for the purpose of navigation shall be withheld from grant or sale to private persons, partnerships or corporations. Const. art. 15, § 3. It was not the purpose of the city in this case to transfer any titles, but to mark the boundaries of littoral holdings, in order to make them certain and permanent, and to prevent questions arising in the future concerning the ownership of lands on either side of the line agreed upon. The purpose and scope of the quitclaim deed plainly appear from the recitals and terms of the instrument. Neither party purports to grant any property or interest to the other.

The trial court found that, although an instrument in the form of a quitclaim deed was adopted by the parties, the substance of the transaction was merely an agreement upon an uncertain boundary, and that the deed was made only for the purpose "of fixing and definitely establishing a boundary line, which was theretofore uncertain and in doubt, and that the said quitclaim deed did not convey any property whatever." That being the fact, the transaction appears to fall within the language used in Loustalot v. McKeel, 157 Cal. 634, 643, 108 P. 707, 711, where the court said: "They [agreements of this character] do not operate as a conveyance so as to pass title from one to another, but they proceed upon the theory that the true line of separation is in dispute and to some extent unknown, and in such cases the agreement serves to fix the line to which the title of each extends."

It follows, therefore, that that portion of the judgment of the trial court, by which it refused to cancel the quitclaim deed and annul Ordinance No. 188 of the city of Santa Monica, fixing the mean high-tide line between the lands of the city and of the Santa Monica Land Company, and refusing to order the removal of the groynes, must be affirmed.

[7] The city of Santa Monica appealed from that portion of the judgment ordering and decreeing that the Santa Monica Land Company, after making certain structural changes in the groynes, immediately convey to the city the two groynes and the strips of land upon which each is situated, and a strip of land 15 feet wide, running from the high-tide line as established, across the property of the land company, to the Palisades Beach Road. It also attempted to appeal from a "portion of the findings" relating to certain accretions said to have formed outside the mean high-tide line as established, a matter wholly outside the issues in the case. The respondent land company moved to dismiss the city's appeal, upon the ground that an appeal does not lie either from findings or a part of a judgment.

No appeal lies from findings, in whole or in part. But it is well settled that a party may appeal from a specific part of a judgment. G. Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 667, 143 P. 1025. See, also, Lake v. Superior Court, 187 Cal. 116, 119, 200 P. 1041, and Whalen v. Smith, 163 Cal. 360, 362, 125 P. 904 (Ann. Cas. 1913E, 1319). The futile appeal from the finding will therefore be disregarded, and the motion to dismiss the appeal from the portion of the judgment which the city deems adverse to it will be denied.

[8, 9] While, apparently, some of the inconvenience to the public, through being denied ready access to the beach fronting the land company's land, can be relieved in the manner found by the trial court, neither the plaintiffs nor the city want such relief, and the respondent land company seems anxious to grant it. The usual and ordinary way of providing access to the beach would be by agreement between the parties, or by condemnation proceedings instituted by the city to provide streets or passageways, with just compensation paid the private owners of the land taken for such use. A court sitting in equity, and having taken jurisdiction, has broad powers. It may grant relief as varied and diversified as the means employed to produce the grievance complained of, and is not bound to the strict legal rights of the parties.

Such rule has application to controversies between private parties who find themselves in a court of equity, but does it apply when one of the parties is a municipality, and matters of policy and public concern are expressed only in legislative action? Courts of equity may, and sometimes do, interfere and enjoin the action of a municipal corporation acting or proposing to act in excess of jurisdiction and without authority. It has no authority to interfere with the legislative or governmental acts within the scope of the city's authority. Glide v. Superior Court, 147 Cal. 21, 24, 81 P. 225. The contention of the city is that the matter of acceptance of property is within the legislative discretion of the city council. Beyond the suggestion that ownership of the strips of land and the groynes might conceivably carry burdens which would militate against the acceptance of a deed thereto, counsel for the city requests that the court "will not call for reasons for the unwillingness of the city to accept" the conveyance in this instance. We are as little concerned about such reasons as we are about the reasons for the land company's anxiety to have the city accept the property. The attitude of the parties clearly indicates that matters of policy and public concern may enter largely into this phase of the controversy.

The Civil Code provides (section 1158) that deeds, or grants conveying real estate, or any interest therein, or easement thereon, for public purposes to a political corporation or governmental agency, shall not be accepted for recordation without the consent of the grantee, evidenced by its resolution of acceptance attached to such deed of grant. We question the power of the court to force the city council, in which the legislative power of the city of Santa Monica is vested by its charter, to pass any such resolution of acceptance. The acceptance of the strips of land and the groynes, and their subsequent maintenance by the city, are unquestionably powers of the municipality. See Harbor Center Land Co. v. City of Richmond, 38 Cal. App. 315, 176 P. 50.

We are of the view that, as to the conveyance directed to be made, a case for the intervention of the strong arm of equity was not made out. The motion of the Santa Monica Land Company to dismiss the appeal of the city of Santa Monica is denied.

That portion of the judgment directing a conveyance of the strips of land, describing them, and the two groynes, is reversed. In all other respects the judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

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206 Cal. 682

RUSSAKOV v. McCARTHY CO. et al.

HURST v. SAME.

(L. A. 9856, 9876.)

Supreme Court of California. March 14, 1929.

As Modified March 18, 1929.

1. Eminent domain 🔑153—Right to proceeds of condemnation does not run with land or pass to vendee after right accrues, in absence of agreement.

The right to the moneys awarded as compensation for the condemnation of property is personal, and does not run with the land or pass to vendee after the right accrues, in the absence of an express agreement to that effect.

2. Eminent domain 🔑153—Vendee is entitled to damage suffered, where right to condemnation proceeds accrues after conveyance.

Vendee, of land condemned, is entitled to compensation for damage suffered, where right to proceeds of condemnation accrues after conveyance.

3. Eminent domain 🔑244—Judgment of condemnation does not vest title in condemnor, but merely gives right to take on payment of value determined by judgment (Code Civ. Proc. § 1255a).

Under Code Civ. Proc. § 1255a the entry of judgment in condemnation proceedings does not pass title to the property sought to be condemned, but merely gives to the public a right to take the property upon paying the value determined by the judgment.

4. Eminent domain 🔑158—Exclusion of evidence as to agreement between vendor and vendee as to disposition of proceeds of condemnation award held error, where deed merely excepted from property conveyed portions sought to be condemned.

Under contracts and deeds excepting from land conveyed portions of lots to be taken by city in condemnation proceedings for street-widening purposes the exceptions should be regarded not as reserving any right of vendor in such portions nor as a restriction of the granting terms, and the exclusion of evidence as to agreements between vendor and vendee as to disposition of proceeds of condemnation award was erroneous.

5. Evidence 🔑441(8)—Evidence of parol agreement as to disposition of proceeds of pending condemnation proceedings held not to vary terms of deed or contracts.

The reception of evidence of parol agreement between vendor and vendee as to disposition of proceeds of award in pending condemnation proceedings does not vary or tend to vary or alter terms of contracts or deeds excepting from property conveyed premises sought to be taken.

In Bank.

Appeals from Superior Court, Los Angeles County; William C. Doran, Judge.

Actions by Max Russakov and Floyd H. Hurst against the McCarthy Company and the City of Los Angeles, a municipal corporation consolidated for trial and appeal. From adverse judgments, plaintiffs appeal. Reversed except as to certain causes of action, as to which one appeal was dismissed.

Charles A. Bank, of Los Angeles, for appellants.

Bauer, Wright & Macdonald and James W. Osgood, all of Los Angeles, for respondent McCarthy Co.

Jess E. Stephens, of Los Angeles, for respondent City of Los Angeles.

WASTE, C. J. The above-entitled actions, consolidated for purposes of trial and appeal, were instituted to have declared and enforced a trust in certain moneys awarded to the defendant McCarthy Company by the defendant city of Los Angeles in satisfaction of judgment entered in a certain condemnation proceeding. The defendant city has no interest or concern in the outcome of this litigation other than that of a stakeholder; the award money being in its possession at the commencement of suit. Any claim that the respective plaintiffs may have in and to the disputed fund arises out of and is founded upon assignments, for purposes of collection only, of the rights of persons asserting an interest or estate in the property condemned, by reason of there having agreed and contracted to purchase, from the McCarthy Company, thirteen described lots, a portion of each of which was thereafter appropriated to the public use. It is the theory of the plaintiffs that their assignors, by the agreements to purchase, became the equitable owners of the lots, and were therefore proportionately entitled to any moneys thereafter awarded for the appropriation by condemnation for public uses of any parts or parcels of the purchased lots. Judgment went for the defendants in each action, and they were dismissed with their costs. The plaintiffs appeal.

The McCarthy Company was the owner of what is known as the McCarthy Bungalow Home Tract No. 2395, in the city of Los Angeles. The portion of the tract with which we are concerned includes lot 6 and lots 20 to 31, inclusive, of block 3, all of which front on Florence avenue. On April 9, 1921, the defendant city commenced a proceeding to widen Florence avenue by taking a strip of land 20 feet in depth from the frontage of all lots facing on that avenue. Title to the thirteen lots herein involved stood in the name of the McCarthy Company at that time, and the company was named as a defendant. A contract with one Herman Fuhrmeister, covering lots 25 and 26, alone antedated the institution of the condemnation proceeding; but, subsequently, and in each instance prior to the entry of the interlocutory judgment therein, the McCarthy Company contracted to sell to the plaintiffs' assignors, or their predecessors in interest, some one or more of the several lots above indicated. On July 24, 1924, the interlocutory judgment was entered, awarding to the defendant McCarthy Company a lump sum of $16,053, the fund here in dispute, as compensation for that portion of the frontage taken from each and all of the lots. When this award was made the terms of three of the contracts, above referred to, covering lots 6, 25 and 26 and 29, had been faithfully performed by the purchasers and deeds conveying said lots to the respective purchasers had been duly executed and delivered. The remaining eight contracts were still executory.

The complaint filed by the appellant Russakov in action numbered L. A. No. 9856 contains eight causes of action, while that of the appellant Hurst in L. A. No. 9876 contains three. The assigned claims of the respective purchasers and grantees in and to a proportionate part of the award money are set forth.

Certain of the contracts of purchase, viz. those set up in causes of action 1, 2, 3, 5 and 8 of the Russakov complaint, covering lots 6, 30, 23 and 24, 27 and 28, respectively, and those set up in all three causes of action of the Hurst complaint, covering lots 20, 21, and 22, in describing the particular lot or lots therein agreed to be sold and transferred, purported to except from the agreement to sell and convey such part or portion of the particular lot or lots described as might thereafter be condemned and appropriated by the defendant city in widening Florence avenue. The three deeds referred to also contained such an "exception." No set form of expression appears to have been employed, for each of the several contracts and deeds contained some one of the following four clauses: "Except any part of said lot within Florence Avenue as widened by the City of Los Angeles;" "less portion in Florence Avenue street widening;" "subject to Florence Avenue widening proceedings;" "except portion of same taken by City in Florence Avenue widening proceedings."

Upon the trial it was urged by plaintiffs and appellants that the intention of the parties as to the disposition of the award moneys was not definitely ascertainable upon a mere reading of the quoted provisions, and that, rather than reserving to the McCarthy Company a portion of the lots (and, as a consequence, the moneys awarded for the taking thereof), these "exceptions" could have as well been inserted in the contracts and deeds as a means of protecting the company "from any possible future claims which might be made by any purchaser by reason of having received any lesser amount of property than that described in the contracts." Plaintiffs therefore sought to introduce parol evidence in order to "explain what the McCarthy Company meant" by the exceptions in the deeds and contracts, and to establish the existence between the parties of an oral agreement as to the disposition of the award in the condemnation proceedings. The trial court sustained the objection of the defendant company to the introduction of the evidence, on the ground that to admit it would be to alter the terms of the deeds and contracts, which were clear and certain, and free from ambiguity. It also ruled that the various contracts placed the title to the lots, as between the parties, in the McCarthy Company, in whatever condition it might be when the condemnation proceedings were completed, and gave the vendor the right to any award which might be made for the portion of the property which, by reason of the condemnation, the vendor was not required to convey to the purchasers. The plaintiffs being thus precluded from asserting any claim to the money paid for the portions of their respective lots, judgment was entered for the defendants.

[1-3] We are of the view that the plaintiffs should have been permitted to show, if they

could, that there was an agreement concerning the disposition of the money to be paid by the city for the portion of the lots condemned. That a person, to be entitled to moneys awarded as compensation for the condemnation of property, must establish an interest or estate in the thing condemned, is, as an abstract proposition of law, unquestionably sound. But the right to compensation is a personal one which does not run with the land, and does not pass to a vendee of the land after the right accrues, in the absence of an express agreement to that effect. Where the right accrues after a conveyance, a vendee or optionee is entitled to compensation for the damage he has suffered. 10 Cal. Jur. 356, and cases cited. When the several contracts and deeds here concerned were executed, the proceeding looking to the appropriation of a strip of land along Florence avenue for street-widening purposes was pending and undetermined. The interlocutory judgment had not been entered. At that time, therefore, the defendant city had not definitely and finally committed itself to the street-widening project. In condemnation proceedings, even the entry of judgment does not pass title to the property sought to be condemned, but merely gives to the public a right to take the property upon paying the value thereof as determined by the judgment. Code Civ. Proc. § 1255a; Pool v. Butler, 141 Cal. 46, 49, 54, 74 P. 444; 10 Cal. Jur. 435, §§ 125, 126. The property condemned does not vest in the plaintiff until payment has been made as required by the verdict of the jury or judgment of the court, and order of final condemnation made and recorded in the office of the county recorder.

[4] The proceeding commenced by the defendant city being in an undetermined state when the contracts and deeds here involved were executed, it follows as a necessary consequence from what has been said that, without incurring any liability whatever, the city could, at that time, and perhaps for some considerable period therafter, have elected to abandon the widening of Florence avenue. If it had seen fit to do so, it would follow that the purchasers and grantees indicated, despite the presence in their respective contracts or deeds of the so-called "exception" clauses, would have taken their respective lots in their entirety, and without diminution, for none of these contracts or deeds purported to reserve to the McCarthy Company any interest or estate in the lots described. The quoted "exceptions" should not be regarded as a restriction of the granting terms of the deeds and contracts, but as an indication that, against the effect of the then pending condemnation proceeding, the McCarthy Company made no undertaking as to the amount of property conveyed or agreed to be conveyed. Price v. Engelking, 58 Ill. App. 547, 552, a case which seems much in point. That being the case, it cannot be positively and unqualifiedly declared that appellants' assignors were without any interest in the strip of land for the taking of which the award was thereafter made. We are of the view, therefore, that the court below prejudicially erred when it refused to permit the introduction of evidence as to oral agreements or understandings which the appellants claim existed between the McCarthy Company and appellants' assignors concerning the disposition of moneys that might be awarded for any part or parts of the property thereafter appropriated to the public use.

[5] The rejected evidence, if admitted, would not have varied or altered the terms of the contracts or deeds which were made subject to the right of the city to take some part of the land for street purposes when the compensation therefor should be paid. It would have tended merely to establish a parol reservation, if one existed, as to the person or persons entitled to receive or share in the compensation that might subsequently be awarded in the condemnation proceedings. Chandler v. Morey, 195 Ill. 596, 63 N. E. 512, 516. Whether or not there was such an agreement, or whether, when executing the several contracts and deeds, the parties gave due and proper consideration to the ultimate effect and result of the condemnation proceeding, and that such consideration was reflected in the purchase price of the respective lots, can be determined on a retrial and the reception of the evidence in accordance with the views herein expressed.

For the foregoing reasons, the judgment in action L. A. No. 9876 is reversed. The judgment in L. A. No. 9856 is also reversed except in so far as it affects the second, fourth, and eighth causes of action, as to which the appeal has been heretofore dismissed.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

BROWN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6488.)★

District Court of Appeal, First District, Division 2, California. Feb. 27, 1929.

Rehearing Denied March 29, 1929. Hearing Granted by Supreme Court April 25, 1929.

1. Prohibition 🔑25—Facts stated as basis for immunity from service of process in petition for writ of prohibition were admitted by demurrer.

Facts set forth in petition for writ of prohibition as basis for plea of immunity from service of process in contempt proceedings sought to be restrained were admitted by demurrer.

2. Process 🔑119—Nonresident defendant, entering state solely to attend trial, is immune from service in contempt proceeding for refusal to pay alimony (Code Civ. Proc. §§ 17, 1016, 1212; Pol. Code, § 4319).

Proceedings for contempt in refusing to comply with terms of divorce decree, being special proceedings, which can be initiated only by personal service of new process, under Code Civ. Proc. §§ 1016, 1212, unless waived, nonresident, entering state solely to attend and testify in trial of another action against him, is immune from service of order to show cause for contempt in not paying alimony, though superior court has continuing jurisdiction to enforce its orders in such cases, in view of definitions of word "process" in section 17, and Pol. Code, § 4319.

3. Process 🔑119—Nonresident defendant held not precluded from claiming immunity from service in contempt proceedings while attending trial, on ground that he was in contempt of state courts.

One failing to pay alimony awarded his former wife *held* not precluded from claiming immunity from service of process in contempt proceedings as nonresident entering state solely to attend and testify at trial of another action against him on ground that he was in contempt of state courts, since court cannot assume his guilt before trial, but must presume that he is not guilty, and determine question solely on issue of court's jurisdiction to bring him before it for trial.

4. Prohibition 🔑3(1)—Whether prohibition petitioner has plain, speedy, and adequate legal remedy must be determined in light of particular facts and circumstances.

Whether petitioner for writ of prohibition has a plain, speedy, and adequate remedy in ordinary course of law is question to be determined in each instance, in light of all facts and circumstances of particular case.

5. Prohibition 🔑5(3)—Prohibition lies to prevent vexation and expense of further contempt proceedings against nonresident, served while attending trial of another action against him.

Where further proceedings under process would be void, and merely put parties to further vexation and needless expense, as in case of nonresident, served with process in proceedings for contempt in refusing to pay alimony awarded former wife while attending trial of another action against him, appellate court, in exercise of its discretion, may terminate proceedings forthwith by issuing peremptory writ of prohibition.

Application by R. Harold Brown for a writ of prohibition to the Superior Court of the State of California in and for the City and County of San Francisco and Frank H. Dunne, Judge thereof. Peremptory writ granted.

Sullivan & Sullivan and Theo. J. Roche and T. L. Breslauer, all of San Francisco, for petitioner.

John E. Manders, of San Francisco, for respondents.

NOURSE, J. This is an original proceeding for a writ of prohibition, restraining respondent superior court from taking any action upon an order to show cause directed to petitioner. In June, 1914, in an action duly instituted for the purpose, the then wife of petitioner, Clara Brown, obtained an interlocutory decree of divorce from petitioner, with an award to her of alimony in the sum of $100 per month. In October, 1927, an action was commenced in the superior court in the city and county of San Francisco by one Ida M. Brown against this petitioner and others, involving the title and ownership of certain shares of capital stock. This petitioner, who is a resident of the state of Louisiana filed his answer in this second action, entered into the state of California and came to the city of San Francisco for the sole purpose of attending upon the sessions of said superior court as a witness and as a party defendant in defense of his property interests in said litigation.

While petitioner was in attendance upon said court and under examination as a witness therein, an order to show cause was issued from another department of said court in the divorce proceeding above mentioned. That order cited this petitioner to appear and show cause why he should not be punished for contempt of court for failing to pay to his former wife the alimony awarded in the divorce decree amounting to the sum of $23,000. In answer to the citation this petitioner appeared specially and moved to quash the service, upon the ground that he was immune from service of process because he was a nonresident and had entered the state solely for the purpose of attending as a witness and as a party defendant in an action pending in the superior court. The respondents present two grounds in their demurrer to the petition —that it does not state sufficient grounds for relief, and that petitioner has another plain, speedy, and adequate remedy in the ordinary course of law.

★Rehearing denied. Hearing granted by Supreme Court.

[1] The facts upon which the plea of immunity was based are set forth in this petition, and are, of course, admitted by the demurrer. The superior court having denied the plea and threatened to proceed with the hearing of the order to show cause, the petitioner claims that further proceedings on the part of the superior court are in excess of its jurisdiction, under the well-settled rule that a nonresident, who has entered this state solely to attend and to testify in an action pending in the courts of this state, is, while in attendance upon such trial, immune from service of process in another proceeding. Hammons v. Superior Court, 63 Cal. App. 700, 707, 219 P. 1037, and cases cited; Stewart v. Ramsay, 242 U. S. 128, 129, 37 S. Ct. 44, 61 L. Ed. 192.

[2] The respondents argue that the rule should not be applied to a divorce proceeding because the superior court has continuing jurisdiction to enforce its orders in such cases. This jurisdiction over the subject-matter is not disputed, but contempt proceedings arising from the alleged refusal to comply with the terms of a divorce decree are special proceedings, which can be initiated only by the service of new process. Section 1212, Code Civ. Proc.; 5 Cal. Jur. p. 942. Before the court can acquire jurisdiction to proceed in such matters, personal service of this process must have been made upon the alleged contemnor, unless such service has been waived. It cannot be served by mail, or by notice to the attorney of record (section 1016, Code Civ. Proc.), except under special circumstances which are not involved here.

In the sections relating to proceedings for constructive contempts of this character the Code uses the terms "warrant of attachment," "order to show cause," "summons," "paper to bring a party into contempt," and "other process." The word "process" is defined in section 17, Code of Civil Procedure, as a "writ or summons issued in the course of judicial proceedings." In section 4319 of the Political Code it is defined as including all "writs, warrants, summons, and orders of courts of justice." The rule referred to exempts a party from the service of "civil process" when coming from another state, and this, we are satisfied, includes the service of an order to show cause initiating a proceeding for constructive or civil contempt.

[3] It is argued that the petitioner should not be heard here because, having failed to pay the alimony awarded, he is in contempt of the courts of the state, citing Weeks v. Superior Court, 187 Cal. 620, 203 P. 93. But this assumes before trial the guilt of the petitioner—the fact which the trial court was called to determine. We may not indulge in that assumption, but must presume that the petitioner is not guilty and must determine the question solely upon the issue of the jurisdiction of the superior court to bring the petitioner before it for trial under the conceded facts of the case.

In this connection the language of the court in Stewart v. Ramsay, supra, in explaining the reason for the rule cited is pertinent. Page 130 of 242 U. S. (37 S. Ct. 46). "The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify." In like vein the Supreme Court of Massachusetts, in Diamond v. Earle, 217 Mass. 499, 501, 105 N. E. 363, at page 363 of the Northeastern Reporter (51 L. R. A. [N. S.] 1178, Ann. Cas. 1915D, 984), said: "It is not merely a privilege of the person; it is a prerogative exerted by the sovereign power through the courts for the furtherance of the ends of justice." For the reasons given we hold that the respondent court is without jurisdiction to proceed with the hearing upon the order by which the petitioner was attempted to be brought into court.

[4, 5] The question whether a petitioner for a writ of prohibition has a plain, speedy, and adequate remedy in the ordinary course of law is a question which must be determined in each instance in the light of all the facts and circumstances of the particular case. Where, as here, further proceedings under the process would be void and would merely put the parties to further vexation and needless expense, this court may, in the exercise of its discretion, properly terminate the proceedings forthwith. Davis v. Superior Court, 184 Cal. 691, 696, 195 P. 390.

Let a peremptory writ issue as prayed.

We concur: KOFORD, P. J.; STURTEVANT, J.

97 Cal. App. 387

STAPLES v. L. W. BLINN LUMBER CO.
(Civ. 5142.)

District Court of Appeal, Second District, Division 2, California. March 4, 1929.

1. Automobiles ⚷244(5, 14)—Evidence held not to show inadequacy of steering wheel or driver's negligence in not completely controlling truck struck by overtaking automobile trailer (Motor Vehicle Act, § 125).

Truck driver's testimony that trailer of automobile passing truck from rear at street intersection, contrary to Motor Vehicle Act, § 125 (St. 1923, p. 557), caught left front wheel of truck, jerking steering wheel from driver's hand and so numbing hand that he was unable to apply brakes promptly, *held* not to show that steering wheel was inadequate or that he was negligent in not keeping truck under complete control, instead of diverting its course into automobiles, standing before and within garage, to avoid hitting women and children at barbecue stand.

2. Automobiles ⚷244(35)—Evidence held not to show that truck was being driven at negligent rate of speed when struck by overtaking automobile trailer.

Evidence that truck was going not over 15 miles per hour when struck by trailer of automobile passing it from rear, causing driver to lose control and divert its course from highway down incline toward garage, owners of which did not notice it until then, *held* not to show that it was being driven at negligent rate of speed at time of impact.

3. Negligence ⚷12—One suddenly thrown into unexpected plight is not required to use best judgment possible under ordinary circumstances.

A person suddenly thrown into an unexpected plight is not required to use the best judgment possible as measured under ordinary circumstances.

4. Automobiles ⚷155—Trespass held not to support recovery for injuries to automobiles struck by truck leaving highway as result of collision with overtaking automobile trailer (Motor Vehicle Act, § 125).

Trespass on garage premises by truck, leaving highway when driver lost control as result of collision with trailer of automobile, passing it from rear at street intersection contrary to Motor Vehicle Act, § 125 (St. 1923, p. 557), would not support recovery for injury to automobiles standing in front of and within garage.

5. Automobiles ⚷242(2)—Res ipsa loquitur doctrine held inapplicable in action for damages to automobiles struck by truck leaving highway as result of collision with overtaking automobile trailer.

Res ipsa loquitur doctrine *held* not controlling in action for damages to automobiles, standing in front of and within garage when struck by truck, which left highway when driver lost control as result of collision with trailer of automobile passing it from rear.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Roy Staples against the L. W. Blinn Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. S. Williams, of Los Angeles, for appellant.

John B. Haas and John D. Home, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem. The plaintiff below, who is the respondent here, was the owner and operator of a garage located on the westerly side of a main thoroughfare known as Harbor boulevard, which runs from the center of the city of Los Angeles to the harbor. The garage was set back from the pavement line something like 10 feet. About even with the southerly wall of the building, but on the street line, is a small restaurant or barbecue stand. A Paige automobile, used as a towcar in connection with the business of the garage, was standing in front of and close to the garage. The Riverside-Redondo boulevard, sometimes called the Compton-Redondo boulevard, crosses Harbor boulevard just a few feet north of the garage herein referred to. Defendant's lumber truck with trailer was traveling southerly along the westerly side of Harbor boulevard, and, while in the intersection of the two boulevards referred to, an automobile with trailer, coming up from the rear, attempted to and did pass the truck on its left side. Other cars at the time were approaching the intersection from the south, and still others were a short distance back of the automobile and trailer. The automobile with trailer swerved back into its right side of the road too quickly to completely clear the truck, and the right side of the trailer struck the left front hub of the truck. The latter vehicle left the pavement, turned to the right and, describing an arc, plunged head-on into the Paige car, damaging it as well as two Ford cars not belonging to plaintiff, standing just within the garage.

Plaintiff recovered judgment in the superior court for the damages to all three cars, with damages for certain business losses occasioned by the wreck of the towcar. Defendant has appealed to this court and asks a reversal of the judgment on the ground that no negligence on the part of defendant was shown, and further that, since the two Ford cars did not belong to plaintiff, he could not recover for their damage without showing an assignment of interest to him. It may be stated without further consideration that plaintiff has shown no right to recover for the damage to the Fords. We shall next consider the question of negligence.

Plaintiff bases his claim of negligence upon two points: (1) That the truck was traveling

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

faster than the law allows, and (2) that the truck's steering wheel was not the proper size for the handling of the machine in such an emergency. Several witnesses, driving along the highway at the time, place the truck's speed at the rate of 10 to 15 miles per hour immediately before it was struck by the trailer. Plaintiff testified that he did not see the truck leave the pavement, but did see it just before it hit the Paige car. He estimated the speed of the truck at about 18 or 20 miles per hour. He heard no brakes applied and saw no skid marks. The truck driver told him that, rather than run into the barbecue stand, where there were women and children, he had turned into the garage. The land in the vicinity of the accident slopes from the pavement downward to the garage. Claude Staples, a brother of plaintiff, testified that he saw the truck leave the pavement, and estimated its speed at that time to be in excess of 20 miles per hour; that it was at first headed for the barbecue stand, but turned to the right, directly into the Paige car; and that the truck driver told him that he had been "hubbed" and that this pulled the steering wheel out of his hand—that he couldn't hold it with that sized wheel. Defendant's garage foreman testified that the truck, including engine and brakes, was in good repair, and that it was equipped with an automatic governor which limited its speed to 15 miles an hour. After the accident, he found the left front wheel hub cap smashed and the front wheels out of line. On cross-examination he said that the governor would not function with the clutch in neutral.

The testimony of the truck driver as to the accident was as follows: "As I was entering the intersection of Compton and Harbor boulevard I slowed down to within six or eight miles an hour, and as my truck was passing the southern line of the intersection a car with a two-wheel trailer came out from behind passing me in the intersection, cutting ahead, the trailer catching left front wheel of my truck, jerking the wheel out of my hand, turning my truck with right angles with the road, throwing it down the slope into two cars standing before a garage, smashing the two cars. As the car struck the wheel and jerked the wheel from my grasp, numbing my hand to the extent that I was unable to apply the brake promptly. The truck proceeding five or ten feet before I was able to set the brakes. Upon seeing that I would be unable to straighten the truck up in time to avoid hitting a small restaurant and knowing there were women waitresses in the restaurant I allowed the truck to go into the cars in preference to striking the restaurant, and at the same time using every effort to stop the truck before it struck the cars." The truck ran about 100 feet from the point of impact with the passing trailer to the point of collision with the towcar.

Plaintiff claims that the truck was being operated at an unlawful rate of speed, which constituted prima facie negligence, and cites section 118(b) of the California Motor Vehicle Act, Statutes 1923, c. 266, tit. 9. But we cannot apply this section, for the reason that its application is premised upon certain conditions such as the carrying capacity of the truck, its equipment as to tires, etc., and none of these conditions is covered by the evidence. The question to be determined is then simplified to this: Is there substantial evidence in the case to the effect that the truck was being driven negligently, or was the truck negligently equipped or conditioned? If there is substantial evidence of negligence, either as to the operation of the truck or as to its equipment or condition, did such negligence proximately contribute to the injury?

[1] There does not appear to be any circumstances which would indicate negligence in the operation, equipment, or condition of the truck at the time of the impact of the passing trailer, unless it can be found in the evidence that the truck's steering wheel was inadequate or that the truck's speed was so excessive as to be a proximate cause of the injury. There is no evidence but that the steering wheel was of standard size, and the testimony regarding the wheel amounts to no more than an expression by the truck driver that under these unusual circumstances he could not control the truck with it. It must not be overlooked that the driver also testified, in close connection with the steering wheel testimony, that his hand was benumbed by the impact. It was, of course, the driver's duty to so handle his machine as to keep it under control, but it is going too far to say that he must so handle it that, when hit as he was hit, he must even then be able to keep it under complete control. Certainly, he is not required to anticipate such an accident, and least of all within an area where overtaking and passing another car is prohibited by law.

Section 125 of the Motor Vehicle Act reads in part as follows: "Overtaking a vehicle. (a) Any vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again be driven to the right side of the highway until reasonably clear of such overtaken vehicle. * * * (c) The driver of any vehicle shall not drive the same so as to pass or overtake any other vehicle going in the same direction at any intersection of public highways unless directed so to do by a traffic or police officer nor upon a curve where the driver's view along the highway is obstructed within a distance of one hundred and fifty feet."

[2] The only evidence as to the speed of the truck before and up to the moment it started to leave the pavement immediately after the impact of the passing trailer is that the truck

was going not to exceed 15 miles per hour. Neither of the Staples brothers noticed the truck before it was in the act of leaving the highway and starting down the incline toward the garage. It is but natural that the truck, out of control and going down grade, would increase rather than diminish speed. We think there is an entire lack of substantial evidence to support the theory that the truck was being driven at a negligent rate of speed when the impact on the highway occurred.

[3, 4] Observing that women were in imminent danger of life and limb, the truck driver managed, under stress of great surprise and danger to himself and with a benumbed hand, to divert the truck's course so as to avoid a catastrophe. He did more than might well have been expected of him. It is so well known that authorities need not be cited that a person suddenly thrown into an unexpected plight is not required to use the best judgment possible as measured under ordinary circumstances. We do not think there was any proof of negligence on the part of the truck driver. We are not at all sure that the trial judge thought so either, for a remark from him in the course of the trial would indicate that he thought the trespass would support a recovery for the injury. The mere mention thereof outside the stress of trial, of course, demonstrates the error in this.

Plaintiff cites the old "Squib" Case, and argues that it favors his contention here. Again but a moment's consideration of the Squib Case reveals it on all fours authority for the liability of the driver who collided with the truck and sent that vehicle out of control, and for the vindication of the truck driver who so unwillingly was caused to assume the role of the innocent but damaging squib.

[5] What we have already said effectively disposes of plaintiff's claim that the doctrine of res ipsa loquitur is controlling in this case, and no further comment relative thereto is required.

The judgment is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

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97 Cal. App. 321

PEOPLE v. LEE. (Cr. 1525.)

District Court of Appeal, First District, Division 2, California. March 1, 1929.

1. Insane persons 🔑86—Order confining to state hospital defendant found insane when committing offenses, reciting that it did not appear that defendant recovered sanity, held valid (Pen. Code, § 1026, as added by St. 1927, p. 1149, § 4; Motor Vehicle Act, § 146).

Where defendant was convicted of violating Motor Vehicle Act, § 146 (St. 1923, p. 564), and of grand theft, and found to have been insane at time offenses were committed, order of court reciting that it did not appear that defendant had fully recovered sanity and directing that defendant be confined to state hospital, was in compliance with Pen. Code, § 1026, as added by St. 1927, p. 1149, § 4.

2. Criminal law 🔑1104(3), 1105(1)—Appellate court cannot act on fragmentary transcription of reporter's notes not properly authenticated nor proper part of clerk's transcript.

District Court of Appeal cannot act on fragmentary transcription of reporter's notes where not properly authenticated and having no proper place in clerk's transcript.

3. Criminal law 🔑570(1)—Certificate reciting defendant's discharge from state hospital held merely prima facie evidence of mental condition at trial of defendant found insane when committing offense (Motor Vehicle Act, § 146).

Where defendant, convicted of violating Motor Vehicle Act, § 146 (St. 1923, p. 564), and of theft, was found to be insane when offenses were committed, and court directed that defendant be confined to hospital, it not appearing that he recovered his sanity, certificate of medical superintendent of state hospital appearing in unauthenticated transcription of reporter's notes, reciting that defendant was discharged as recovered, was merely prima facie evidence of defendant's mental condition at time of trial.

4. Criminal law 🔑1144(13)—Where order recited defendant appeared insane at trial, but certificate of medical superintendent showed sanity, it must be presumed that additional evidence was offered to support order.

Where defendant was convicted of offense, but found insane when committing offense, and certificate of medical superintendent of state hospital was prima facie evidence that defendant was sane at trial, it must be presumed on appeal in support of order confining defendant to hospital because it did not appear that defendant recovered sanity, that additional evidence was introduced showing defendant had not recovered sanity.

5. Criminal law 🔑1023(11) — Order directing defendant's confinement in state hospital held not appealable; remedy being by habeas corpus (Pen. Code, § 1237, § 1026, as added by St. 1927, p. 1149, § 4, and § 1026a, as added by St. 1927, p. 1148).

Order directing that defendant, found insane when committing offenses and at time of trial, be confined in state hospital, *held* not an appealable order under Pen. Code, § 1237, but defendant's remedy under section 1026, as added by St. 1927, p. 1149, § 4, and section 1026a, as added by St. 1927, p. 1148, was by proceeding in habeas corpus.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Francis E. Lee was convicted of violating the Motor Vehicle Act, § 146, and of grand theft, and found to have been insane at time of committing the offenses, and he appeals. Appeal dismissed.

F. W. Sawyer, of San Francisco, and Marlowe Bumpus, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant charging the defendant with the commission of a wrongful act expressed in two counts. In the first count he charged the violation of section 146 of the Motor Vehicle Act (St. 1923, p. 564), and in the second count he charged the commission of grand theft. The defendant entered a plea to each count by pleading not guilty and also not guilty by reason of insanity. A trial was had before the court sitting with a jury. The jury returned a verdict in four parts, finding the defendant (1) guilty under the first count; (2) that he was insane at the time the offense charged was committed; (3) guilty under the second count; and (4) that he was insane at the time the offense charged was committed. When the defendant was arraigned for judgment, after having ruled on all motions and objections why judgment should not be pronounced, the court stated: "The defendant having been convicted by the verdicts of the jury of the crime of grand theft and also a violation of section 146 of the California Vehicle Act, and the jury after trial having rendered its verdict finding that the defendant was insane at the time of the commission of the two offenses, and it not appearing to the court that the defendant has fully recovered his sanity, and it further appearing to the court there is no state hospital for the criminally insane, now, therefore, it is the judgment of this court and it is ordered, adjudged and decreed, and directed that the said defendant be confined in the Mendocino State Hospital, located at Talmadge, California, for the time and in the manner prescribed by law. It is further ordered, adjudged and decreed that the sheriff of the County of Alameda deliver said defendant to the superintendent of the Mendocino State Hospital, located at Talmadge, California, and that said superintendent confine said defendant at said hospital as prescribed by law and in pursuance of this judgment." From that judgment or order the defendant has attempted to appeal, bringing up what purports to be the judgment roll certified by the county clerk, but neither in whole nor in part attested by the affidavit of the reporter, nor certified in whole nor in part by the certificate of the trial judge.

[1-4] The appellant makes one point, and that is to the effect that he has been tried for a felony, acquitted by reason of his insanity, but nevertheless imprisoned in a state hospital instead of a state penitentiary, and that under the facts he should have been dismissed. At this point it should be stated that pages 10 to 15 of the clerk's transcript appear to be a transcription of the notes of the reporter of the proceedings had when the trial court made the order or judgment hereinabove set forth. On the date last mentioned it will be noticed that the trial court recited in its order, "it not appearing to the court that the defendant has fully recovered his sanity." Such being the case, the order made by the trial court was in exact compliance with the statute. Pen. Code, § 1026 (as added by St. 1927, p. 1149, § 4). However, the defendant picks up the unauthenticated transcription of the reporter's notes and reads therefrom what purports to be a certificate of a medical superintendent of a state hospital to the effect that the defendant was discharged October 19, 1928, as recovered. Whatever might have been the mental condition of the defendant June 22, 1928, the date of the alleged offense, or at any time thereafter, he argues that the last expression on the subject was that contained in the certificate of the medical superintendent. The error in this position rests in this, we are not entitled to act on the fragmentary transcription of the reporter's notes because it is not properly authenticated and furthermore has no proper place in the clerk's transcript. Giving the defendant the fullest benefit of the information therein contained, all we can say is that the certificate is but prima facie evidence of the mental condition of the defendant at the time of the trial, and, nothing to the contrary appearing, in support of the order of the trial judge, we are bound to presume that other and additional evidence was introduced showing, or tending to show, that at the time of the trial it did not appear to the trial court "that the defendant has fully recovered his sanity."

[5] The respondent contends that the order or judgment entered on November 23, 1928, is not an order or judgment from which the defendant is entitled to appeal. Pen. Code, § 1237. The only authority that seems to be closely in point is Rex v. Machardy, (1911) 2 K. B. 1144, Ann. Cas. 1912A, 461. The analogy between the two cases is very close. The case cited was determined by the Court of Criminal Appeal in England. After a careful examination, the court reached the conclusion that such a judgment or order is not in any proper sense a judgment of conviction, but that it is in the nature of an order in relief of the prisoner. Although such orders are not appealable, it has been held in other jurisdictions that the remedy of the prisoner is to apply for a writ of habeas corpus. In re Crosswell, 28 R. I. 137, 66 A. 55, 13 Ann. Cas. 874. These views are emphasized when section 1026a of the Penal Code (as added by St. 1927, p. 1148), which was enacted on the same day, is read in connection with section 1026 of the Penal Code. The former shows that the remedy is and was intended to be a proceeding in habeas corpus. It expressly so provides, but it also provides that that remedy may not be invoked until the confinement

has continued one year. We may presume that when the defendant selected the pleas, which he later interposed, he did so with all of these provisions of the statutes in mind.

For the reasons stated, the appeal is dismissed.

We concur: KOFORD, P. J.; NOURSE, J.

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97 Cal. App. 296

LAS POSAS WATER CO. v. VENTURA COUNTY. (Civ. 6206.)

District Court of Appeal, Second District, Division 1, California. March 1, 1929.

1. Deeds 🔑90—Rule that whole of contract must be taken together, so as to give effect to every part, held applicable to deed (Civ. Code, § 1641).

Rule, under Civ. Code, § 1641, that whole of contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other, *held* applicable in construing deed.

2. Deeds 🔑90, 124(3)—Grant must be interpreted in grantee's favor, and modifying clause in deed of doubtful import will not cut down fee contemplated by granting clause (Civ. Code, § 1069).

Under Civ. Code, § 1069, a grant must be interpreted in favor of grantee, and where there is an asserted modifying or limiting clause in deed, if such clause is of doubtful import, fee contemplated by granting clause of deed will not be cut down.

3. Deeds 🔑124(3)—Habendum clause, referring to public highway, held not restriction on clause quitclaiming fee title to county.

Words in habendum clause of deed granting strip of land to county, stating that grantee, its successor and successors, should hold forever "as public highway," *held* not a restriction or limitation on clause quitclaiming fee title.

4. Highways 🔑80—Statute providing that, by accepting land for highway, public acquire only right of way, does not refer to fee title to land (Pol. Code, § 2631).

Pol. Code, § 2631, providing that, by taking or accepting land for highway, public acquire only right of way and incidents necessary, etc., simply means that, by taking or accepting an easement over land for a highway, the public acquire only a right of way, etc., and statute has no reference to fee title to land which is servient to easement.

5. Highways 🔑80—County may hold fee title to land over which highway runs, while public own easement for highway (Pol. Code, § 2639).

Under Pol. Code, § 2639, county may hold fee title to land over which highway runs, while public or people of state own easement or right of way for highway.

6. Highways 🔑80—Deed quitclaiming to county strip of land, together with tenements, hereditaments, and appurtenances, to have and to hold forever as public highway, conveyed fee as well as easement for road purposes.

Deed quitclaiming strip of land described, together with all tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, to have and to hold all and singular the premises, together with appurtenances, unto grantee, its successor and successors, forever, as public highway, *held* to convey fee to county as well as easement for road purposes.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action to quiet title by the Las Posas Water Company against the County of Ventura. From the judgment, plaintiff appeals. Affirmed.

Farrand & Slosson, of Los Angeles, for appellant.

Edward Henderson and James C. Hollingsworth, both of Ventura, for respondent.

CRAIL, Justice pro tem. The sole question presented for the determination of the court is whether the defendant, by the deed herein described, acquired the title in fee to the strip of land in controversy or only an easement for road purposes. Defendant's rights therein were acquired by deed executed and delivered to it on the 6th day of April, 1889, by the then owners of the property through which the strip runs. About three years later the same grantors granted to appellant a right of way over the same strip, together with a right to enter upon, use, and enjoy the same, in the operation, maintenance, repair, extension, and use of its water distribution system.

The question is whether the first-mentioned deed conveyed to defendant the fee to the land described in the deed or only an easement for road purposes. The trial court held that it conveyed the fee. It is the contention of the appellant that only an easement for a public road was granted by this deed, and therefore the owners of the land over which the strip runs had a right to subsequently grant the right of way to appellant for its pipe lines subject to the right of way for road purposes previously conveyed to respondent.

The granting part of the deed to defendant reads as follows: "Witnesseth, that the said parties of the first part * * * have remised, released and forever quitclaimed, and by these presents do remise, release and forever quitclaim, unto the said party of the second part, and its successors, all that certain strip or parcel of land situate, lying

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and being in the said county of Ventura, state of California, and particularly bounded and described as follows, to wit: A strip of land 60 feet wide; that is, 30 feet on either side of the following described line: [Then follows description.] The total length of the road described in the foregoing field notes is 19 miles, 18 chains, and 47 links * * * Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances."

The habendum clause reads as follows: "To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, its successor and successors, forever, as a public highway."

It is appellant's contention that the use in the instrument of the words "the road," and the use in the habendum clause of the words "as a public highway," indicated an intention of the grantors simply to convey an easement to the county for highway purposes and not to grant the fee, and, furthermore, that under section 2631 of the Political Code, it appearing on the face of the instrument that the strip therein described was for road purposes, that all the respondent could take by virtue of the deed, regardless of rules of construction, was an easement for highway purposes.

[1, 2] The following rules of construction, among others, are applicable: The whole of a contract is to be taken together, so as to give effect to every part if reasonably practicable, each clause helping to interpret the other (Civ. Code, § 1641); a grant is to be interpreted in favor of the grantee (Civ. Code, § 1069); where there is an asserted modifying or limiting clause in a deed if such clause be of doubtful import the fee contemplated by the granting clause of the deed will not be cut down (Cooper v. Selig, 48 Cal. App. 228, 191 P. 983; 9 Cal. Jur. 254).

In the case of Cooper v. Selig, supra, the court construed a somewhat similar deed. This deed was in the usual form of a grant, bargain and sale deed, but provided in the habendum clause that it was "for the purposes of a public road of said city." After reviewing the authorities in California and elsewhere, the following language is used: "While the case is not free from difficulty, yet we think, the recital of the purpose for which the land was to be used should have no greater force than if the grantee in consideration of the conveyance had promised to use the land for the purposes of a highway. If such had been the case, it would not be disputed, in view of the decisions, that the promise to so use the land would be construed as a covenant and not a condition, and the fee would not thereby be affected, in the absence of a stipulation for forfeiture and re-entry."

[3] Appellant contends that some effect must be given to the words "as a public highway." These words indicate the use to which the land should be put, and they are not at all inconsistent with a conveyance of the title in fee. The land could be used "as a public highway" equally as well, whether a fee or a mere easement was conveyed. As we view it, the words in the habendum clause are not a restriction or limitation upon the clause which quitclaims the fee title. The granting clause could hardly have been clearer in expressing an intent to remise, release, and quitclaim the whole fee title, rather than a mere easement. In fact, an inspection of the clause as quoted above will disclose that words are used which are inconsistent with an intention to convey a mere right of way over the land described. Some effect must be given to these words. They must not be treated as mere surplusage, if reasonably practicable to give effect to them. Certainly this is so where the words relied upon by appellant are of doubtful import, and lend themselves as readily to the idea of an expression of the use to which the land is to be put as to the idea of a limitation upon the fee. In construing the instrument, we should not overlook the fact also that, if the grantors really intended to convey only an easement, they could easily have so expressed their purpose, and that the grant is to be interpreted in favor of the grantee.

[4] Finally appellant relies upon section 2631 of the Political Code, which reads as follows: "*The Public Easement.* By taking or accepting land for a highway, the public acquire only the right of way, and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this and the Civil Code provided." It has been said that this section is only the formulation of the general rule laid down in the books and decided cases, when treating of highways as easements. Wright v. Austin, 143 Cal. 236, 76 P. 1023, 65 L. R. A. 949, 101 Am. St. Rep. 97. It is not new law, but simply means that, by taking or accepting an easement over land for a highway, the public (the people of the state) acquire only the right of way, etc. It should be borne in mind that this section has no reference to the fee title to the land, which is servient to the easement. The fee title may belong to the owner of the adjacent property, or it may belong to one who owns only the property which is subject to the easement itself. It may be owned by a private individual or corporation, or by the county, or by the state.

[5] It has been held that, while the custody

and control of highways outside of municipalities are confined to the supervisors of the several counties in which they are located (Pol. Code, § 2639; People v. County of Marin, 103 Cal. 223, 37 P. 203, 26 L. R. A. 659), the highways do not belong to the county, but to the people of the state (Slayden v. O'Dea, 182 Cal. 500, 189 P. 1066). By "highways" in this connection is meant the easement, not the fee. The state does not hold such easements in the same right as the title to land which it has purchased. On the contrary, it holds them in trust for the public use, and consequently there is no merger of the easement in the servient tenement, even when the state acquires title to the fee. People v. County of Marin, supra. It is obvious, when the above distinctions are recalled, that there is nothing inconsistent in fact, and nothing contrary to said section, in the county of Ventura holding the fee title to the land over which the highway runs, while the public, or people of the state, own the easement or right of way for a highway.

[6] From the above considerations, we are of the opinion that the deed conveyed the fee to the land described therein, as well as an easement for road purposes. No mention is made in the briefs filed by the respective parties herein of section 2623 of the Political Code, which is in the same chapter with the section upon which appellant relies, and which provides in part that "each county shall be deemed to have acquired title to any road opened over any land in conformity to any order made by its board of supervisors pursuant to this chapter after one year shall have elapsed from the time of making the order opening the road." And as the record on appeal does not show that such an order opening the road was or was not made, we have not taken this section into consideration.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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97 Cal. App. 329

BREWIS v. TOFFELMIER et al.★

(Civ. 6515.)

District Court of Appeal, First District, Division 1, California. March 2, 1929.

Rehearing Denied April 1, 1929. Hearing Denied by Supreme Court April 29, 1929.

1. Conspiracy ⚷19—In action for conspiracy to defraud in stock sale, evidence supported finding that sale was made after issuance of permit.

In action for damages for fraudulent representations in sale of stock, made pursuant to conspiracy, evidence *held* sufficient to support finding that stock was sold after issuance of permit by commissioner of corporations.

2. Conspiracy ⚷21—Failure to show purchaser of corporate stock copy of permit to sell it held not as matter of law to authorize recovery for fraudulent conspiracy in sale.

Failure to show purchaser of corporate stock copy of permit to sell such stock *held* not as matter of law to entitle purchaser to recover for fraudulent representations in sale pursuant to conspiracy, although purchaser in such case has remedy of rescission.

3. Conspiracy ⚷19—In action for damages for fraudulent misrepresentations in stock sale, pursuant to conspiracy, evidence supported finding for defendants.

In action for damages for fraudulent misrepresentations in sale of corporate stock, made in pursuance of conspiracy entered into by defendants, evidence *held* sufficient to support finding for defendants, where there was conflict as to claims of fraud, and there was showing that plaintiff did not rely on representations made.

4. Conspiracy ⚷9—In action for fraudulent misrepresentations in stock sale pursuant to conspiracy, plaintiff cannot base claim on misrepresentation in prospectus not given her by defendants and not inducing sale.

In action for damages through fraudulent misrepresentations in stock sale, pursuant to conspiracy entered into by defendants, plaintiff cannot claim under contention that misrepresentation in printed prospectus was continuing, unaffected by withdrawal of prospectus in absence of notice, where prospectus was not given her by any of defendants and she disclaimed having bought because of it.

5. Appeal and error ⚷1011(1)—In action for misrepresentations made pursuant to conspiracy, finding as to defendants' statements held conclusive on conflicting evidence.

In action for damages for fraudulent misrepresentations in stock sale, made pursuant to conspiracy entered into by defendants, finding of trial court is conclusive under conflicting evidence as to statements made by defendants.

6. Fraud ⚷20—To recover for fraudulent misrepresentation, plaintiff must have relied on it.

In order to recover for fraudulent misrepresentation it must be shown that party claiming relief must have believed in and relied on it.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Marian F. Brewis against J. C. Toffelmier and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Edwin H. Williams, of San Leandro, for appellant.

J. M. Koford and Roscoe D. Jones, both of Oakland, for respondents.

BARNARD, Justice pro tem. In this action recovery is sought for damages claimed to have been suffered by plaintiff through certain fraudulent misrepresentations, alleged to have been made in pursuance of a

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★Rehearing denied. Hearing denied by Supreme Court.

conspiracy entered into by defendants. The complaint alleges that defendants were interested in the ownership of stock in the San Leandro Canning Company, which company owned certain assets, including a canning plant and a stock of finished canned goods. That said plant had been operated at a loss during the year 1920, and said company was at all times after November 15, 1920, in a failing condition and unable to meet its bills. That the defendants, well knowing said conditions, entered into a conspiracy to organize another company for the purpose of taking over the old company at a price far in excess of its value, and to sell stock in the new company to plaintiff and others at an inflated valuation, to the end that they might dispose of the old company, notwithstanding its insolvency, at a great profit. That, in pursuance of this conspiracy, defendants organized the San Leandro Canning Company, Inc., became the majority of its board of directors, and controlled all of the acts and business of the new corporation. That on November 17, 1920, defendants represented to the commissioner of corporations that the old company possessed assets of the value of $135,000 over its debts, including $132,500 worth of finished canned goods on hand, and secured a permit allowing the new company to take over the old company and permitting the sale of stock in the new company.

It is further alleged that after said takeover defendants issued and caused to be delivered to plaintiff a printed prospectus, representing, in brief, that although 1920 was a bad year in the canning industry, the old company in six weeks of operation had made a net profit of over 10 per cent.; that the new company was in a sound and solvent condition, and that the directors were themselves selling the stock to save for the company the amount of the usual broker's commissions; that defendants, in pursuance of said conspiracy, caused two of their number to call on plaintiff on December 22, 1920, after said permit to sell stock was issued and after she had received a copy of said prospectus, and caused them to represent to her that the old company had made a large profit in 1920 from the sale of its entire stock of finished canned goods; that the new company was in a sound condition; that many wealthy local people had invested in the stock; and that the new company had taken over the old company because its business was profitable, and they desired further capital for expansion, and for no other reason. It is then alleged that each of said representations was false, was known to the defendants to be false, and was made for the purpose of defrauding plaintiff; that, in pursuance of the conspiracy, no copy of the corporation commissioner's permit was ever shown or delivered to plaintiff; that plaintiff believed and relied upon the representations aforesaid, and paid $3,000 for 30 shares of said stock, to her damage in that amount, the same being valueless. And that in March, 1922, plaintiff, for the first time, discovered the falsity of said representations and the facts showing said conspiracy.

In their answer defendants denied having made any of the misrepresentations alleged, and denied all allegations of conspiracy. Among other things, the court found that none of the defendants had entered into any conspiracy, and that no acts or things were done pursuant to any conspiracy whatever; that at the time of the takeover the old company possessed assets of over $135,000 in excess of its liabilities; that its stock of finished canned goods was then of the value of $132,500.02; that its entire stock of canned goods had been sold "subject to approval of price," and that this was at that time the usual method in the industry; that a profit of $12,605.71 had been made in 1920; that at the time the prospectus was issued it was the intention to sell stock in the new company without the payment of broker's commissions, but the attempt to do so proving unsuccessful, the prospectus was withdrawn on November 17, 1920; that the only commissions paid were in accordance with the permit issued by the commissioner of corporations; that the stock purchased by plaintiff was at that time worth its face, and that no representation made by any defendant was false when made. This appeal is from the judgment in favor of defendants, based on the findings.

As will be noted, this action is not one based on rescission, and is not against the corporation, the salesmen who sold the stock, or the board of directors. It is brought against certain individuals who constituted a part of a board of directors of a corporation, and is based entirely on the theory that the defendants entered into a conspiracy to make the alleged misrepresentations and defraud the plaintiff. While the charge of conspiracy makes necessary an examination of all the facts and circumstances, including the misrepresentations claimed, it must be kept in mind that each misrepresentation charged is to be considered, not as such a charge against the particular individual involved in each separate instance, but in the light of its effect on the general charge of conspiracy. Of necessity, the decision of this case involves much more comment on facts than on law.

[1] It is urged that the evidence shows that the corporation stock in question was sold prior to the issuance of a permit by the commissioner of corporations, and for that reason, under authority of Boss v. Silent Drama Syndicate, 82 Cal. App. 109, 255 P. 225, this case must be reversed. The permit to sell stock was issued on December 13, 1920. Considerable evidence was introduced seek-

ing to prove the purchase of plaintiff's stock at an earlier date. But the complaint alleges that the representations leading to the purchase were made "after said permit was issued as aforesaid." And the plaintiff testified that the first conversation she had with any one about the company was on December 22, 1920, and that she signed the subscription agreement on that day. The evidence sustains the finding of the court that the plaintiff subscribed for the first of her stock on December 22, 1920, and the rest in March, 1921.

[2] The most serious question of law involved in this appeal arises from the fact, as properly found by the court, that no copy of the corporation commissioner's permit to sell stock was shown or delivered to plaintiff prior to the purchase by her of the stock in question. The permit, under which the sale was made, was in the usual form, and required that this be done. It is strenuously urged that, on the authority of Boss v. Silent Drama Syndicate, supra, and Otten v. Riesener Chocolate Co., 82 Cal. App. 83, 254 P. 942, this not only renders the sale void, but permits the plaintiff, without rescission, to recover damages for fraud. The principles laid down in Boss v. Silent Drama Syndicate do not apply here, the court having found on sufficient evidence that the stock was not sold prior to the issuance of a permit. Otten v. Riesener Chocolate Co. held that, where a permit has been issued, but a copy thereof has not been shown or delivered to the purchaser, the contract of sale is void, and a rescission may be had. Apparently this remedy was available to the plaintiff in the instant case, subject to the usual rules in such cases. However, this last case is not authority for the proposition that in such a case as this, without rescission, a plaintiff is entitled to recovery, as a matter of law.

Under the rule laid down in Boss v. Silent Drama Syndicate, where stock has been sold before a permit has been issued, an action for damages may be maintained against the vendor company and its officers, on the ground that such an issue of stock is virtually a representation by the company and its officers that the stock is valid, when, in fact, it is void and nonexisting. To hold that this same reasoning applies to a case where the permit has been issued, and where the stock itself may be properly issued, but where the permit has not been complied with, in that a copy thereof has not been shown to the purchaser, would be an extension of this rule requiring careful consideration. Such an extension of the rule is not necessary to protect the purchaser, as he has an ample remedy in his right of rescission. Otten v. Riesener Chocolate Co., supra. His stock is not something that does not exist, as in the other case, but is properly issued, even if not properly delivered, and to so extend the rule would be to permit him to sue for damages, in the amount of what he had paid, while still retaining the stock actually bought, and presumptively worth what he paid for it. We think that such is not the law, but that in such a case the purchaser is confined to his remedy of rescission, with full protection to himself and no injustice to the vendor.

If it be assumed, however, that the rule in Boss v. Silent Drama Syndicate should be thus extended, it would still not be controlling in this case. Even if it should be held that such a fraud, as may be said to arise from a constructive misrepresentation that shares of stock are valid when in fact they are nonexistent, also arises in a case where a permit to sell exists, but a copy of the same is not shown or delivered to the buyer, and that, therefore, an action for damages, as well as one for rescission, would lie, still it would be quite another thing to hold that this applied or was controlling in such an action, not against the company or corporation, and its officers, but against a selected list of part of the directors of such a company, especially where, as in this case, it is set up not as a direct allegation against the parties to the particular acts complained of, but as a part of general charges of conspiracy. In our opinion, the failure to show to the purchaser a copy of the permit to sell stock, under the pleadings herein, does not as a matter of law entitle plaintiff to recover, but is only one matter for consideration in relation to the charge of conspiracy.

A large part of appellant's contentions relate to certain claimed misrepresentations appearing in various advertisements in newspapers and on moving picture screens to the effect that a 10 per cent. dividend had been paid by the old company in 1920. The facts in this regard were not pleaded, and were admitted in evidence only as going to show the intent, or existence of a conspiracy. At most, their publication was brought home only to one or two of the defendants, and not very definitely as to them.

[3] Another very considerable part of such claimed misrepresentations centers about the printed prospectus above referred to, which is alleged to have been delivered to the plaintiff by the defendants. But the plaintiff testified she received it from her brother, and not from the defendants. In any event, she testified: "I did not make the investment because of the prospectus." The case is practically reduced to such misrepresentations as it is claimed were made to plaintiff orally, and in pursuance of the conspiracy alleged.

The most important of these, and, indeed, the gist of this action, is the claim that plaintiff was deceived by being told that the company had made a net profit of over 10 per cent. the preceding year; that the finished canned goods on hand were of the value of $132,500, and were all sold; and that the company was in a sound and solvent condition. The record contains evidence that at the time of the takeover the liquid assets of the company were over $28,000 more than its current liabilities; that its capital was then intact with a surplus of $37,827.58; and that a profit of $12,605 had been made the preceding season on a capital of less than $100,000. The evidence further shows that the entire stock of finished canned goods on hand had been sold, and were awaiting shipment, it being true, however, that these had been sold "subject to approval of the price," which is shown, without contradiction to have been the usual practice in the canning industry at that time. These facts and figures are bitterly assailed, and it is apparent that the contrary views held by appellant on these points are responsible for this controversy. The evidence shows that these canned goods had been sold in the manner just noted; that they were carried on the books at the list prices issued in 1920 by the California Packing Corporation; that the above valuation was in accordance with those prices; that as rapidly as possible they were then being delivered, and continued to be delivered for months later, at those prices; that during all of this time these goods were considered by all of the defendants to be of that value, and as having been sold; that subsequently the market dropped and various buyers canceled their orders, and a new list was received on May 9, 1921, showing a radical reduction in price; and that while some of the goods were delivered, the market continuing to drop, a large quantity remained on hand at a great depreciation in value. With the dropping of prices and the canceling of the orders, the company became unable to pay its debts. About March, 1922, or soon after, the defendants resigned from the board of directors of the company, a new board took charge, and shortly thereafter the canning plant was sold for the debts. Appellant sees in these facts conclusive proof that defendants knew in December, 1920, and in March, 1921, what was soon to take place, and insists that the only conclusion to be drawn therefrom is that defendants conspired together to get from under a disastrous situation, by defrauding plaintiff and others through selling them stock in the enterprise. But the inference can also be fairly drawn from these and other facts in evidence that appellant is trying to put back into 1920 conditions that developed in 1921, and later. No proof of advance knowledge on the part of defendants, or any of them, is shown by the record, other than the inference appellant would draw, as above stated. And any conflict in the evidence, or any legitimate inference therefrom, has been by the trial court resolved in favor of defendants.

[4, 5] An additional misrepresentation urged is a statement in the printed prospectus that no commissions would be paid for the sale of stock in the company, whereas commissions were actually paid. The defendants testified that, after a trial, this plan failed, and distribution of the prospectus ceased, and arrangements to pay commissions were made. Appellant's contention, that this was a continuing misrepresentation, unaffected by any withdrawal of the prospectus in the absence of notice to her, is of no avail, because the prospectus was not given her by any of the defendants, and she disclaims having bought because of it. It is true her testimony is that she was told the same thing by defendant Faustina, but he denied this, and the finding of the court is conclusive on that point. We may also add our doubt whether this is a material false representation, in any event. San Leandro Canning Co., Inc., v. L. Perillo, 84 Cal. App. 635, 258 P. 670.

Again, it is urged that she was told by one of defendants that new capital was being sought for the purpose of expanding the business of the company, whereas later it developed that the money was used to pay debts. If this be true, at that time (December, 1920) apparently all parties thought the returns from the sale of canned goods would take care of all debts, and there is no evidence that the intention in selling stock was not to provide for such expansion. While such a statement might have seemed more questionable in March, 1921, when plaintiff purchased her last stock, even then the original list prices were still prevailing, and no evidence exists that defendants considered the need for cash at that time as more than a temporary condition. But again we have a denial of the fact by the defendant in question and another conflict.

A number of claims of error in the exclusion of particular evidence are made, which we find without merit. Most of these were attempts to introduce, as evidence of facts existing in 1920, compilations made much later, by other people, with the addition of the results of changed conditions.

[6] Viewing the entire case from the standpoint of fraudulent misrepresentations alone, and in addition to the matters above commented on as reducing the various charges to what is no more than a series of conflicts in the evidence, there is another consideration which supports the judgment of the trial court. It is elementary that, in order to recover for fraudulent misrepresentation, it must be shown that the party claiming relief must have believed in and relied upon the same. The plaintiff has so alleged in her complaint, but the court has found to the contrary. The plaintiff apparently did not believe the two defendants who sold her the stock, on one of the main representations, as she testified: "Mr. Perillo and Mr. Faustina told me among other things that the market for canned goods was bright and good. And

I told them that the market would be very poor in my judgment. It was right after the war and inferred from that that things would be bad." She further testified that she accepted a discount as an "inducement" for her last purchase, and that she did not buy because of the prospectus. Again, she testified, "I was told that Mr. Carey and Mr. Hale had bought stock, and thought that if they had bought stock it would be perfectly safe for me to follow their example. Q. Then that is the thing that made you buy the stock? A. Not only that, but other parties who had bought, prominent people, and I felt that if they always knew how to invest their money wisely, so I felt that if they invested at that time it would be a wise thing to follow their example." In the light of this testimony and the surrounding facts, including the fact that the complaint was not filed for more than 3½ years after the acts complained of, and nearly 2½ years after their alleged discovery, the court, with all the witnesses before it, may well have been convinced that the moving cause of her purchase of stock was the desire to follow the example of supposedly successful people, rather than any reliance on any representations made to her by defendants, and the evidence is sufficient to support the court's finding.

As we have pointed out, this action is based not on any misrepresentations of particular individuals among the defendants, but upon charges of conspiracy upon the part of all of them to do or procure the doing of the acts charged. In addition to the considerations already noted, the trial court has found that no such conspiracy existed. The only evidence of such conspiracy consists in the facts above briefly set forth, including, as pointed out, a portion thereof admitted for that purpose only, and the inferences that could be drawn therefrom. Opposed to this, we find the denials of all of the defendants, such doubt as to the making of the representations the reliance thereon, and the effect thereof as are above commented upon, and the possible contrary inferences from all of the circumstances, including the fact that as opposed to the claim that defendants originated this scheme in order to get from under and sell out at an inflated valuation, the evidence shows the defendants sold none of their own stock, and themselves lost their entire investment of nearly $100,000. The evidence shows the reverses of 1921 and later were as much a surprise and disappointment to defendants as to plaintiff.

Where a plaintiff, instead of availing herself of so plain a remedy as rescission, retains the property, and waits more than 3 years, possibly to see the outcome of the venture, not only is additional doubt thrown on the truth of such charges as here made, but the equities cannot be said to unquestionably favor going to the extent asked, in such an action as this, under the facts here shown. This entire case presents a question of conflicting evidence which must be the matter of argument in another than an appellate court. From a study of the record we feel that not only are the essential findings of the trial court sustained by the evidence, but that a somewhat closer question would have been presented had they been the other way.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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97 Cal. App. 342

NICOLAISEN v. TOFFELMIER et al.★
(Civ. 6516.)

District Court of Appeal, First District, Division 1, California. March 2, 1929.

Rehearing Denied April 1, 1929. Hearing Denied by Supreme Court April 29, 1929.

Conspiracy ⚿9—Plaintiff, having discovered falsity of one representation, held put on guard as to other misrepresentations.

In action for damages for fraudulent misrepresentations, plaintiff having discovered falsity of one representation *held* put on guard as to any other misrepresentations.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by N. E. Nicolaisen against J. C. Toffelmier and others to recover damages for fraudulent misrepresentations. Judgment for defendants, and plaintiff appeals. Affirmed.

Edwin H. Williams, of San Leandro, for appellant.

J. M. Koford and Roscoe D. Jones, both of Oakland, for respondents.

BARNARD, Justice pro tem. The facts in this case are essentially the same as those in Joseph Flores v. Toffelmier et al. (Cal. App.) 275 P. 824, this day decided. The allegations of the complaint and the findings of the court are about the same. The main differences are that this plaintiff purchased stock in the San Leandro Canning Company, Inc., on the 2d and 5th days of May, 1921, respectively, and from one Lee Mills, not from any of the defendants. The said Mills was an agent working for two of the defendants only. This action was filed in July, 1924, was tried jointly with the Flores Case above mentioned, and two other cases this day decided, and this appeal is from a similar judgment in favor of the defendants. Appellant claims that he purchased stock because of representations contained in the printed prospectus discussed in the case of Joseph Flores v. Toffelmier et al., supra, and the

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★Rehearing denied. Hearing denied by Supreme Court.

case of Brewis v. Toffelmier et al. (Cal. App.) 275 P. 819. The defendants denied having authorized the use of the said prospectus after November, 1920. The court decided, upon sufficient evidence, that the representations aforesaid were true, and not false. The only exception is in the matter of not paying commissions. If this be regarded as a continuing misrepresentation, or if it was actually used in May, 1921, by authority of the defendants, and if it be a material false representation, there is evidence that the appellant herein did not believe the same. The record shows that he testified that at the time he understood the salesman got a commission out of the stock he bought. Having thus discovered the falsity of this particular representation, which he says he considered so important, he was put on his guard as to any other misrepresentations. These facts, with those referred to in the cases of Joseph Flores v. Toffelmier et al., supra, and Brewis v. Toffelmier et al., supra, support the finding of the trial court that the misrepresentations complained of were not made, were not relied upon, were in any event barred by the statute of limitations, and that no conspiracy existed.

For the reasons set forth herein, and in the two cases just named, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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97 Cal. App. 339

FLORES v. TOFFELMIER et al.★
(Civ. 6517.)

District Court of Appeal, First District, Division 1, California. March 2, 1929.

Rehearing Denied April 1, 1929. Hearing Denied by Supreme Court April 29, 1929.

1. Conspiracy ⚷19—In action for fraudulent misrepresentations induced by conspiracy, evidence supported finding that misrepresentations were not made or relied on.

In action for damages for fraudulent misrepresentations in stock sale induced by conspiracy of defendants, evidence *held* sufficient to support finding that misrepresentations were not made or relied on, where making of representations was denied and there was some evidence indicating that plaintiff did not believe representations or rely on them.

2. Limitation of actions ⚷197(2)—Action for fraudulent misrepresentations filed in July, 1924, held barred by limitation under evidence showing facts putting plaintiff on guard in March, 1921.

Finding, that action for damages for fraudulent misrepresentations was barred by statute of limitations, *held* sustained where action was filed in July, 1924, and, though plaintiff testified that he first discovered fraud in March, 1922, further testimony as to plaintiff's belief in misrepresentations showed facts putting him on guard at time stock was bought in March, 1921.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Joseph Flores against J. C. Toffelmier and others, to recover damages for fraudulent misrepresentations. Judgment for defendants, and plaintiff appeals. Affirmed.

Edwin H. Williams, of San Leandro, for appellant.

J. M. Koford and Roscoe D. Jones, both of Oakland, for respondents.

BARNARD, Justice pro tem. The facts in this case are essentially the same as those in Brewis v. Toffelmier et al. (Cal. App.) 275 P. 819, this day decided. The plaintiff herein purchased shares of stock in the same enterprise involved in that case, in the latter part of December, 1920, and again in March, 1921. In general, the allegations of the complaint as to claimed misrepresentations and conspiracy, and the findings of the court, are the same in both cases. The cases were tried together, in conjunction with still two other cases, and this appeal is from a similar judgment in favor of the defendants. While there is a separate appeal in each case, all four cases were submitted on a single set of briefs. While there are claims of minor misrepresentations in this case, not raised in the Brewis Case, these are flatly contradicted in the evidence, and call for no discussion. Most of our discussion in the case of Brewis v. Toffelmier, supra, applies as well to the points raised here.

[1] This plaintiff testified that copies of the printed prospectus, referred to in the Brewis Case, were given him by two of the defendants, and further that he relied upon the representations contained therein. The two defendants concerned denied giving him such copies. Nothing in the prospectus was proved, without contradiction, to have been a misrepresentation, and the court found the statements therein were true when made, it being also found that, while the statements therein relative to selling the stock without paying broker's commissions were true when made, this plan was later abandoned as unsuccessful. Appellant urges that these were continuing representations, upon which he was entitled to rely until personally notified of any change. Assuming such to be material misrepresentations, which is doubtful, the making of them was denied. And there is some evidence that he did not believe such representations or rely upon them. He testified that he presumed at the time that the person selling him stock was being paid. He also testified: "I thought the company was running along good. Many people spoke about it, it was known around town, every-

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★Rehearing denied. Hearing denied by Supreme Court.

body was speaking about it. I would hear them, but I could not remember anybody. There were hundreds of stockholders. It was a sort of local industry that people had pride in. I heard people speak of it prior to the time I bought stock. They said it was a good thing. It brought more people into town and made business. More valuable real estate, all that sort of stuff. * * * I thought I would help it along. That is why I bought the stock, to a certain extent." And again, in March, 1921, before he bought three additional blocks of stock, he was offered a discount, and testified that the fact that the stock had gone down 5 per cent. since December caused him to do some thinking. The finding that such misrepresentations were not made or relied upon is supported by the evidence.

[2] The court found this action was barred by the statute of limitations. The action was filed in July, 1924. The plaintiff testified he first discovered the fraud in March, 1922. But he further testified in reference to March, 1921, when he bought his last stock: "I presumed he was getting compensation. I naturally presumed that he wasn't working for nothing." And in reference to the discount he received on the same occasion: "If the stock had gone down five per cent in value since I bought my first stock, it caused me to do some thinking." These statements go to the alleged misrepresentations most complained of, namely, the nonpayment of any commissions and the value of the stock. We think they were sufficient to put him upon his guard at that time, and that this finding of the court is sustained.

For the reasons given in Brewis v. Toffelmier, supra, and the additional reasons herein set forth, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

97 Cal. App. 795

Mae FLORES, Plaintiff and Appellant, v. J. C. TOFFELMIER, L. J. Toffelmier, L. Perillo, J. E. Faustina and A. E. Pelton, Defendants and Respondents. (Civ. 6518.)★

District Court of Appeal, First District, Division 1, California. March 2, 1929.

Rehearing Denied April 1, 1929. Hearing Denied by Supreme Court April 29, 1929.

Appeal by plaintiff from a judgment of the Superior Court of Alameda County, E. C. Robinson, Judge, in an action for damages for fraudulent misrepresentations. Affirmed.

Edwin H. Williams, of San Leandro, for appellant.

J. M. Koford and Roscoe D. Jones, both of Oakland, for respondents.

BARNARD, Justice pro tem. All the material facts in this case are practically the same as those in Brewis v. Toffelmier et al. (Cal. App.) 275 P. 819, this day decided, and are exactly the same as those in Joseph Flores v. Toffelmier et al. (Cal. App.) 275 P. 824, also this day decided. The plaintiff herein is the wife of the plaintiff in the latter case, and her stock in the San Leandro Canning Company, Inc., was purchased for her by her husband, under circumstances identical with those surrounding the purchase of his own stock in said company.

These cases were all tried together, and this appeal is from a similar judgment in favor of the defendants.

For the reasons given in the case of Brewis v. Toffelmier et al., supra, and in the case of Joseph Flores v. Toffelmier et al., supra, the judgment appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

NIELSEN v. SWANBERG. (Civ. 6754.) †

District Court of Appeal, First District, Division 1, California. March 11, 1929.

Rehearing Granted April 10, 1929.

1. Corporations 🔑121(5)—Evidence sustained finding that plaintiff elected to exercise option to have defendant repurchase corporate stock.

In action to recover repurchase price of corporate stock, evidence *held* sufficient to sustain finding that plaintiff elected to exercise option contained in agreement to have defendant repurchase stock.

2. Appeal and error 🔑173(2)—Objection that notice of election to require defendant to repurchase stock should have been in writing held unavailable on appeal, where not interposed at trial.

Objection that notification of election to exercise option to require defendant to repurchase corporate stock should have been in writing could not be insisted upon on appeal, where no objection was interposed at trial nor motion for nonsuit made.

3. Corporations 🔑118—Defendant's inability to consummate repurchase of stock and his giving plaintiff to understand tender was unnecessary rendered tender unnecessary.

Inability of defendant to consummate repurchase of stock as agreed and his giving plaintiff to understand that no tender would be necessary rendered tender unnecessary.

4. Corporations 🔑121(2)—Where stock was to be pledged as security for purchase price, tender was unnecessary before suit for purchase price (Civ. Code, § 2913).

Where agreement for repurchase of stock provided that stock should be pledged as security for payment of purchase price, no tender was necessary before bringing suit for pur-

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★Rehearing denied. Hearing denied by Supreme Court.

† Rehearing granted. 278 P. 876.

chase price, since pledgor is not entitled to possession of pledged property until debt is paid, and restoration of stock to defendant would have extinguished plaintiff's lien under Civ. Code, § 2913.

5. **Corporations ⚷121(1)—Right to recover purchase price of stock under written agreement was not limited to suit based on theory of damages under statute (Civ. Code, § 3311).**

Right to recover purchase price of stock under written agreement for repurchase was not limited to suit based on theory of damages exclusively, under Civ. Code, § 3311.

6. **Sales ⚷340—Seller of personalty may hold property and sue for price, sell property as buyer's agent, and recover difference between sale and contract price, or retain property and recover difference between market and contract price.**

Where buyer breaches contract, seller of personal property may, first, hold property for buyer and sue for purchase price; second, sell property as agent of buyer and recover difference between contract price and that received at sale; and, third, retain property and recover difference between market price at time and contract price.

7. **Contracts ⚷166—Writing referred to in contract for specified purpose became part of contract for such purpose only.**

Where reference was made in contract regarding repurchase of corporate stock to written lease for specified purpose of fixing time during which plaintiff's assignor should not engage in ice cream business in certain city, such writing became part of contract for such purpose only.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by A. T. Nielsen against C. O. Swanberg. From a judgment for plaintiff, defendant appeals. Affirmed.

Joseph C. Meyerstein, of San Francisco, for appellant.

Avery J. Howe, of Palo Alto, for respondent.

CAMPBELL, Justice pro tem. This action is for the purpose of recovering the repurchase price of certain stock and is predicated upon a clause in a written agreement executed on June 25, 1923, between the Altomont Creamery, Inc. (respondent's assignor), as the party of the first part, Acme Ice Cream Company, as party of the second part, and C. O. Swanberg (appellant) as party of the third part, which is as follows: "The Third Party further agrees that at any time prior to July 1, 1926, should the first party not have exercised the option next hereinabove given it to exchange the said preferred stock for common stock, he, the Third Party, at the option and upon the request of the First Party, will purchase the said 130 shares of preferred stock at the price of $100 per share, payable at the rate of $1,000 upon transfer of the said stock, and not less than $1,000 per month thereafter until the entire sum of $13,000 is paid, provided, however, that in case the First Party shall desire to exercise either of the options herein granted, it shall so notify the Third Party not less than 30 days prior to the time when such option shall be exercised, said stock to be pledged as security for payment of the said purchase price." Judgment was entered for plaintiff for $3,000, as the monthly installments found to be due under the contract up to the filing of the complaint, and from such judgment defendant has appealed.

Appellant specifies the following errors: The court erred in finding that respondent elected to exercise the option contained in the agreement sued upon; that respondent tendered the stock to appellant; that the Altomont Creamery, Inc., or its assignee, performed all the terms and conditions of the agreement sued upon, on their part; that defendant did breach, break, and repudiate said agreement; and that there is now due, owing, and wholly unpaid and was, at the time of the commencement of this action, due, owing, and wholly unpaid by appellant to respondent, the sum of $3,000. The first and main question presented is, did respondent exercise his option, for under the terms of the agreement sued upon it was incumbent upon him to notify appellant 30 days prior to July 1, 1926, that he elected to do so.

[1, 2] The testimony relative to the demand or notification that respondent desired to exercise his option is without dispute that respondent called upon appellant at the Granada Hotel in San Francisco in February, 1926, and said to him:

"I asked him if he bore in mind that I had 130 shares of stock that would be due and payable about June or July, and he said yes, he was aware of that fact and that it would be taken care of.

"Q. Did he say anything as to what was meant by the expression 'taken care of'?

"The Court: You say you made a demand upon him? A. Yes.

"Q. Now, what was that demand? A. The demand that he pay me $1,000 a month on the preferred stock, which he had guaranteed to repurchase.

"Q. Did you say that to him, in the same language you have used here, or substantially that language? A. I said to him exactly as I said before. I asked him if he was aware of the fact that that would be due and payable at that time, and he said yes, that he had that in mind, and that it would be taken care of."

In this conversation respondent requested that appellant purchase the stock, "that he pay me $1,000 a month on the preferred stock, which he had guaranteed to repurchase." Appellant contends that this statement that he demanded that appellant pay him $1,000 a month on the preferred stock is qualified by respondent's answer to the question by the court, "I said to him exactly as I said before. I asked him if he was aware of the fact that that ($1,000 a month) would be due and payable at that time and he said yes, he had that in mind, and that it would be taken care of." We question appellant's claim that respondent intended to qualify his statement that he demanded that appellant pay him $1,000 a month on the preferred stock. In any event, appellant must have understood that respondent was exercising his option and requesting him to purchase the preferred stock. This is shown by his answer: "Yes, he was aware of that fact and that it would be taken care of." This is further evidenced by appellant's statement to respondent, when the latter called at the Granada Hotel in July, as testified to by respondent: "I know what you are here for and I have a long story to tell you * * *. He was very sorry to have to tell me that he wasn't able to pay me for the stock right now, but if I would not get excited about it and go to court about it, he would make arrangements to pay me a little later on."

In Flickinger v. Heck, 187 Cal. 111, 114, 200 P. 1045, 1046, the court says: "The particular act or acts which constitute an election may be fixed by the terms of the option, as also the time when, the place where, and the persons to whom it shall be made. James on Law of Option Contracts, §§ 801, 817. The language of the contract itself controls as to what act or acts constitute an election. Under the terms of one option, election may consist of a tender of the property to be sold or purchase price to be paid; under the terms of another option, it may consist of a mere notice of election to purchase or sell, leaving payment of the price and delivery of the property as subsequent matters in performance of the executory contract raised by the election. Breen v. Mayne, 141 Iowa, 399, 118 N. W. 441." The contract in the present case provides that to exercise the option, "it (Altomont Creamery, Inc., respondent's assignor) shall so notify the third party (appellant) not less than 30 days prior to the time when said option shall be exercised." There is no question but that the notification given was within the period provided in the contract, the only point raised being as to its sufficiency.

As to appellant's contention that the notification should be in writing to take it out of the statute of frauds, it may be said that appellant had bound himself in writing in the original contract to perform his obligation to purchase the stock upon Altomont Creamery, Inc., respondent's assignor, notifying appellant of its desire to exercise the option. Furthermore, as no objection was interposed at the trial nor motion for nonsuit made, the objection cannot now be insisted upon. Nunez v. Morgan, 77 Cal. 427, 19 P. 753; Armstrong v. Barceloux, 34 Cal. App. 437, 167 P. 895.

[3, 4] Appellant gave respondent to understand by his statement, "Yes, he was aware of the fact and that it would be taken care of," that no tender would be necessary. In the early part of July, 1926, appellant said to respondent: "I am very sorry, Mr. Nielsen, that I am an old man, over 80 years old, and this is the first time I ever had to break my word, but I am simply unable to pay it." At this time he made no statement that had the the stock been tendered before July 1st he could have completed the purchase according to the agreement, nor did he offer any evidence to that effect at the trial. While the complaint alleges a tender and the court so found and the evidence does not support such a finding, the inability of appellant to consummate the purchase and his giving respondent to understand that no tender would be necessary renders a tender unnecessary. Hulen v. Stuart, 191 Cal. 562, 569, 217 P. 750. Where "defendant led plaintiff to believe that if he had agreed to repurchase the bonds he would keep his agreement, and defendant did not notify plaintiff to the contrary * * * until it was too late for plaintiff to make tender * * * plaintiff was therefore excused from making tender, and defendant is now estopped from claiming that there was no sufficient tender." Pierce v. Lukens, 144 Cal. 397, 402, 77 P. 996, 998. Further, the agreement here provides that the stock is to be purchased on monthly payments, and "Said stock to be pledged as security for payment of said purchase price." The stock being pledged, no tender was necessary—a pledgor is not entitled to possession of pledged property until the debt is paid. Puckhaber v. Henry, 152 Cal. 419, 93 P. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844; Savings Union Bank & Trust Co. v. Crowley, 176 Cal. 546, 169 P. 67. Restoration of the stock to appellant would have extinguished respondent's lien. Civ. Code, § 2913.

[5, 6] Plaintiff's right to recover the purchase price of the stock under the written agreement is not limited, as contended by appellant, to a suit based on the theory of damages exclusively under section 3311 of the Civil Code. A seller of personal property has three remedies: (1) He may hold the property for the buyer and sue for the purchase price; (2) he may sell the property as agent of the buyer and recover the difference between the contract price and that received at the sale; and (3) he may retain the property and recover the difference between the market price at the time and the contract price. Dustain v. McAndrew, 44 N. Y. 72. Here, as was said in Williamson v. Marshall, 54 Cal. App. 24, 28, 200 P. 1058, 1060, "the facts bring the case within the provision of section 3302 of the Civil Code, which provides that 'the detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon.' We do not think it matters, as urged by the respondents, that the plaintiff has not followed the usual and ordinary form of alleging his damage."

[7] Appellant contends that respondent failed to prove the performance of the conditions of the lease which in paragraph 2 of the agreement was made a part thereof in this, "that the lessor (Altomont Creamery, Inc.), or its assignee, did furnish light, water, power or refrigeration, as provided in paragraph 4 of said lease." Paragraph 2 of the agreement refers only to the agreement not to engage in the business of selling ice cream within the limits of Palo Alto for a period contemporaneous with a certain lease entered into between the parties and "to which said lease reference is hereby specifically made." The agreement, it seems, refers to the lease for but one purpose—to fix the term during which respondent's assignor should not engage in the ice cream business in Palo Alto. Where reference is made in a contract to another writing for a specified purpose, such writing becomes a part of the contract for such purpose only. Moreing v. Weber, 3 Cal. App. 14, 84 P. 220.

We have examined the authorities cited by appellant and do not find them, under the facts presented by the record in the present case, inconsistent with the views here expressed.

This disposes of the questions raised by appellant's specifications of error, and from what has been said it follows that we find no error calling for a reversal of the judgment. Furthermore, the equities are with respondent, and his right of recovery should not be defeated by a too narrow and technical construction.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

CAMM & HEDGES CO. v. BANK OF COVELO et al. (Civ. 6583.)★

District Court of Appeal, First District, Division 2, California. Feb. 27, 1929.

Rehearing Denied March 29, 1929. Hearing Granted by Supreme Court April 25, 1929.

1. Fraud 🔑49—Fatal variance held not to exist between pleading and proof in action by materialman for damages for false representations.

In action by materialman for damages for fraudulent representations, where complaint alleged that defendants stated they would notify plaintiff when money due building contractor was paid over so that there would be no chance of such money going through other channels and thereby in any way deprive plaintiff of its security, while proof showed that defendants stated they would notify plaintiff when notice of completion of building was filed and also when warrants were drawn for payment, *held* that there was no fatal variance, since final payments would naturally follow notice of completion and the drawing of warrants.

2. Fraud 🔑64(3)—Whether alleged fraudulent representations were made willfully with intent to induce materialman to alter his position to injury or risk held for jury (Civ. Code, § 1709).

In action by materialman for damages for false representations, in that defendants falsely stated that notice of completion of building had not been filed and that they would notify plaintiff when it was filed, whether representations were made willfully with intent to induce plaintiff to alter his position to his injury or risk under Civ. Code, § 1709, *held* question for jury under the evidence, since fraudulent intent is seldom capable of direct proof, but is a matter of inference.

3. Fraud 🔑12—Promise made by one knowing it to be impossible is "fraudulent promise."

A promise made by one who knows it to be impossible is a fraudulent promise.

4. Fraud 🔑13(2)—Where untrue statements are made by one knowing them to be untrue for purpose of injuring another, fraudulent intent is inferred.

Fraudulent intent is implied and inferred where untrue statements are made by one who knows them to be untrue, for purpose of injuring another.

5. Fraud 🔑12—Conduct subsequent to promise may be sufficient to show that at time of promise there was no intention of performing it.

Conduct subsequent to alleged fraudulent promise may be sufficient to show that at time of promise there was no intention of performing it.

6. Fraud 🔑25—If materialman was induced to withhold notice of claim because of misrepresentations, action for fraud would lie (Code Civ. Proc. § 1184).

If materialman with right under Code Civ. Proc. § 1184, to sequester enough of moneys due contractor to satisfy materialman's claim was induced to withhold notice of its claim until too late by reason of fraudulent representations of defendants, there was a sufficient injury upon which to found an action for damages for fraud, the other elements existing, since it was thereby induced to alter its position to its injury or at least to its risk.

7. Fraud 🔑64(1)—In action for damages for fraudulent representations evidencing materialman to withhold notice of claim, motion for nonsuit held properly granted as to one of defendants to whom no declaration was attributed (Code Civ. Proc. § 581, subd. 5).

In action by materialman for damages for alleged fraudulent representations inducing it to withhold notice of its claim until it was too

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★Hearing granted. 280 P. 962.

late, evidence *held* to justify granting of motion for nonsuit under Code Civ. Proc. § 581, subd. 5, as to one of defendants as to whom no declaration was attributed; there being no proof of an accord between such defendant and others as would make each responsible for declarations of the other.

8. Banks and banking ⚷228—Whether bank was liable for misrepresentations of officers inducing materialman to withhold notice of claim held question for jury.

In action by materialman for damages for alleged fraudulent representations by directors and officers of bank inducing materialman to withhold notice of its claim, evidence *held* sufficient to go to jury on question whether bank was liable for the misrepresentations of its officers and directors.

Sturtevant, J., dissenting.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by the Camm & Hedges Company against the Bank of Covelo and others. From the judgment, plaintiff appeals. Judgment reversed as to some of the defendants, and affirmed as to remaining defendants.

G. P. Hall and Emmett I. Donohue, both of Petaluma, for appellant.

Hale McCowen, Jr., and Will Van Dyke, both of Ukiah, for respondents.

KOFORD, P. J. This action was for damages for alleged fraudulent representations and promises. It was tried before a jury. Motions for nonsuits on behalf of the individual defendants were granted and denied as to the defendant Bank of Covelo, but at the end of the testimony a directed verdict was given for Bank of Covelo. Plaintiff appeals.

A. W. Biggers was performing a contract for the erection and construction of a public school near the town of Covelo for the Round Valley Union school district. He was indebted to the Bank of Covelo for overdrafts and loans in the sum of about $6,100, and assigned to that bank all moneys due and to become due him under the contract. Plaintiff supplied millwork for the school and had an unpaid claim therefor in the sum of $3,220.80. Mr. Owens, a representative of plaintiff, went to Covelo on January 21 or 22, 1924, for the purpose of collecting or making sure of the payment of this claim. While there he met some of the defendants, who are alleged to have made such fraudulent statements and false promises that plaintiff thereafter took no steps to enforce payment of its claim, such as to file a stop notice, and as a result did not receive payment. The money due Biggers was collected by the bank, and after payment of its own claim it put the balance in Biggers' checking account and it was immediately disbursed by him.

Owens was the main witness for plaintiff. Owens, after arriving in Covelo, first made inquiries of defendant Long, thinking he was the secretary of the board of trustees. Long referred him to defendants Johnson and Rohrbough, who at the time happened to be standing on the sidewalk across the street in front of the Bank of Covelo. A general conversation amongst the four men ensued. Defendants Long, Johnson, and Rohrbough were members of the board of school trustees. Johnson was secretary of the board. Defendant Long was a stockholder and officer of the bank. Defendants Johnson and Rohrbough were each directors and stockholders of the Bank of Covelo, the latter being president and the owner of a majority of the capital stock. Owens testified to the conversation had between these three men and himself: "I told them that I was there to collect the claim of plaintiff and that if the notice of completion had been filed I was to file a stop notice." "Mr. Rohrbough told me that there was $11,000 of money that was yet to be paid on account of the contract for the school building; that there was sufficient money there to pay our bill together with all other bills; and Mr. Rohrbough said that all of the money was being paid through the Bank of Covelo and that the bill of Camm & Hedges would be paid together with all bills, because there was sufficient money with which to pay it." "He positively stated all bills are being paid through the Bank of Covelo. He said there was 'sufficient money on hand to meet the bills because there was over $11,000 that was still to be paid out on account of that contract.' I said that I was there for the purpose of filing a stop notice if there was—if the notice of completion had been filed, but they said it hadn't been filed because the architect had not yet accepted the building owing to some changes made—some extras, and that had been held up." "I asked Mr. Johnson, after I found out he was the secretary of the board of trustees, if he would notify Camm & Hedges whenever the notice of completion was filed and the warrants drawn for the payment—for the last payment, and he promised he would notify Camm & Hedges when that took place." "No notice was ever received." "Having received this assurance that our bill would be paid, I relied upon that assurance and left for Petaluma."

As a part of plaintiff's case in chief there was also received in evidence the original recorded copy of the said notice of completion. The notice of completion, among other things, stated: "that on the 11th day of January, 1924, the work under said contract was actually completed by said Arthur W. Biggers and accepted by said board of trustees." The notice was signed by defendant Johnson as clerk of the board and sworn to by him before a notary public. It was indorsed: "Recorded at the request of G. R. Redwine, for Board of Trustees of Union School District, January 17, 1924."

H. O. Camm testified to certain admissions made on March 11, 1924, in conversations with several of the bank officers.

The grounds of the motion for nonsuit were not stated except to say upon the ground mentioned in subdivision 5 of the Code of Civil Procedure, § 581, which states: "When upon the trial the plaintiff fails to prove a sufficient case for the jury." The argument upon the motion as shown in the record is upon the sufficiency of the testimony of Owens to establish the fraudulent representations alleged and also upon its sufficiency to support a cause of action as for breach of contract. Sufficiency of either the pleadings or proof on the question of damages was not mentioned nor argued either at that time or on this appeal.

The complaint is based upon both fraudulent promises and fraudulent representations, but it does not attempt to declare upon contract. Nevertheless, on this appeal, as in the court below, argument is addressed to the sufficiency of the testimony to support a cause of action based upon contract as well as upon the sufficiency of the proof to support each of the allegations of fraud contained in the complaint. It will be sufficient for this opinion, however, to confine our remarks to two allegations of fraudulent representations upon which we think there was sufficient testimony to go to the jury.

The testimony of Owens concerning the statements of Rohrbough is in almost the identical words of one of the misrepresentations alleged in the complaint, to wit, that said defendants represented "that all bills for labor and material furnished and consumed in the construction of said school building would be paid by said defendants through said bank and from said fund."

[1] Another representation alleged in the complaint and concerning which sustaining evidence was given is that "said defendants would notify plaintiff when said money was paid over so that there would be no chance of said money going through other channels and thereby in any way deprive said plaintiff of its security." The proof is not only that Johnson said he would notify plaintiff when the notice of completion was filed, but also that he would notify plaintiff when the warrants were drawn for the payment. This appears in the testimony above quoted and also in the redirect testimony of Owens. We emphasize the twofold character of this part of the testimony because it is respondents' contention that we cannot consider the testimony regarding the representation or promise to notify when the notice of completion was filed, because not alleged as a representation and because it therefore constitutes a fatal variance. It is true that the complaint does not allege that defendants promised to notify plaintiff whenever a stop notice was filed. It does, however, allege that defendants represented "that said defendants would notify said plaintiff when said money was to be paid over, so that there would be no chance of said money going through other channels and thereby in any way deprive said plaintiff of its security." This difference does not constitute a variance under the circumstances of this case. The final payments would naturally follow the notice of completion and the drawing of the warrants. Giving notice of these things would be giving notice of "when said money was to be paid over so that there would be no chance," etc., as alleged in the complaint. This allegation is sustained by the evidence of the two statements or representations made by Johnson, i. e., (1) that he would notify when the notice was filed, and (2) that he would notify when the warrants were drawn.

[2-5] Were the untrue representations thus alleged and proven to have been made by the defendants Johnson and Rohrbough proven to be fraudulently made with the intent to deceive? Civil Code, § 1709, states the rule of law especially applicable to this case: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Under the evidence produced in the trial court, it was a question for the jury to decide whether the representations made by Johnson and by Rohrbough were made willfully with the intent to induce plaintiff to alter his position to his injury or risk. Fraudulent intent is seldom capable of direct proof; it is a matter of inference. Holiday v. Tolosano, 39 Cal. App. 151, 178 P. 170; Tench v. McMeekan, 17 Cal. App. 14, 118 P. 476; Williams v. Hasshagen, 166 Cal. 386, 137 P. 9.

When Johnson stated on January 21 or 22 that the notice of completion had not been filed and that he would notify plaintiff when it was filed, the jury could infer that he then knew that it had already been filed because he was secretary of the board which accepted the building January 11, because he had signed and sworn to the notice and because it had been filed and recorded January 17 on behalf of the board. A promise made by one who knows it to be impossible is a fraudulent promise. Langley v. Rodriquez, 122 Cal. 580, 55 P. 406, 68 Am. St. Rep. 70; Newman v. Smith, 77 Cal. 22, 18 P. 791; Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am. St. Rep. 189. The fraudulent intent is implied and inferred where untrue statements are made by one who knows them to be untrue for the purpose of injuring another. Hodgkins v. Dunham, 10 Cal. App. 691, 698, 103 P. 351; Whitney v. West Coast Life Ins. Co., 177 Cal. 74, 80, 169 P. 997. Conduct subsequent to the promise may be sufficient to show that at the time of the promise there was no intention of performing it. In Williams v. Hasshagen, supra, it is said: "The effort of the corporation to collect the note instead of returning it according to the promise of Hays is sufficient evidence of that fraud which arose from the making of a promise without intention of performance." See, also, Holiday v. Tolosano, 39 Cal. App. 151, 178 P. 170.

There was evidence of this kind from which the jury could also infer that Johnson had no intention of notifying plaintiff when the warrants were to be drawn. A part of plaintiff's case in chief were all of the warrants issued by authority of the board of school trustees in payment of the Biggers' contract. These warrants bear upon their face the written approval of the board of trustees of the school district over the signatures of either all or a majority of the trustees. Among these warrants were the last three paid to the bank. Two of these, for $939.70 and $2,232.25, respectively, were ordered paid over the signatures of Johnson, Long and Rohrbough on January 22, 1924. This was upon the very next day after the representation if the conversation was on the 21st of January, as testified to by Owens, and upon the same day if the conversation was upon the 22d, as testified to by other witnesses.

We may add that Camm's testimony of his conversation with Bank Director and Bank Officer George Biggers, Cashier Thomas, and President Rohrbough included some admissions on the part of each which could reasonably add considerable to the inference of willful intent to deceive if the jury were so minded. This conversation took place March 11, the day the last warrant was put through. It evidenced on the part of these bank officials a desire to help Biggers keep the funds coming from the school board out of the reach of plaintiff. This conduct was so inconsistent with the promise to notify the plaintiff when the warrants were to be drawn as to show a willful intent to deceive when the promise was made.

It is also an important circumstance that the testimony shows a motive for making the representations. At the time of the conversation the bank held an assignment of all moneys to become due to the contractor, Biggers. This assignment from its very nature was of an uncertain value because its value would naturally be affected by all the uncertainties with which building contractors have to contend. One of these uncertainties is that the amount which may become due the contractor may be reduced or entirely used up by the claims of laborers and materialmen who under the statute are entitled to file stop notices. If the bank officials by their representations induced plaintiff as one of such claimants to refrain from filing its stop notice, the value of said assignment as security to the bank was thereby increased. This was a benefit to the bank.

[6] The plaintiff, of course, was injured or at least induced to alter its position to its injury and risk. Under the statute, Code of Civil Procedure, § 1184, plaintiff had a right to sequester enough of the moneys due the contractor to satisfy its claim. This right is given in lieu of a mechanic's lien which is not permitted against public property. Plaintiff's right, however, must be exercised within a certain time limit. If plaintiff was induced to withhold its notice until too late, it was thereby induced to alter its position to its injury or at least to its risk. It is a fair inference that these matters of common knowledge were well known to the defendants. This is a sufficient injury upon which to found an action for damages for fraud, the other elements existing. Alexander v. Church, 53 Conn. 561, 4 A. 103; Guild v. More, 32 N. D. 432, 155 N. W. 44, 48. It is like being induced by fraud to withhold the filing of an action until barred by the statute of limitations. This has been held to be actionable fraud. Desmarais v. People's Gaslight Co., 79 N. H. 195, 107 A. 491; Cockrill v. Hall, 65 Cal. 326, 4 P. 33.

[7] As to defendant Long, we see nothing in the testimony to warrant the denial of his motion for nonsuit. No declaration is attributed to him by the evidence. There is no proof of such an accord or agreement between Long, Rohrbough, and Johnson as would make each responsible for the declarations of the other. None of them were under any duty to Owens when that gentleman first appeared and conversed with them. Their interest, or at least the interest of their bank, was adverse to the interest of Owens' firm, the plaintiff. They could have remained silent, or could have told Owens to look out for himself. Rohrbough and Johnson, however, undertook to speak, and they are responsible for their deceit if the jury finds their conduct to be such. Sullivan v. Helbing, 66 Cal. App. 478, 226 P. 803, 26 Cor. Jur. 1074, § 17. Long did not speak and he is not responsible.

[8] The evidence was also sufficient to go to the jury upon the question of whether the defendant Bank of Covelo, a corporation, was also answerable for the fraud of Rohrbough and Johnson. First, the president of the bank is chief executive officer and, as such, has authority to oversee the collection of debts due to the bank, such as the debt of defendant Biggers for which the bank held the assignment of Biggers as security. In Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 P. 130, it is stated that under the uses and customs of modern banking the president of a bank is no longer limited to exercise the powers expressly conferred upon him by the directors. It is also held that the

president of other corporations, while acting in the usual manner and within the scope of powers which the president is accustomed to have, is presumed to be vested with power to perform such acts. 14a, Cor. Jur. 358; Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 P. 388; Southern Pacific Co. v. Los Angeles Milling Co., 177 Cal. 395, 170 P. 829. Second, the jury could properly draw an inference that Rohrbough and Johnson did what they did on behalf of the bank rather than on behalf of themselves individually, because their only rational motive for deceiving plaintiff under the testimony would be their desire to aid the bank. Third, by inducing plaintiff to forbear to file its withhold notice for its claim, the security assignment held by the bank was increased in value to that extent, to wit, $3,220.80. They could also infer that the bank took possession of and handled $3,220.80 more than if plaintiff had filed its withhold notice. Fourth, notice and knowledge of the president of a corporation is notice and knowledge of the corporation itself. Goodwin v. Central Broadway Building Co., 21 Cal. App. 376, 131 P. 896; Balfour v. Fresno Canal, etc., Co., 123 Cal. 397, 55 P. 1062; Williams v. Hasshagen, 166 Cal. 386, 137 P. 9; 14a, Cor. Jur. 493; Swartz v. Burr, 43 Cal. App. 442, 185 P. 411; Jan Wai v. Smith-Riddell Co., 55 Cal. App. 59, 202 P. 952; Montecito Valley Co. v. Santa Barbara, 144 Cal. 597, 77 P. 1113.

Summarizing the foregoing, there is sufficient evidence from which the jury could infer, first, that Rohrbough was acting within the scope of his ordinary duties as president; second, that Rohrbough and Johnson were at least assuming or trying to aid the corporation; third, that the corporation received the benefit from the conduct of its president and director; and, fourth, that the corporation had full notice and knowledge of what was taking place during the 30-odd days that passed before it became too late for plaintiff to file his stop notice. With these elements drawn from the proof by the jury, it could hold the corporation liable for the said acts of its officers, under the rule that a corporation is liable for the fraud and torts of its agents and officers the same as a natural person if committed under its express or implied authority. 7 Thompson on Corporations (3d Ed.) §§ 5449, 5450, 5410, and 5411; 14a, Cor. Jur. 765; Maynard v. F. F. Insurance Co., 34 Cal. 48, 91 Am. Dec. 672; People v. Palermo Land & Water Co., 4 Cal. App. 717, 89 P. 723, 725; Chamberlain v. California Edison Co., 167 Cal. 500, 140 P. 25.

Nonsuits were granted to defendants English, Thomas, and George Biggers practically by consent, and there is no evidence to hold them. The judgment in favor of the defendant Bank of Covelo and defendants Rohrbough and Johnson is reversed, and the judgment in favor of each of the remaining defendants is affirmed. Appellant will recover costs on appeal against defendants Bank of Covelo, Rohrbough, and Johnson.

I concur: NOURSE, J.

STURTEVANT, J. I dissent. While the plaintiff's action is multifarious both as to parties and causes of action it is none the weaker—for the same reason it is none the stronger. Its real weight can be ascertained only by considering it in each aspect. I will proceed to do so. I am wholly unable to say that the complaint sounds in tort and not in contract. It contains certain allegations intended to show a cause of action sounding in contract. In the trial court appellant so claimed. However, the proof introduced prior to a motion for a directed verdict wholly failed to support any cause of action sounding in contract. In this behalf the showing of the plaintiff was an attempt to show a contract of guarantee. But viewed as such, as contended by the respondents, the purported contract was not in writing and was wholly unsupported by any consideration whatsoever. Civ. Code, §§ 2792–2794.

The main opinion holds that the motion for a nonsuit was properly granted as to the defendant Long. With that conclusion I agree. Moreover, in my opinion the motion was properly granted as to the defendants Johnson and Rohrbough and was erroneously refused as to the bank. They were charged under subdivisions 1, 2, and 4 of section 1710 of the Civil Code. Under the fourth division it was charged that they made "a promise, * * * without any intention of performing it." The facts recited show that it was the claim of the plaintiff that Owens made a gratuitous mandate which the mandatory has not executed. As was said by Martin, J., in 3 Hen. VI., 36b, 37a: "If this action shall be maintained on this matter, for each agreement broken in the world, there will be an action of trespass." In the case of Elsee v. Gatward (1793) 101 Eng. Rep. Reprint, 82, Lord Kenyon examined a similar set of facts and held that they would not support an action in assumpsit nor an action as for tort. Under a similar set of facts, in the case of Thorne v. Deas (1809) 4 Johns. (N. Y.) 84, Chancellor Kent made an exhaustive examination of the authorities and reached the same conclusion. When our Civil Code was being prepared the rule of those two cases was adopted as the statutory law of this state: "One who, without consideration, undertakes to do a service for another, is not bound to perform the same. * * *" Commissioners' Civ. Code, § 1975. Viewed as a contract of agency the rule is the same. 2 C. J. "Agency," §§ 374, 384; Mechem on Agency, § 1258; 1 Clark & Skyles on Agency, §§ 46, 433. And, if viewed as a bailment, the rule is the same. II Kent's Comm. p. 570; Story on Bailments, § 166 et seq.; IV Elliott's Contracts, § 3015. When thereafter Johnson and Rohrbough failed to perform the alleged promise they but exercised their legal rights. As they were exercising their legal rights, it is immaterial what motive or intent caused them to do so. Boyson v. Thorn, 98 Cal. 578, 33 P. 492, 21 L. R. A. 233; Parkinson Co. v. Bldg. Trades Council, 154 Cal. 581, 595, 98 P. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. This reasoning we submit applies with full force to all promises alleged, whether attributed to Johnson or to Rohrbough.

We pass to alleged false representations. In its complaint the plaintiff alleged that defendants made certain representations. It then alleges that the representations "were untrue and false and that defendants knew them to be untrue and false." This allegation is broader than the statute. Civ. Code, § 1710. Being so, it is broad enough to include subdivisions 1 and 2 of section 1710. As so read plaintiff's complaint charges, in legal effect, "that with intent to induce this plaintiff to alter its position to its injury and/or risk the defendants did wilfully suggest as a fact that which was not true and which the defendants did not believe to be true; and did wilfully suggest as a fact that which was not true and which the defendants had no reasonable ground for believing it to be true." This theory rests, in part at least, on the fact that according to the testimony of the plaintiff's witness Owens, one of the defendants, Johnson, stated that the notice of completion had not been filed, whereas it had been filed. Such was the record when plaintiff rested. The statement, if made, was not true. But then what? That showing is not enough. The plaintiff was bound to introduce proof not merely of a falsehood but of falsehood and fraud. The rule is clearly set forth in 2 Pomeroy's Equity Jurisprudence, §§ 884 and 885. The rule had been distinctly announced in Behn v. Kemble, 7 C. B. Rep. (N. S.) 97 Eng. Com. Law Rep. 264; Addington v. Allen, 11 Wend. (N. Y.) 374, 389; Zabriskie v. Smith, 13 N. Y. 322, 330, 64 Am. Dec. 551. When the codes were adopted the rule as announced in those cases was adopted in framing the provisions of sections 1708–1710, inclusive. See Commissioners' Code, 1872. The decisions of this state are to the same effect. Newman v. Smith, 77 Cal. 22, 26, 18 P. 791; Daley v. Quick, 99 Cal. 179, 185, 33 P. 859; Filipini v. Trobock, 134 Cal. 441, 443, 62 P. 1066, 66 P. 587. The evidence showed that Johnson had made a misstatement. There was not a scintilla of evidence proving or tending to prove any other element of the charge—that the misstatement was made (1) willfully, (2) with intent to deceive, (3) that Johnson did not believe it to be true, or (4) that he had no reasonable ground for believing it to be true. Except the filing or nonfiling of the notice of completion, there is not a particle of evidence in the record that any fact stated by either Rohrbough or Johnson was untrue, nor is there any evidence that Johnson knew that the notice had been filed. Owens testified that Johnson stated to him that the architect for certain reasons had held up the filing of the notice. This statement implied that the notice had been duly executed, but had not been filed. The evidence does not show that if the architect had changed his mind and had filed the notice that Johnson had been so informed at the time he spoke to Owens, or that he willfully or fraudulently misstated the fact as to any matter.

As to the defendant bank, the trial court was clearly correct in directing a verdict. When Owens was talking to Rohrbough and Johnson and Long on the sidewalk, the business of the Bank of Covelo was in no manner involved. So far as the record discloses the bank had an assignment which fully protected it in all its rights. When, thereafter, it collected on its assignment, but so far as the record discloses did not collect an additional cent, it acted within its clear legal rights, and there was neither an authorization nor a ratification of anything done by Rohrbough or by Johnson. Civ. Code, §§ 2338, 2339.

I call attention to the numerous instances in which my brothers say that this or that inference may fairly be drawn. I do not for one moment controvert the general proposition that fraud or deceit may seldom be proved by direct evidence, and that sometimes they may be inferred from other facts which have been proved. There is no doubt that in some cases, under certain conditions and circumstances, an inference of fraud may be drawn. But that is not so in each and every case. The line of demarcation is defined for us by statute. Code Civ. Proc. § 1960. The most of the proven facts are stated in the main opinion. It should be added that the proof showed these additional matters. The witness Owens was an entire stranger to the defendants Johnson, Rohrbough, and Long, and his principal and himself had had no confidential relations and not even any former business relations directly or indirectly with the defendants. The witness Owens and all of the defendants are apparently prominent men and each one presumably is a man of good character and honest dealing. The defendant corporation held an assignment of the building contract on the schoolhouse. The limit of its claim was $6,100. The limit of the plaintiff's claim was $3,300. When these men held their conversation there was due and unpaid to the contractor $11,000. Under no fact in the case did defendant bank stand to make or to lose one single penny as the outgrowth of the conversation held on the sidewalk. Every fact regarding the filing of the notice of completion, and every fact regarding moneys due or unpaid to the contractor, would be shown with full certainty and without possibility of secrecy by the records in the office of the county recorder and the books in the office of the superintendent of schools—all of which were accessible to all persons. There is no evidence of any trick or device. Now, accepting all of the proved facts and on such a deduction from these facts as is warranted by a consideration of the usual propensities and passions of men, and the particular propensities and passions of these particular men, the course of business, and the course of nature (Code Civ. Proc. § 1960), can it be inferred that Johnson, Long and/or Rohrbough did or said anything for the purpose of willfully deceiving the witness Owens? I claim it cannot, and therefore both motions were properly granted. Young v. Covell, 8 Johns. 23, 5 Am. Dec. 316, is directly in point to the effect that the trial court acted properly in granting the nonsuit. That case is one of the cases on which the commissioners framed section 1710 of the Civil Code. (See Commissioners' Note.) Davis applied to Young to purchase Young's interest in a boat. Covell, standing by, recommended Davis very highly, saying that if Davis wanted $5,000 he would let him have it in a minute. Within a week it became known that Davis was insolvent. Young sued Covell as for deceit. The trial court granted a motion for a nonsuit. The plaintiff appealed. The court said: "It is well settled that this action cannot be sustained without proving actual fraud in the defendant, or an intention to deceive the plaintiff, by false representations. The simple fact of misrepresentation, unconnected with a fraudulent design, is not sufficient. The evidence produced by the plaintiffs at the trial did not make out the fraud, *or show enough to justify the jury in drawing that conclusion.* * * * *Deceit* is the *gist* of the action. If the cause had gone to the jury, the testimony would not have warranted a verdict for the plaintiffs, and the motion to set aside the nonsuit ought therefore to be denied." In Marsh v. Falker, 40 N. Y. 562, the defendant had recommended the credit of a merchant. Later it appeared that he was mistaken. The plaintiff sued him in an action for deceit. At the end of the plaintiff's case the defendant made a motion for a nonsuit. It was denied. At the end of the defendant's case he made a motion for a directed verdict. That motion was denied. The jury returned a verdict against him, and he appealed. On page 565 the court said: "But before the plaintiff could lawfully recover that loss from the defendant, it was equally as essential to the right to do so, that he should satisfactorily prove that these representations were fraudulently made. That they were not only false in fact, and caused the loss sustained by him, but beyond this, that they were made with the intent to deceive him. This was the gist of the action, and it has always constituted its distinguishing element; and as such it has been described and maintained by all the authorities. [Citing cases.]" In that case, as in this case, it was claimed that the jury might make certain inferences and thus fill out the plaintiff's proof. The court examined that contention exhaustively and concluded that no inference of fraud could legally be drawn. Thereupon it affirmed the order of General Term ordering a new trial because of the error denying the nonsuit.

Moreover, it is settled law in this state that the ruling of a trial court when attacked in a court of review will be tested by the question, What is the law? and not by the question, What reason did the trial court assign for its ruling? Conceding that counsel for defendants did not specially call to the trial court's attention the defect as to proof as to damages, it is impossible for one to examine this record without noticing that that subject-matter stands out prominently. When each motion was made it became necessary for the trial court to scan the evidence to see if a case had been made by the plaintiff. The action sounding in deceit, damages must be alleged, and they must be proved. Denver v. Burton, 28 Cal. 549; Harron, Rickard & McCone v. Wilson, Lyon & Co., 4 Cal. App. 488, 88 P. 512; Munson v. Fishburn, 183 Cal. 206, 190 P. 808. In this case no proof whatever was introduced on that subject. Conceding that it had the right to perfect an inchoate lien and that it has been deprived of its lien, then its damage would be the value of its lien. Alexander v. Church, 53 Conn. 561, 4 A. 103; Kritzer v. Moffat, 136 Wash. 410, 240 P. 355, 44 A. L. R. 681. But what that value may have been the evidence does not show.

A directed verdict is proper whenever, upon the whole evidence, the judge would be *compelled* to set a contrary verdict aside as unsupported by the evidence. Estate of Baldwin, 162 Cal. 471, 473, 123 P. 267. If, in this case, the order directing the verdict had not been made, would the trial court have been *compelled to set the verdict aside?* To my mind the failure to do so would have been an abuse of discretion. I find no error in the record, and I think the judgment should be affirmed.

IRISH v. HAHN et al. (Civ. 5546.) ★

District Court of Appeal, Second District, Division 1, California. Feb. 27, 1929.

Hearing Granted by Supreme Court April 25, 1929.

1. Electricity ⚷11—Rates for electrical energy, if compensatory, should include amount for interest on value of property and allow for replacement and depreciation.

Rates fixed by city for use of electrical energy, if compensatory, should include amount sufficient to pay interest on value of property, and also sum sufficient to meet expenses of replacements, and sufficient sum for depreciation in anticipation of future.

2. Electricity ⚷11—City operating electric light plant must serve customers without discrimination.

Property owner located within city limits is entitled to electric power service under city's power system at same rates for like services as other property owners within the city, and city, like private corporation, must serve without discrimination all patrons who use electrical energy.

3. Constitutional law ⚷233—Eminent domain ⚷2(11)—City's assessment against abutting property for replacement of overhead equipment held void as denying equal protection and taking property without compensation, where abutting property had been taxed for purchase of general power system.

Where city purchased and constructed electric light plant out of funds raised by general bond issue, and defendants' property was taxed proportionately for purpose of paying bonds, assessment against defendants' property as abutting property for expense of replacement of poles and overhead equipment by underground conduits *held* void as denying equal protection of laws and taking property of defendants without just compensation, since conduit was not public improvement of local nature such as can be charged against abutting property, but was merely incidental to city's furnishing of electric power.

4. Municipal corporations ⚷419—Municipality cannot construct replacements in general system by local improvement assessments against small portion of property which has already been taxed for general system.

Where the only authority for levying special assessment is in making local improvements, municipality cannot construct replacement to general system to be used for commercial purposes by special assessments against small portion of property which has already been taxed its proportionate share of cost of general system.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Edwin A. Irish against Edwin F. Hahn and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Thomas S. Bunn and Arthur M. Ellis, both of Los Angeles, for appellant.

Hahn & Hahn, of Pasadena, for respondents.

Roscoe R. Hess, of Pasadena, Frederick G. Stoehr, of Los Angeles, and Leonard A. Diether, of Pasadena, amici curiæ.

CRAIL, Justice pro tem. This is an action brought by the plaintiff for the recovery of a special assessment which was levied by the city of Pasadena against defendants for the construction of certain underground conduits and laterals in front of the defendants' property on Colorado street. The trial court found that the ordinance under which the assessment was levied was void and the assessment therefore void, and entered judgment in favor of the defendants. It is from this judgment that the plaintiff appeals.

The appeal is on the judgment roll, and there is no dispute as to the facts. The city of Pasadena, in its proprietary capacity, operates an electric light plant, including an overhead distributing system, which at the time of the proceedings in question furnished electric energy in said city, and charged for said service a rate fixed by the railroad commission of the state of California. This entire distributing system and electric light plant was purchased from the Southern California Edison Company and was paid for from the proceeds derived from a sale of a general bond issue. The defendants' property was a portion of the property which was taxed for the purpose of paying these bonds. The proceedings involved in this action were under the city charter and certain city ordinances, and provided for the laying of these underground conduits, which were intended to *replace* the said poles and overhead equipment. The equipment which was to be so replaced was a part of the general distributing system above referred to. The entire cost of installing the conduit system was assessed against property fronting on that portion of the street where the replacement was made, although the defendants' property was abundantly served with electrical energy as theretofore connected. That the conduit is in fact a part of its general distributing system is indicated by the fact that, although the city of Pasadena in its proprietary capacity as owner of the general distributing system pays an annual rental for the use of the conduit in the distribution of its electrical energy, this "payment" goes into a fund known as the "conduit fund department" of the general fund of the city, which is used, among other things, for replacing broken lights and broken poles, which manifestly would be parts of the distributing system.

The following findings are included among those signed by the trial court: "That the said city of Pasadena, acting in its proprietary capacity, did at all times mentioned in plaintiff's complaint, and now, manufactures electrical energy and transmits, distributes and disposes of the same to its consumers

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★Hearing granted. 281 P. 385.

throughout the city of Pasadena, and that it did at all times mentioned in said complaint, and does now, charge and collect for the manufacture, distribution and sale of such electrical energy a rate sufficient to compensate itself for the costs thereof. That the purchase price paid for the electrical plant, by means of which said electrical energy is manufactured, distributed and sold, including the transmission and distribution lines, power lines, poles, wire and equipment was, and is, paid for out of funds derived from bonds issued on the general credit of the said city and from funds derived from the operation of said system. * * * That the said conduits and ducts and laterals actually *did replace such electrical transmission* and trunk lines and poles as were theretofore purchased and used by the said city of Pasadena in its proprietary capacity for such purposes, in front of defendants' property. That since the completion of said conduits, ducts and laterals, the said city of Pasadena has been, and now is using the same for the purpose of holding and carrying wires, cables, switches and appurtenances by means of which electrical energy is transmitted to its various customers on Colorado street and within the property described in the specific district referred to in the said complaint. * * * The principal purpose to be served by the construction, maintenance, and use of the said conduit is to assist the city in the conduct of its manufacture, distribution, and sale of its electrical energy for commercial purposes in its proprietary capacity."

Appellant admits that the conduit is a replacement. He says in his opening brief "in the proceedings here in question it (the city) *replaced* and enlarged certain underground conduits, ducts, laterals and transmission lines. * * * The city has discontinued the use of the overhead wires and thus occasioned the necessity that enlarged conduits be supplied." Also, "the question of *repairing* * * * plants of this sort is one of considerable moment."

The question involved is whether or not the city of Pasadena may charge the cost of the replacement of any part of its general distributing system to a limited portion of the property served. Or, as stated by appellant: "Does the rebuilding and enlargement of the conduit here in question constitute an improvement of the property of the defendants for which the payment of an assessment on the said property can be exacted by the city?" This is an important question, not alone to the city involved and to other cities of California, but to the private owners of public utilities and to the property owners of California alike.

The city of Pasadena, as amicus curiæ, asserts in its brief that: "The case presents a question of constitutional law upon which there appears to be no express, direct authority."

It is the contention of appellant that public improvements, which create a benefit to particular property over and above the general benefits to the public or to property of the municipality at large, can be assessed against the particular property benefited, and that the conduit in question constitutes such a local benefit. The principle of law is not denied by respondents. It is the application of the principle to the facts upon which they do not agree.

[1] The city of Pasadena collects for the manufacture, distribution, and sale of its electrical energy a rate sufficient to compensate itself for the costs thereof. The rates which are fixed for the use of electrical energy and charged to consumers, if compensatory, include not merely an amount sufficient to pay interest on the value of the property, but also a sum sufficient to meet the expenses of replacements and a reasonable sum for depreciation. A lower rate would not be sustained as constitutional (22 Cal. Jur. 68, and cases cited), and in this regard the future is to be anticipated (Id). The only purpose of providing a depreciation fund, included in the rates paid by the people, is to provide the necessary costs of replacements in the power plant and distributing system as such replacements become necessary. Hence the city of Pasadena, out of the rates which it charges for electrical energy, is already provided with a fund with which to pay the costs of its replacements.

[2, 3] And yet the conduit in question is merely a replacement of a part of the distributing system of the electric plant of Pasadena, as the trial court held, a part of the equipment by which it transmits electric energy from the municipal power plant for industrial and commercial purposes. If this be its principal service, and the findings so hold, and if this service be already adequately paid for, then the conduit is not a public improvement of a local nature such as can be charged against the defendants' property by a special assessment. The improvement of the property, if any, is merely incidental to the service. The defendants' property, located within the city limits, is entitled to service at the same rates for a like service as other property within the city. It is the duty of the city, like a private corporation, to serve without discrimination all patrons who are users of its electrical energy. 18 Cal. Jur. 1081. The assessment would impose a greater charge against one consumer than that charged against the general body of consumers, and is therefore void as violative of the constitutional provision which assures to each of them the equal protection of the laws; and is violative of that provision which protects them against the taking of their property without just compensation.

We are not discussing the right of a municipal corporation either to construct or purchase an electric plant (section 19, art. 11 of the Constitution), nor the right to extend its transmission and service system into territory not theretofore served and not theretofore assessed for its plant and equipment. We are discussing the right of a municipality acting in its proprietary capacity to construct replacements in its equipment belonging to its general plant which was purchased or constructed out of funds raised by a general bond issue or tax and to charge the cost of said replacement against a limited portion of the property served by its general plant, even though said portion be the property abutting on the replacement.

[4] In the instant case the original cost of the plant and the distributing system in general was paid for by a bond issue which was a charge against all the property in the city. The defendants' property paid for its proportionate part of the purchase price of the distributing system throughout the city. It would be unequal and unjust to then charge the defendants' property and neighboring properties by means of a special assessment with the cost of the distributing equipment abutting upon their property or the cost of any portion of the distributing system. It has been held in a case upon which the city greatly relies and which it quotes, that: "If the only statutory authority for levying special assessments is in making local improvements, the corporation cannot construct a general system of waterworks by special assessments." Hewes v. Glos, 170 Ill. 436, 48 N. E. 922. It is more apparent and it is necessarily true that where, as in this case, the only authority for levying the special assessment is in making local improvements the municipality cannot construct replacements to its general system, to be used for commercial purposes, by special assessments against a small portion of the property which has already been taxed its proportionate share of the cost of the entire general system.

It is the contention of appellant that a municipality in the exercise of its police powers should provide for the removal of overhead wires in densely inhabited areas of cities. The danger from overhead wires of high voltage for commercial purposes arises out of the service itself and the obligation is upon the utility which furnishes the service to provide it safely.

It is claimed by appellant that the question presented by the appeal was recently presented in the case of County of Los Angeles v. Hunt, 198 Cal. 753, 247 P. 897, "although it does not appear from the report" and that similar proceedings were upheld. We have examined the files themselves. The case involved the laying of a gas main in a street as an incidental part of paving the street itself. The question discussed in the briefs in this regard was whether the use of this main by private companies would make void the assessment.

We have reached the conclusion that the assessment is not a valid one. We have read the authorities which have been cited by appellant, as well as by the city of Pasadena as amicus curiæ. They have little application to the point involved. Whatever the analogies may be, this case is fairly distinguishable from those involving the question of assessing the cost of local connections made necessary by and incidental to the paving of a street; and from those involving street widenings and openings; and from those involving the construction of tunnels or union stations; and from those involving the construction of electroliers, connected by conduits, for street lighting purposes and which lighting the courts have held is as necessary for the convenient use of a street as the pavement of the street itself.

The authorities cited by appellant affirming the validity of assessments in cases like those last above mentioned do not, in any case, present the question as to the replacement of the instrumentalities of transmission of energy for commercial purposes in currently used equipment.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

97 Cal. App. 60

PEOPLE v. GRANT. (Cr. 1762.)

District Court of Appeal, Second District,
Division 1, California. March 1, 1929.

Criminal law 🔑980(1)—Failure of trial court on plea of guilty to inquire into facts of violation of Vehicle Act is abuse of discretion.

Refusal of trial court to make any inquiry after plea of guilty into the facts surrounding the commission of an offense under the Vehicle Act (St. 1923, p. 517, as amended), punishment for which ranges from fine of $1 to imprisonment in the penitentiary for five years, is an abuse of legal discretion.

Appeal from Superior Court, Riverside County.

On petition for rehearing. Former decision reaffirmed.

For former opinion, see 274 P. 1005.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., James S. Howie and John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

YORK, J. The petition for rehearing filed herein by the Attorney General is denied. The facts and circumstances of the particular case, as we view them, were much more harsh, and more advantage was taken of the defendant, than in the Case of Wallington, reported in People v. Schwarz and Wallington, 201 Cal. 309, 257 P. 71. From the record in the instant case, we assume that the representative of the district attorney's office was Mr. Redwine, a deputy district attorney, because, immediately upon the occurrence referred to, he appeared for the district attorney's office in the matter of accepting the plea, which was obtained immediately after the statement "from $1 up" was made.

We do not intend to enlarge and we do not believe that we have enlarged the scope of the case of People v. Schwarz and Wallington, supra. In that case the defendant was guilty of a very serious crime, and her punishment therefor, in comparison with that of defendant herein, was a very mild punishment for the crime committed. In the instant case, the only crime committed by the defendant, under the admitted facts, was that he failed to give the number of his automobile after he had seen one of the parties in the other car write down the correct number of his car, which was called out to him by the only other occupant of the car; it being probably a violation of the Vehicle Act of California (St. 1923, p. 517, as amended), as it reads, for defendant not to have given the number to both of them, in accordance with the strict technical wording of that act. We cannot see how this is comparable in any way with the crime charged against defendant Wallington in People v. Schwarz and Wallington, supra.

In the instant case, this court held that, under the facts and circumstances of the case, where, as shown by the admitted facts, the defendant was not guilty as charged in the information, but was only guilty, if at all, of a minor technical offense under the Vehicle Act, *and* where a *wide* discretion was vested in the trial court of fixing the punishment from one dollar up to five years in the penitentiary, that in order to exercise sound discretion or any *legal* discretion at all, it was necessary that the trial court should make *some* inquiry of *some* kind into the *facts* surrounding the commission of the offense. This not having been done by the trial court in the instant case, it is ordered that the order of the trial court, refusing to set aside and vacate the judgment therein, be and is hereby reversed, and the order refusing to allow the defendant to withdraw his plea of guilty and plead not guilty is hereby ordered reversed, in accordance with our decision heretofore rendered herein.

We concur: HOUSER, Acting P. J.; CRAIL, Justice pro tem.

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97 Cal. App. 422

WILLIAMS CO. v. SUPERIOR COURT OF CALIFORNIA, WITHIN AND FOR LOS ANGELES COUNTY. (Civ. 6319.)

District Court of Appeal, Second District,
Division 2, California. March 8, 1929.

1. Prohibition 🔑10(1)—Prohibition arrests proceedings of any tribunal exercising functions in proceedings of which they have no jurisdiction (Code Civ. Proc. § 1102).

Under Code Civ. Proc. § 1102, prohibition arrests proceedings of any tribunal exercising judicial functions, when such proceedings are without the jurisdiction thereof.

2. Courts 🔑472(6)—Superior court has not concurrent jurisdiction with municipal court, where demand excluding interest is more than $300 and less than $1,000; "except as hereinafter provided" (Const. art. 6, §§ 5, 11, as amended in 1924).

Under Const. art. 6, § 5, as amended in 1924 (see St. 1923, p. 1678), giving superior court jurisdiction in specified cases, "and in all other cases, except as hereinafter provided, in which the demand, exclusive of interest or the property in controversy, amounts to $300," and section 11, as amended in 1924, giving municipal courts jurisdiction where "demand, exclusive of interest, or the value of the property in controversy amounts to $1,000 or less," the superior court has not concurrent jurisdiction with

municipal court in actions at law, where demand, exclusive of interest, is more than $300 and less than $1,000; the words "except as hereinafter provided" having reference to section 11 as well as subsequent provisions of section 5.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Except.]

Application for writ of prohibition by the Williams Company against the Superior Court of the State of California within and for the County of Los Angeles. Demurrer to petition sustained.

Fredericks, Hanna & Morton, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondent.

CRAIG, J. On or about February 13, 1928, the petitioner herein filed in the superior court of Los Angeles county an action for the principal sum of $925, alleged to have been theretofore earned in the city of Los Angeles as a commission upon the sale of real property, and due to the plaintiff, as assignee, from H. E. Van Till, defendant therein. Answer was filed, and the case brought to trial on September 24, 1928. The defendant objected to the introduction of any evidence upon the ground that the municipal court had exclusive original jurisdiction thereof, since the cause of action arose within the boundaries of said city. The court sustained this objection and indicated its intention to dismiss the action. Thereupon the plaintiff instituted this proceeding, asserting that the jurisdiction of municipal courts is concurrent with that of the superior court in actions at law wherein the demand, exclusive of interest, is more than $300. The respondent herein demurred to the plaintiff's petition upon the sole ground that it does not state facts sufficient to entitle the latter to the relief prayed.

[1, 2] Prohibition arrests proceedings of any tribunal exercising judicial functions, when such proceedings are without the jurisdiction thereof. Code Civ. Proc. § 1102. We think the action here in controversy is clearly without the jurisdiction of the superior court. In 1924 section 5 of article 6 of the Constitution, and also section 11 of the same article, were amended. These amendments clearly were made for the purpose of establishing the jurisdiction of municipal courts. It seems evident that the amendment to section 5 was for the express purpose of removing any inharmony that might have existed between that section as it formerly read and the new provisions of section 11. As amended, the applicable portion of section 5 reads: "The superior courts shall have original jurisdiction in all cases in equity and in all cases at law, which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases, except as hereinafter provided, in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and in all criminal cases amounting to a felony, and in all cases of misdemeanor not otherwise provided for; of actions for forcible or unlawful entry or detainer, except as otherwise provided in this article; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate; of divorce and for annulment of marriage; and of all such special cases and proceedings as are not otherwise provided for; and said courts shall have the power of naturalization, and to issue papers therefor."

Section 11 provides: "In any city and county and in any city which is governed under a charter framed and adopted under the authority of this constitution containing a population of more than forty thousand inhabitants, as ascertained by the last preceding census taken under the authority of the Congress of the United States, a municipal court may be established as in this article provided, anything in this constitution to the contrary notwithstanding. For each such municipal court at least one judge shall be elected by the qualified electors of the city or city and county at the general municipal election, and such additional judges as shall be determined by the legislature. In any city, or city and county, in which there shall be more than one judge of a municipal court, the judges of such court may hold as many sessions of such court at the same time as there are judges thereof, and the business thereof shall be apportioned among the judges thereof in the manner prescribed by law. Municipal courts shall have original jurisdiction, except as hereinafter provided, in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars or less, and of actions of forcible or unlawful entry or detainer where the rental value is one hundred dollars or less per month, and where the whole amount of damages claimed is one thousand dollars or less, and in cases to enforce and foreclose liens on personal property where the amount of such liens or the value of the property is one thousand dollars or less, and in all criminal cases amounting to misdemeanor or punishable by fine and imprisonment in the city or city and county or county jail, or punishable by fine or such imprisonment. * * *

"The legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof except in the particulars otherwise specified in this section, and for the establishment of municipal courts in cities or cities and counties governed under charters framed and adopted under the authority of this constitution, and having the population hereinbefore in this section specified. * * *"

It seems to us too plain for argument, or taking time and space to consider the attempted distinction between such phrases as "except as hereinafter provided," "in all other cases," "otherwise provided in this article," and "not otherwise provided for," that these two sections as amended are to be read together, and that, by the use of "except as hereinafter provided," reference was made to any provisions which might appear after the language just quoted having to do with the subject dealt with, whether in section 5 or section 11, or, for that matter, any other section of article 6. This being so, we think it clear that the jurisdiction over the subject-matter of the instant case exists only in the municipal court.

The demurrer to the petition for writ of prohibition is sustained.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

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97 Cal. App. 377

GIRARD et ux. v. IRVINE.★

GIRARD v. SAME.

(Civ. 6687.)

District Court of Appeal, First District, Division 1, California. March 4, 1929.

Rehearing Denied April 3, 1929. Hearing Denied by Supreme Court April 29, 1929.

1. Appeal and error ⇨207—Argument that defendant's counsel was trying to deprive poor people of their rights held not ground for reversal, in absence of request for instruction to disregard it.

Remarks of plaintiff's counsel in argument to jury that defendant's counsel was trying to deprive poor people of their rights, that evidence showed that plaintiffs were poor, and that one of them was unable for that reason to take further medical treatment for injuries complained of, *held* not ground for reversal, if improper, in absence of request for instruction to disregard them, not being such as would have justified order discharging jury.

2. Trial ⇨108½—While evidence that defendant is insured is inadmissible, and questions designed solely to get fact before jury improper, counsel may ask questions necessary to ascertain jurors' bias or prejudice.

While evidence that defendant in action for damages is insured against loss is inadmissible, and it is improper for counsel to endeavor to get such fact before jury by questions designed solely for that purpose, it is proper for counsel to ask in good faith such questions as may be necessary to ascertain whether prospective jurors are free from bias or prejudice that might affect their verdict.

3. Appeal and error ⇨1060(1)—Questions informing prospective jurors that defendant was insured do not require reversal, where damages awarded are not excessive, nor defendant's liability doubtful.

Questions, asked prospective jurors in good faith to ascertain whether they are free from bias or prejudice, cannot be said to have resulted in miscarriage of justice, requiring reversal of judgment, even if improper, as informing them that defendant was insured, where amount assessed as damages is not disproportionate to that reasonably shown by evidence, and defendant's liability is not a close question.

4. Appeal and error ⇨1060(1)—Questions on voir dire as to juror's acquaintance with persons connected with defendant's insurer held not ground for reversal.

Questions to juror on voir dire as to his acquaintance with persons connected with accident insurance company, and presence of one of them in court, *held* not ground for reversal, even if improper, as informing prospective jurors that defendant was insured, where his negligence was not a close question, and record did not clearly show bad faith in asking questions.

5. Appeal and error ⇨978(2)—Trial court's implied conclusion, in denying new trial, that counsel's misconduct was not prejudicial, cannot be disturbed, unless plainly wrong.

Trial court's implied conclusion, in denying defendant's motion for new trial for misconduct of plaintiff's counsel, that no prejudice was suffered by defendant, cannot be disturbed on appeal, unless plainly wrong under all the circumstances.

6. Witnesses ⇨271(1), 275(2)—Cross-examination as to disposition and whereabouts of witnesses' written statements after accident, and whether defendant talked with insurance adjuster, held proper (Code Civ. Proc. § 1000).

Questions to defendant's witnesses on cross-examination as to what was done with, and present whereabouts of, written statements made by them after accident, and cross-examination of defendant as to whether he ever talked with insurance adjuster about facts of case, *held* properly allowed, where such statements, according to witnesses' testimony, related to merits of action, and production thereof might have been compelled, if in their possession, under Code Civ. Proc. § 1000; record indicating no intention to apprise jury that defendant was insured, which was not necessary effect of questions.

7. Trial ⇨260(1)—Refusal of instruction fully covered by instructions given was not error.

Refusal of instruction on point fully covered in other instructions given by court was not error.

8. Trial ⇨237(1)—Instruction that affirmative of issue must be proved, and decision made according to preponderance of evidence, held not erroneous, as requiring defendant to meet plaintiffs' case by such preponderance (Code Civ. Proc. § 2061, subd. 5).

In personal injury suits, wherein pleas of contributory negligence were interposed, instruction, pursuant to Code Civ. Proc. § 2061,

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★Rehearing denied. Hearing denied by Supreme Court.

subd. 5, that affirmative of issue must be proved and decision made according to preponderance of evidence, when contradictory, *held* not erroneous, as requiring defendant to meet plaintiffs' case by such preponderance.

9. Negligence 🔑122(1)—Burden of proving contributory negligence is on defendant.

Burden of proof as to issue of contributory negligence, pleaded by defendant, rests on the latter.

10. Trial 🔑296(3)—Instruction to find for defendant, if he used ordinary care, held sufficient to remove impression, created by another instruction, that he would be negligent under circumstances stated, notwithstanding reasonable care.

Instruction to find for defendant, if he used ordinary care and caution in operating his automobile immediately before accident, *held* sufficient to remove any impression, created by another instruction, that his failure to pass plaintiff's automobile without collision by seasonably turning to right would constitute negligence, though he used reasonable care to avoid collision.

11. Trial 🔑253(4)—Instruction that plaintiff, if suddenly imperiled by defendant's negligence, was excused for omitting some precautions and making unwise choice, held not erroneous, as ignoring question whether peril was due to his own negligence.

Instruction that, if plaintiff was suddenly placed in peril by defendant's negligence, and did not have sufficient time thereafter to consider all circumstances, he was excusable for omitting some precautions, and making unwise choice, *held* not erroneous, as ignoring question whether his perilous position was due to his own negligence, especially where jury was repeatedly instructed that he could not recover, if guilty of negligence proximately contributing to accident in slightest degree.

12. Trial 🔑233(2)—Instruction to allow plaintiff no more damages than sum alleged held not erroneous, as authorizing allowance of such sum, though not warranted by evidence.

Instruction that plaintiff alleged damage to his automobile in stated sum, and that jury could allow him no more, *held* not erroneous, as authorizing it to allow such sum, though evidence showed that value of automobile was much less.

13. Damages 🔑208(1)—Value of plaintiff's automobile immediately before collision with defendant's automobile held for jury.

The question of the value of plaintiff's automobile immediately before collision with defendant's automobile *held* for the jury.

14. Damages 🔑38—Damages for lessening of injured minor's earning power may be recovered, though injured person had not worked.

Damages for injuries to minor may be estimated on earning power, and recovery had for lessening thereof, regardless of whether injured person had worked or not.

15. Damages 🔑208(4)—Minor's earning capacity and degree to which lessened by injuries held for jury.

In action for injuries to minor girl in automobile collision, evidence *held* to justify submission to jury of question as to her earning capacity and degree to which it might be lessened by injuries; such matters being presumably within jury's knowledge or observation as persons of ordinary intelligence and experience.

16. Estoppel 🔑68(2)—Father, suing as minor's guardian ad litem, for loss of earning capacity, would be estopped to sue therefor on his own behalf (Civ. Code, § 197).

While injured minor's earnings during minority belonged to parents equally under Civ. Code, § 197, father, bringing action as her guardian ad litem for loss of earning capacity, would be estopped to bring action therefor on his own behalf.

17. Parent and child 🔑7(6)—Mother, not suing for loss of injured daughter's earning capacity, nor asserting right to portion of amount recovered by daughter, waived such right, and cannot complain of failure to restrict recovery to period after daughter's minority.

Mother, bringing no action for loss of earning capacity by injuries to minor daughter, and testifying in support of latter's claims, with full notice of action brought by daughter and amount and character of damage alleged, without asserting right to portion of amount recovered, waived any right thereto, and cannot complain that recovery was not restricted to period following minority.

18. Damages 🔑132(7)—$2,500 for injuries to leg bone of minor girl, with resulting loss of earning capacity, held not excessive.

Verdict awarding $2,500 damages to minor girl for injuries to leg bone, which caused swelling and pain at time of accident and in following year, and might recur in physician's opinion, with resulting loss of earning capacity, *held* not excessive.

Appeals from Superior Court, Napa County; Percy S. King, Judge.

Actions by Leon Girard and wife and by Leonie Girard, a minor, by Leon Girard, her guardian ad litem, against Thomas Irvine. Judgments for plaintiffs, and defendant appeals. Affirmed.

Nathan F. Coombs, of Napa, and Redman & Alexander, of San Francisco, for appellant.

Philip M. Carey, of Oakland, and Thomas C. Anglim, of Napa (Robert Collins, of Richmond, and Marvin B. Sherwin, of Oakland, of counsel), for respondents.

PER CURIAM. On May 29, 1925, Leon Girard and his wife, Louise, and Leonie, his daughter (who is a minor) were riding in their Ford car, driven by respondent Leon Girard, south along the public highway between the towns of St. Helena and Napa. At a point about a mile north of the town of

Rutherford a collision occurred with a Nash car, which was being driven by defendant Irvine in a northerly direction. Due to the collision, both Louise and Leonie Girard received personal injuries and the Ford car was damaged.

The first action was brought by Girard and his wife to recover for the injuries suffered by Mrs. Girard and the damage to the Ford automobile, and the second by Leonie Girard, through her father, as guardian ad litem, to recover for the injuries which she received. The cases were tried together, and the jury returned a verdict for the plaintiffs in the first action in the sum of $2,567 and a verdict of $2,500 for the plaintiff in the second action. From the judgments entered thereon, defendant Irvine has appealed.

As grounds for reversal it is claimed that the findings against appellant on the question of negligence are unsupported, that the attorney for the plaintiffs was guilty of prejudicial misconduct, and that the court erred in certain of its instructions to the jury and by refusing an instruction offered by appellant.

As to the first point it will be sufficient to say, without reviewing the evidence in this opinion, that while the evidence was conflicting the conclusion of the jury that the accident was caused solely by the negligence of the defendant Irvine was fully supported.

[1] In the course of the direct examination of Mrs. Girard she testified without objection that, after receiving treatment for her injuries during a certain period, she was financially unable to continue treatments, and, further, that her husband was a laboring man earning daily wages. Later her husband, on cross-examination by the defendant, testified that at the time of the accident he was in the employ of a farmer in Napa county, engaged in vineyard work. Counsel for plaintiff, in the course of his argument to the jury, said of opposing counsel: "Mr. Alexander has been unfair in many ways in fighting this claim. He is trying to deprive poor people of their rights." These remarks counsel for defendant assigned as misconduct, and requested the trial court for that reason to discharge the jury. In reply counsel for plaintiffs said: "The evidence shows that they were poor people. Mrs. Girard was unable to take further medical treatment for that reason."

Assuming the remarks, even in view of the evidence, to have been improper, they were not of a character which would have justified an order discharging the jury, nor were they such that their effect upon the jury, if any, could not have been removed by an instruction that they be disregarded. No request for such an instruction was made, and appellant is consequently not in a position to complain. People v. Babcock, 160 Cal. 537, 117 P. 549; Grossetti v. Sweasey, 176 Cal. 793, 169 P. 687; Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672, 12 A. L. R. 1007; Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393.

[2-4] Appellant also complains of questions asked of one of the jurors on his voir dire as to his acquaintance with any persons connected with an accident insurance company, including an adjuster for the company, both the company and the adjuster being named by counsel, and in the latter connection counsel for the defendant was asked whether the adjuster was present in court. Following this the court, at the request of the appellant, instructed the jury that no insurance company was a defendant in the case.

It is contended that the purpose of the questions was to inform prospective jurors that an insurance company, as the insurer of the defendant, was interested. While evidence that a defendant in an action for damages is insured against loss is not admissible (Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 P. 147, Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700), and it is improper for counsel to endeavor to get the fact before the jury by questions designed solely for that purpose (Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739), nevertheless it is proper for counsel to ask in good faith such questions as may be necessary to ascertain whether prospective jurors are free from bias or prejudice that might affect their verdict (Cozad v. Raisch Imp. Co., 175 Cal. 619, 624, 166 P. 1000, Arnold v. California Portland Cement Co., 41 Cal. App. 420, 183 P. 171); nor can such questions, conceding their impropriety, be said to have resulted in a miscarriage of justice, where the amount assessed by the jury as damages is not disproportionate to that which the evidence reasonably shows, and the defendant's liability therefor under the evidence is not a close question (Eldridge v. Clark & Henery Construction Co., 75 Cal. App. 516, 243 P. 43). In the present case the negligence of the defendant was not, in our opinion, a close question, and we cannot say that the questions asked were necessarily prejudicial; nor is it clear from the record that they were not asked in good faith.

[5] In denying defendant's motion for a new trial, based upon the grounds, among others, of the misconduct of plaintiff's counsel, the trial court impliedly determined that no prejudice was suffered by the defendant, and its conclusion cannot be disturbed, unless, under all the circumstances, it was plainly wrong. Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538. This cannot be said here.

[6] Counsel for the plaintiffs, during the course of the trial, questioned witnesses for the appellant on their cross-examination as to certain written statements made by them after the accident. These questions, which were objected to by appellant, related prin-

cipally to what had been done with the writings after the same had been signed by the witnesses, and their present whereabouts. Further, in the cross-examination of the appellant, he was asked if he had ever talked with the insurance adjuster mentioned about the facts of the case. The court's rulings in the above connection are assigned as error, and it is further contended that these questions also tended to apprise the jury of the fact that the appellant was insured.

The written statements, according to the testimony of the several witnesses indicated, contained matter manifestly relating to the merits of the action, and the production of which, if in their possession, the court might have compelled. Code Civ. Proc. § 1000; Ex parte Clark, 126 Cal. 239, 58 P. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176; Morehouse v. Morehouse, 136 Cal. 332, 68 P. 976; Roche v. Llewellyn Iron Works Co., supra. The questions were not such that their necessary effect was to apprise the jury that the defendant was insured; nor does the record indicate that this was the intention of counsel, and under the above authorities the questions were properly allowed.

[7] Appellant complains of the refusal of an instruction, offered by him, which stated in substance that, unless the jury found that the speed at which his automobile was being driven at the time of the accident proximately contributed thereto, the question of speed was immaterial. The point was fully covered in other instructions by the court, and the refusal of the instruction offered was not erroneous.

[8, 9] The court instructed the jury that "in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence." While the instruction is one which the court is required to give on all proper occasions (Code Civ. Proc. § 2061, subd. 5), appellant claims that it required him to meet the case made by the plaintiffs by a preponderance of the evidence. This was not its effect, as the burden was expressly placed upon the party having the affirmative of the issue, which in this case, pleas of contributory negligence having been interposed to both complaints, would as to that issue rest upon appellant. Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376.

[10] The jury was also instructed as follows: "When two moving vehicles coming toward each other meet on a highway, the driver of each must turn reasonably to the right of the center of the highway, so as to pass without interference. If you find from the evidence in this case that the defendant Irvine had clear opportunity and room on said highway to seasonably turn to his right of the center of the highway, and thus pass Girard's automobile without interference or collision, and you further find that the defendant Irvine failed so to do, then I instruct you that his failure in this regard, if any, would constitute negligence on the part of the said defendant Irvine."

Appellant contends that the element of reasonable care was omitted from the above, and that there was placed upon him the absolute duty to turn seasonably to the right. The instruction, standing alone, would be subject to criticism; but elsewhere the jury was fully and correctly instructed that, if they found that appellant immediately before the accident used ordinary care and caution in the operation of his automobile—i. e., such care and caution as a reasonably prudent person would have exercised under the circumstances—no damages could be awarded against him. This, we think, was sufficient to remove any impression that the appellant would be guilty of negligence, notwithstanding that he had used reasonable care to avoid the collision.

[11] The jury was further told that, if the plaintiff Girard was suddenly placed in peril by the negligence, if any, of the appellant, and did not have sufficient time thereafter to consider all the circumstances, then he was excusable for omitting some precautions for his own safety and the safety of those with him which otherwise he would have taken, and likewise excusable for making, if the jury so found, an unwise choice under this disturbing influence.

It is claimed that the instruction ignored the question whether the plaintiff's position of peril was due to his own negligence. The instruction did not purport to say that a person placed in sudden peril by his own negligence is removed from the imputation of contributory negligence, but that an unwise choice under such circumstances is not of itself contributory negligence. Similar instructions were approved in Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358, and Hammond v. Pacific Electric Ry. Co., 32 Cal. App. 756, 164 P. 50. Moreover, the jury was repeatedly instructed that if Girard, in the operation of his automobile, was guilty of negligence which in the slightest degree proximately contributed to the accident, then neither he nor his wife could recover.

[12, 13] The court by its instructions submitted to the jury the questions whether her injuries had impaired the earning capacity of Leonie Girard, or were reasonably certain to do so in the future, and the amount of damage, if any, suffered by Girard by reason of injuries to his automobile. It is claimed that there was no evidence which justified the submission to the jury of the minor's loss of earning capacity; further, that any loss in that respect during minority could only be recovered by her parents, and that the jury was authorized by the court's instruction to allow the sum of $375 for the damage to the automobile, whereas the evidence showed its value to have been much less than that amount.

Contrary to appellant's contention, the jury was instructed that Girard alleged a damage to his automobile in the sum of $375; that, if they found for him, no allowance in a sum greater than that amount should be made. The plaintiff testified that in 1921 he paid $375 for the car, which was a 1919 model, and that about three months prior to the accident it was overhauled at a cost of $73. After the accident, according to certain of the testimony, it was valueless. The question of its value immediately before the accident was one for the jury, and their conclusion, for aught that appears, was fully supported.

[14, 15] The evidence shows that, among other injuries, the minor sustained an injury to one of the bones of her leg, the periosteum being affected. This caused swelling and pain at the time of the accident, and the condition occurred again in 1926. In the opinion of her physician, the injury was of such a character that the condition might be a recurring one, although he was unable to give a definite opinion in that regard. While it does not appear that anything had been earned by the minor, either before the accident or subsequently, nevertheless damages may be estimated upon earning power, and if this has been lessened a recovery may be had, regardless of whether the injured person had worked or not. Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 P. 72; Gotsch v. Market St. Ry. (Cal. App.) 265 P. 268; Holmes v. California, etc., Fruit Co., 69 Cal. App. 779, 232 P. 178. For this there is no precise measure of damages. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, Dow v. City of Oroville, 22 Cal. App. 215, 134 P. 197. The evidence was sufficient to justify the submission of the question to the jury, her earning capacity and the degree to which the same might be lessened by her injuries being presumably within the knowledge or observation of the jury as persons of ordinary intelligence and experience. Storrs v. Los Angeles Traction Co., supra, Gotsch v. Market St. Ry., supra.

[16] While the earnings of the minor during minority belonged to her parents equally (Civ. Code, § 197), here her father, having brought the action as her guardian ad litem claiming such loss on her behalf, would be estopped from attempting to recover the same in an action brought on his own behalf (Moline Timber Co. v. Taylor, 144 Ark. 317, 222 S. W. 371; Morris v. Kasling, 79 Tex. 141, 15 S. W. 226; Kenure v. Brainerd, etc., Co., 88 Conn. 265, 91 A. 185; Baker v. Flint, etc., R. R. Co., 91 Mich. 298, 51 N. W. 897, 16 L. R. A. 154, 30 Am. St. Rep. 471; Louisville Ry. Co. v. Esselman [Ky.] 93 S. W. 50; Revel v. Pruitt, 42 Okl. 696, 142 P. 1019; Abeles v. Bransfield, 19 Kan. 16; American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784).

[17] As to the interest of the mother therein, it is not contended that any action has been brought by her to recover for any loss in this respect. Moreover, the record shows that, with full notice of the action brought by her daughter and the amount and character of the damage alleged, she testified in support of her daughter's claims, and has in no manner asserted a right to a portion of the amount recovered. Under such circumstances, it has been held that any right thereto was waived, and that the defendant could not complain that the child's recovery was not restricted to the period following her minority. Louisville, H., & St. Louis Ry. Co. v. Lyons, 156 Ky. 222, 160 S. W. 942.

[18] The conclusions of the jury were fully sustained by the evidence, and in neither of the cases was the amount of damages awarded excessive. After an examination of the record in each case, including the evidence, we find no error which in our opinion resulted in a miscarriage of justice or would justify a reversal of either of the judgments appealed from.

The judgments are accordingly affirmed.

INGRAM et al. v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY, et al. (Civ. 6185.)★

District Court of Appeal, Second District, Division 2, California. Feb. 25, 1929.

Hearing Granted by Supreme Court April 25, 1929.

1. Master and servant ⚷416—Department having set aside order denying rehearing held to have jurisdiction to order rehearing without regard to time when petition for rehearing was filed (Workmen's Compensation Act, § 20, subd. (d), and § 64, subd. (f).

Department of Industrial Relations, Division of Industrial Accidents and Safety, *held* to have jurisdiction under Workmen's Compensation Act (St. 1917, p. 850) § 20, subd. (d), Deering's Gen. Laws 1923, Act 4749, to order rehearing of proceeding generally without respect to date of any petition for rehearing and without regard to fact that more than 30 days had elapsed after filing of such petition, where it had set aside an order denying a rehearing, notwithstanding section 64, subd. (f).

2. Master and servant ⚷417(3)—Certiorari held proper to review award pursuant to rehearing, though there was no petition for second rehearing (Workmen's Compensation Act, § 67, subd. (a).

Certiorari will lie to review award made pursuant to rehearing of Department of Industrial Relations, Division of Industrial Accidents and Safety, though there was no petition for rehearing after second award, notwithstanding Workmen's Compensation Act (St.

★Hearing granted. 284 P. 212.

1917, p. 875) § 67, subd. (a), Deering's Gen. Laws 1923, Act 4749.

3. Master and servant 🔑405(2)—Evidence held to show that employment of subcontractor, injured while painting roof before commencing work under subcontract, was casual (Workmen's Compensation Act, § 8, subd. (c).

Evidence in compensation proceeding, showing that injured employee was subcontractor for performance of certain work in interior of house being remodeled, but was injured while painting roof while awaiting conclusion of other work which had to be completed before he could commence performance of subcontract, *held* sufficient to show that employment was casual at time of injury, within Workmen's Compensation Act (St. 1917, p. 835) § 8, subd. (c), Deering's Gen. Laws 1923, Act 4749.

4. Master and servant 🔑414—Whether employers were engaged in excluded employment held fact question to be determined by department (Workmen's Compensation Act).

In proceeding under Workmen's Compensation Act (St. 1917, p. 831, as amended), question whether employers were engaged in an excluded employment was question of fact to be determined by department.

5. Master and servant 🔑417(7)—In reviewing sufficiency of evidence to support finding in compensation case, question is whether such finding is supported by any rational view of evidence (Workmen's Compensation Act).

In reviewing sufficiency of evidence to support finding in proceeding under Workmen's Compensation Act (St. 1917, p. 831, as amended), question presented is whether finding assailed is supported by any rational view of evidence.

6. Master and servant 🔑405(4)—Evidence held insufficient to support finding that work of employee at time of injury, while painting roof, was in course of business of employer, who was lawyer (Workmen's Compensation Act, § 8, subd. c).

In proceeding under Workmen's Compensation Act, evidence *held* insufficient to support finding that work being done by employee at time of injury was in course of trade, business, profession, or occupation of employers, under Workmen's Compensation Act (St. 1917, p. 835) § 8, subd. (c), Deering's Gen. Laws 1923, Act 4749, where employers were lawyer and his wife and employee was injured while painting roof.

Application by J. E. Ingram and another for certiorari to review an order of the Department of Industrial Relations, Division of Industrial Accidents and Safety, and another. Award annulled.

F. Britton McConnell, of Los Angeles (J. W. Carrigan, of Los Angeles, of counsel), for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

WORKS, P. J. Respondent department, upon petition of respondent Stoolfire, made its award against petitioners. The latter applied to this court for a writ of review and the writ issued. We are now to determine whether the award shall stand.

It is contended by respondents that petitioner J. E. Ingram—who was a defendant in the proceeding before respondent department from its beginning, petitioner Minnie H. Ingram having been made a defendant later—cannot be heard to assail the award which it is the purpose of the present proceeding to annul. The department had made an earlier award in the proceeding before it on November 24, 1926, running against petitioner J. E. Ingram alone. On December 16, 1926, he petitioned for a rehearing, and on January 14, 1927, the petition was denied. On February 7, 1927, petitioner J. E. Ingram filed a petition asking that the order of January 14 be set aside, and for rehearing. On March 1, 1927, the department ordered, under a recital, "good cause appearing therefor," "that said order heretofore made and entered on the 14th day of January, 1927, be and the same is hereby vacated and set aside," and, further, "that the defendant's petition for rehearing filed herein on the 7th day of February, 1927, be and the same hereby is granted." On September 20, 1927, an order was made whereby petitioner Minnie H. Ingram was joined as a party defendant in the proceeding. Pursuant to the order of March 1, 1927, a rehearing was had and at the conclusion thereof, and on July 27, 1928, an order was made which recites, among other things: "It is hereby ordered as and for the decision after rehearing that the findings and award heretofore made and filed herein be, and hereby are, rescinded and annulled and new findings and award made and substituted therefor as follows"—the substance of the findings and award then being set down. This award ran against both petitioners in the proceeding now before us. On August 17, 1928, petitioner Minnie H. Ingram filed a petition for a rehearing from the award of July 27, but petitioner J. E. Ingram filed no such petition.

Respondents, calling attention to the fact that the order of March 1, 1927, after setting aside the order of January 14, 1927, denying a rehearing, granted the petition for a rehearing dated February 7, 1928, and not that dated December 16, 1927. It is said that the petition of February 7 was a second petition for rehearing and that no authority existed for granting it. Crowe Glass Co. v. Industrial Accident Commission, 84 Cal. App. 287, 258 P. 130, is cited as establishing this lack of authority, and petitioners concede that the point is well taken. Respondent then says that under subdivision (d) of section 20 of the Workmen's Compensation Act, which will be referred to hereafter more at large, the department had the power, pursuant to the petition of February 7, 1928, to set aside the order of January 14 denying a rehearing, but that the petition for rehearing dated December 16, 1927, never having been granted, was denied by operation of law. This, despite the fact that the department had made an order setting aside the order which specifically denied it. The denial by operation of law is predicated of the provisions of subdivision (f) of section 64 of the Workmen's Compensation Act (Stats. 1917, p. 874, Deering, Gen. Laws, 1923 Ed., Act 4749), which is to the effect that a petition for rehearing, if not acted upon, shall be deemed to have been denied before the expiration of 30 days from the date of its filing. After references to subdivision (d) of section 20 of the act after comment as to the effect of that section upon the question presented, and after a reference to the section of the Workmen's Compensation Act which makes a petition for rehearing a necessary prerequisite to an application to the courts for the writ of review, under certain circumstances, respondent thus concludes its argument upon the point: "The dilemma confronting Petitioner J. E. Ingram, therefore, is that on the one hand he can not claim that his Petition for Rehearing filed February 7, 1927, was a valid Petition for Rehearing or that the order of March 1, 1927, granted his original Petition for Rehearing of December 16, 1926, and, therefore, the first original award of the Commission is void and the last decision is good. On the contrary, he can not claim that the second or final order of the Commission of July 27, 1928, is void and the original Findings and Award legal. Whichever award he elects to stand on as legal is final and binding upon him because of his failure to take the proper procedural steps prior to appeal." Without particular notice of the seeming anomaly presented by this quotation culminating in its last sentence, we proceed to a consideration of the arguments advanced by petitioner in opposition to the question raised by respondent.

[1] Subdivision (d) of section 20 of the Workmen's Compensation Act (Stats. 1917, p. 850, Deering, Gen. Laws, 1923 Ed., Act 4749) provides in part: "The commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, such power including the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated." It is conceded by all the parties that the order of March 1, 1928, to the extent that it assumed to set aside the order of January 14, shows a proper exercise of the powers of the department. It is also agreed, as we have already seen, that the order of March 1, in so far as it assumed to grant the rehearing asked for in the petition of February 7, was ineffective. We think that the concession as to the effectiveness of a part of the order of March 1 operates to annihilate the consequences which respondent sees as flowing from the agreement of the parties to the effect that another part of it was inoperative. Suppose the department did act inadvisedly in granting the petition for rehearing dated February 7. Suppose it should have granted the one dated December 16. Suppose, indeed, that it had no power to grant the latter for the reason that more than 30 days had elapsed after it was filed. It did have power to set aside its order denying the petition of December 16, under the concession made by the parties and under the law as it appears to us to read. Plainly, as it seems, there was no power to grant the petition for rehearing dated February 7. To say that the department had no power, later than January 15, 1928, to grant the petition of December 16—and it does seem that it had not—is to say that the department was brought to an impasse, was caught in a cul de sac, after and although it had made a perfectly valid order setting aside the order of January 14 denying the petition of December 16. Such things cannot be. Having set aside the order denying the latter petition, the department certified to the world that the order should not have been made and that the proceeding should be reopened. This being so, we think the department had the jurisdiction, under the broad powers conferred by subdivision (d) of section 20, to order a rehearing of the proceeding generally, without respect to the date of any petition for rehearing, and without regard to the fact that more than 30 days had elapsed after the filing of any such petition. If it did not have that jurisdiction, the order setting aside the order denying rehearing was a futile act, a vain thing. The Legislature did not intend such an anomaly. Taking the order of March 1 in its entirety, we think its effect was to set aside the order it assumed to set aside and to grant a rehearing. As it could have granted neither the petition of December 16 nor that of February 7, the mention of the latter in its order is to be regarded as surplusage. We think these consequences arise from the broad language of subdivision (d) of section 20 and from the fact that, under it, the department, in a proper exercise of its powers, had set aside the order denying the petition for rehearing of December 16. It is to be remembered that all that we have quoted above from subdivision (d) is made to depend from the opening language of the subdivision: "The commis

sion shall have continuing jurisdiction over all its orders, decisions and awards. * * *" A part of the subdivision which we have not quoted is to the effect that no award shall be rescinded or amended more than 245 weeks after its rendition, and the first of the two awards which are of interest here was rescinded long before the expiration of that period. The order setting aside the order denying the petition of December 16 was the first step toward that result. The broad powers conferred by subdivision (d) are pointed out in Bartlett Hayward Co. v. Industrial Accident Commission (Cal. Sup.) 265 P. 195.

[2] Subdivision (a) of section 67 of the Workmen's Compensation Act (Stats. 1917, p. 875, Deering, Gen. Laws, 1923 Ed., Act 4749) provides: "Within thirty days after the application for a rehearing is denied, or, if the application is granted, within thirty days after the rendition of the decision on the rehearing," interested parties may petition the courts for the writ of review. It is true, taking this language literally for the moment, that there was here no granting of an application for a rehearing. A rehearing was granted irrespective of formal application therefor. The rehearing having been had, an award having been made pursuant to it, no second rehearing was possible (Crowe Glass Co. v. Industrial Accident Commission, supra), and petitioner J. E. Ingram's only recourse was to the courts by means of an application for the writ of review. To that recourse he resorts in the present proceeding. If he had petitioned for a rehearing after the second award, his act would have been futile. The Legislature could not have contemplated such an act as a necessary basis for his petition addressed to us. We think petitioner J. E. Ingram is properly before us.

[3] Petitioners make the point that the injuries suffered by respondent Stoolfire arose out of an employment which was both casual and not in the course of the trade, business profession, or occupation of petitioners. We shall first dispose of the question whether the employment was casual. Such an employment is one "where the work contemplated is to be completed in not exceeding ten working days * * * and where the total labor cost of such work is less than one hundred dollars." Subdivision (c), § 8, Workmen's Comp. Act (Stats. 1917, p. 835, Deering's Gen. Laws, 1923 Ed., Act 4749). Stoolfire was a subcontractor for the performance of certain work in the interior of a house being remodeled by petitioners and which was near its completion. He was awaiting the conclusion of certain work by another subcontractor, which work was necessary to be completed before Stoolfire could commence the performance of his subcontract. During this period of waiting Stoolfire, willing to earn a little money at odd jobs, entered into an arrangement with petitioners to do certain work as to which he testified thus: "[J. E. Ingram] said there was a fence to build, a couple of garages to build, the inside of the house had been started by somebody to be remodeled, and I had to finish the remodeling, setting the partitions and doing various things that were to be done, a pair of steps to be built in front, and I don't know, I expect that was all he stipulated." It was agreed that this work was to be done at a certain rate per hour. After concluding all the work mentioned by Stoolfire in the quotation above set forth he began the painting of the roof of petitioner's house, and it was during the progress of this latter work that he suffered the injury for which respondent department awarded him compensation. It is conceded that, if the work of roof painting was a distinct employment, separated from that under which Stoolfire had performed the other odd jobs, the employment was casual under the statute. Stoolfire testified that the "painting of the roof was not laid out to start with," meaning that it was not mentioned by petitioner J. E. Ingram when Stoolfire had his first talk with him about the odd jobs, and he further said that he (Stoolfire) "brought up the question of painting" the roof. He further testified that the first conversation about this painting occurred the day before the painting was commenced. Although the record is not entirely clear upon the subject, it seems that Stoolfire first spoke to his son about the matter of painting the roof and that the son talked with petitioner J. E. Ingram on the subject before Stoolfire broached it to him. At any rate, Ingram testified that Stoolfire said to him, "I can paint the roof;" and the witness then proceeded:

"I said to Mr. Stoolfire, 'You are too old a man and you are too heavy, and you have been injured and complaining about your back.' I said, 'You don't want to go upon that roof.' I said, 'I talked with your son and your son told me of your condition and that he should not allow his father to go up on that roof.'

"Q. What did Mr. Stoolfire say? A. He got very angry at me.

"Q. What did he say? A. Well, he said that he could do the work as well as his son or anybody else, that he was not too old and not too heavy, and he would do it. I told him I did not want him to get up on the roof. I further told him that his son had told me that his wife didn't want him to get up on the roof.

"Q. What was the conclusion of the conversation? A. The conclusion was, it was rather rainy—looked like rain, in the morning, and I told him not to go on that roof.

"Q. And you left? A. And left; yes, sir."

Ingram further said that he never saw Stoolfire following this conversation until after the latter was injured. Stoolfire testified that Ingram did not tell him not to go upon the roof; but a part of his testimony relates to the conversation detailed by Ingram, as above set forth, and it also contains a statement as to the origin of the subject of painting the roof:

"Q. Who brought up the question of painting? A. I did.

"Q. Do you remember any conversation about it not being advisable for you to go upon the roof? A. I think he says, 'You are awful heavy to get up there.' He possibly did."

There is another scrap of testimony by petitioner J. E. Ingram which bears upon the general question under discussion. It should be said in explanation of it that Stoolfire testified that he was to do some painting on the outer walls of the house immediately after concluding work on the roof, and as a part of the same arrangement which included the roof painting. Ingram said:

"Q. Did you intend to paint, to have Mr. Stoolfire paint the house at the time that he first went to work for you? A. Absolutely not.

"Q. Did you intend to have him paint the house at the time he was working on the garage? A. No intention in the world at that time.

"Q. Did you first decide to have the house painted when he suggested that he might paint it? A. Yes sir."

We are satisfied that the employment in which Stoolfire was engaged at the time he was injured was casual.

[4-6] We are now to determine whether the work being done by Stoolfire at the time of his injury was in the course of the trade, business, profession or occupation of petitioners. Petitioner J. E. Ingram was a lawyer, and there is no evidence that petitioner Minnie H. Ingram, who was his spouse, had any employment or occupation other than that of housewife. But respondent claims that petitioners are within the Workmen's Compensation Act because it was the business of petitioners to remodel the house—which was a dwelling—upon which Stoolfire was at work when he was injured, and put it into condition for sale or rental. Respondent further says: "It was not their home. On the contrary, it was property acquired by them without relation to their own scheme of living. Inference is that it was a business venture." Respondent also says, in effect, that whether petitioners were engaged in an excluded employment was a question of fact to be determined by the department, which is, of course, true, and that a finding upon that point, if supported by any rational view of the evidence, is beyond review here. The real question presented, under all the circumstances of the controversy, is whether the finding here assailed is supported by any rational view of the evidence.

Petitioners owned but two parcels of real property, that upon which they resided and that composed in part of the house which they were engaged in remodeling. This latter property was acquired some considerable time before the remodeling was commenced. Petitioner J. E. Ingram testified:

"Q. When you acquired this property did you acquire it as an investment to hold? A. No, sir.

"Q. What was your intention in acquiring it? A. To be honest with you, I didn't know what to do with it when I got it. In other words, I thought I would sell it and get rid of it or something. I didn't have anything definite in mind."

Speaking of a later time, apparently when the remodeling was in progress, Ingram testified further: "A. We did not make up our minds what we should do with it, not knowing who would go on it, etc., and I told Mr. Stoolfire that I had been communicating with my sister, and she might come, that I was not decided, and that was why I did not want to finish anything.

"Q. What was this about chickens? A. I told them further that my wife's mother had some chickens in Texas and we were trying to induce her to come here from Texas and bring the chickens to put on this place; and we had not the consent of either one, and therefore we did not know what we were going to do with the premises." Subdivision (c) of section 8 of the Workmen's Compensation Act (Stats. 1917, p. 835, Deering, Gen. Laws, 1923 Ed., Act 4749) reads, in part: "The phrase 'course of the trade, business, profession or occupation of his employer' shall be taken to include all services tending toward the preservation, maintenance or operation of the business, business premises or business property of the employer. The words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity, the trade name, articles of incorporation or principal business of the employer to the contrary notwithstanding." The finding here in question was not supported by the evidence.

Award annulled.

We concur: CRAIG, J.; THOMPSON, J.

97 Cal. App. 409

BENTINCK v. MENOTTI et al. (Civ. 6470.)

District Court of Appeal, First District, Division 1, California. March 7, 1929.

1. Justices of the peace ⚷86(8)—Statute as to releasing of attachments held inapplicable to proceedings in justice courts (Code Civ. Proc. § 540).

Code Civ. Proc. § 540, prescribing procedure for releasing of attachments, *held* inapplicable to proceedings in justice courts, in view of section 869

2. Justices of the peace ⚷86(8)—Application for release of attachment must be made to justice court out of which attachment issued (Code Civ. Proc. § 540).

Application for release of attachment, issued out of certain justice court, must be made to same court and not to court of another county, under Code Civ. Proc. § 540, such statute having no application to proceedings in justice courts.

3. Attachment ⚷1—Attachment proceedings are statutory, and statute must be strictly followed.

Proceedings relating to attachments are purely statutory, and statute must be strictly followed.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by R. C. Bentinck against M. E. Menotti, individually and as constable of Sausalito township, county of Marin. Judgment for defendants, and plaintiff appeals. Affirmed.

Howard Harron, of San Francisco, for appellant.

L. C. Pistolesi, of San Francisco, for respondents.

NEEDHAM, Justice pro tem. On the 19th day of September, 1927, the plaintiff and appellant herein, Bentinck, was sued in the justice court of Palo Alto township, Santa Clara county, and on the same day a writ of attachment was issued out of said justice court and was subsequently placed in the hands of the defendant and respondent herein, M. E. Menotti, who at the time was constable of Sausalito township, in the county of Marin, and thereafter, on the 26th day of September, 1927, Menotti, as such constable, attached at Sausalito a certain automobile belonging to appellant, Bentinck.

The defendant, Menotti, as constable of Sausalito township, Marin county, after making the attachment above stated, made his return upon the writ and gave it to a clerk in the law office of the plaintiff's attorney in the justice court action in Palo Alto, with directions to forward the same to the justice court at Palo Alto for filing. The said writ was filed in the justice court of Palo Alto on the 24th day of October, 1927.

On the 11th day of October, 1927, the plaintiff and appellant herein, Bentinck, defendant in the justice court action at Palo Alto, through his attorney, gave notice to the attorney of the plaintiff in the justice court action that he would apply to the justice of the peace of Sausalito township, Marin county, for an order discharging the attachment, and on said day the attorney for Bentinck appeared before the justice of the peace of Sausalito township and the said justice fixed and approved an undertaking in the sum of $300 for the release of the said attachment. It appears that said undertaking was never filed, either in the justice court at Sausalito or in the justice court at Palo Alto. It also appears in evidence that no application was made at any time for the fixing of an undertaking for the release of the attachment in the justice court at Palo Alto.

After the approval of said undertaking on the 11th day of October, 1927, by the justice of the peace of Sausalito, the appellant on the same day presented to the defendant herein, as constable, the said undertaking, and demanded the release of the attachment of the automobile, which was refused.

On the 20th day of October, 1927, the plaintiff and appellant sued Menotti individually, and also as constable, in the superior court of Marin county, and alleged that the defendant had converted the said automobile as of the date of the 11th day of October, 1927, and prayed for damages in the sum of $1,651.50, the alleged value thereof. The superior court of Marin county gave judgment for the defendant, Menotti, for costs, and plaintiff, Bentinck, has appealed.

[1] The real question involved here is whether section 540 of the Code of Civil Procedure is applicable to proceedings in justice courts, or whether the said section applies only to proceedings in superior courts as to the releasing of attachments. Counsel on both sides practically admit this is the real issue involved, and such was the position of the learned judge who tried the case. Section 869 of the Code of Civil Procedure reads as follows: "The sections of this code from section 541 to section 559, both inclusive, are applicable to attachments issued in justices' courts, the word 'constable' being substituted for the word 'sheriff,' whenever the writ is directed to a constable, and the word 'justice' being substituted for the word 'judge.'"

[2, 3] It will thus be seen that section 869 of the Code of Civil Procedure does not mention section 540 of the same Code. It would therefore seem to be quite plain that section 540 is excepted from the provisions of section 869 of the Code of Civil Procedure. The appellant, in his attempt to have the attachment issued out of the justice's court of Palo Alto

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

released, instead of applying to the justice's court out of which the attachment was issued, applied to the justice's court of Sausalito township, in the county of Marin, and it is quite apparent that there is no authorization for such a procedure. It is fundamental that the procedure relating to attachments is purely statutory and the statute must be strictly followed. The cases of Hesser v. Rowley, 139 Cal. 410, 73 P. 156, and Doe v. Cramer, 179 Cal. 722, 178 P. 850, are pertinent to the issues involved in this appeal. In the last-named case we quote the following language which appears in the syllabus of the case: "An attachment plaintiff has five days, after *notice* of the *filing* of an undertaking, under sections 554 and 555 of the Code of Civil Procedure, for the release of an attachment, within which to require justification of the sureties, until the lapse of which time without requiring justification the attaching officer is bound to keep the property for the benefit of the attachment plaintiff, *and he is not guilty of conversion* for failure to comply with a prior demand by the attachment defendants for the return of the property." (Italics ours.)

As stated it appears that no undertaking was *filed*, either in the justice court at Sausalito or at Palo Alto. In the same case, from the body of the opinion, we quote the following: "The attachment plaintiff * * * had at least five days [beyond the notice of the *filing* of the undertaking] within which to require justification. Until he suffered that time to pass without requiring justification, the constable was bound to keep the property for the benefit of the attachment plaintiff."

No other points require discussion. Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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97 Cal. App. 412

BENTINCK v. MENOTTI et al. (Civ. 6675.)

District Court of Appeal, First District, Division 1, California. March 7, 1929.

1. Attachment ⚿193—Owner to obtain possession of attached automobile must pay garage fees (Civ. Code, §§ 3051, 3057).

Owner to procure possession of attached automobile on release of attachment is required to pay garage fees under Civ. Code, §§ 3051, 3057.

2. Attachment ⚿193—Garage costs become lien on attached automobile placed in garage for safe-keeping (Civ. Code, §§ 3051, 3057).

Where attached automobile is placed in garage for safe-keeping, garage costs become lien upon automobile under Civ. Code, §§ 3051, 3057.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by R. C. Bentinck against M. E. Menotti and another. Judgment for defendants and plaintiff appeals. Affirmed.

Howard Harron, of San Francisco, for appellant.

L. C. Pistolesi, of San Francisco, for respondents.

NEEDHAM, Justice pro tem. This is a companion case to that of Bentinck v. Menotti (Cal. App.) 275 P. 849, this day decided. The facts in the instant case are the same, except that this is a case in claim and delivery for the recovery of the same automobile, the defendant Menotti being sued in his individual capacity, and H. S. Bell is added as a defendant, Bell being the keeper and owner of the garage in which the automobile in question was stored while under attachment by Constable Menotti.

The evidence shows the automobile was placed in the garage of Bell by the constable on the 26th day of September, 1927; that on the 24th day of December, 1927, Menotti, as constable, received an order to release the attachment upon said automobile, and immediately notified the attorney of the appellant that he could have possession of the automobile upon the paying of the garage fees. Menotti notified Bell to deliver the automobile to either the appellant or his attorney upon payment of his fees for storing and keeping the automobile. The appellant refused to pay the storage fees, which amounted to $25, and brought the present action in claim and delivery in the superior court of the county of Marin, and the court held that the appellant could not recover, and gave judgment for the defendants, and plaintiff, Bentinck, has appealed.

[1, 2] In addition to the issues raised in the companion case there is here but one issue remaining to be determined, and that is: Was the appellant obliged to pay the garage fees before he could gain possession of his automobile? We think it is clear that the obligation to pay the garage fees rested upon the appellant; the automobile being lawfully in the possession of the respondents by virtue of the attachment and the placing of the same in the garage for safe-keeping, the garage costs became a lien upon the automobile. (Sections 3051, 3057, Civ. Code.)

In regard to garage costs the case of Newell v. McDonald, 60 Cal. App. 202, 212 P. 389, states: "Where a sheriff was notified by plaintiff's attorney to release an attached automobile, and such officer thereupon directed the garage in which the car was stored to release it and the garage refused to do so until the costs of storage were paid, the sheriff in ratifying and affirming the stand taken by the garage demanded nothing more than the statute authorized him to require."

See, also, the case of Robinett v. Connolly, 76 Cal. 56, 18 P. 130, and Perrin v. McMann, 97 Cal. 52, 31 P. 837.

These authorities sustain the position of the respondents. Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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97 Cal. App. 205

PEOPLE v. BIESCAR. (Crim. 1735.)★

District Court of Appeal, Second District, Division 2, California. Feb. 26, 1929.

Rehearing Denied March 13, 1929. Hearing Denied by Supreme Court March 28, 1929.

1. Rape 🔑51(1)—Evidence held to support conviction of rape by force.

Evidence *held* to support conviction of rape by force, notwithstanding improbability of prosecutrix's story.

2. Witnesses 🔑269(2)—Cross-examination of witness as to party attended by prosecutrix prior to date of alleged rape held properly excluded as not within scope of direct examination.

In rape prosecution, questions asked on cross-examination of witness, concerning party attended by prosecutrix prior to date of alleged rape, *held* properly excluded as not within scope of direct examination.

3. Rape 🔑40(2)—Refusing cross-examination of prosecutrix as to "wild party" shortly before alleged rape, at which accused claimed to have had intercourse with her consent, held error.

Refusal to permit cross-examination of adult prosecutrix as to "wild" all-night party some days before alleged rape, at which party accused claimed to have had intercourse with prosecutrix with her willing consent, *held* reversible error, the fact that no reference to such party had been made on her direct examination furnishing no valid objection.

4. Rape 🔑40(3)—Exclusion of questions on prosecutrix's cross-examination and testimony of accused as to prosecutrix sleeping with man before date of alleged rape held error.

Exclusion in prosecution for rape by force of questions on cross-examination of prosecutrix and testimony of accused as to prosecutrix sleeping with man at party shortly before date of alleged rape *held* error, prosecutrix's testimony as to resistance placing her previous chastity in issue.

5. Criminal law 🔑706—District attorney's question, on cross-examination of defendant in rape case, as to number of times married, if misconduct, held not prejudicial.

District attorney's question, on cross-examination of defendant in rape trial, whether defendant was married, and how many times he had been married, if misconduct, was not prejudicial.

6. Criminal law 🔑706—Cross-examining accused as to offer of $5,000 to prosecutrix not to appear as complaining witness in prosecution for rape by force held not misconduct.

Questioning accused on cross-examination in prosecution for rape by force as to whether he offered prosecutrix $5,000 to not appear as complaining witness against him *held* not prejudicial misconduct on part of district attorney.

7. Criminal law 🔑706—Cross-examining accused as to offer to marry prosecutrix held not misconduct in rape trial.

Cross-examining accused in prosecution for rape by force as to whether he offered to marry the prosecutrix *held* not misconduct on part of district attorney.

8. Criminal law 🔑706—Cross-examination of accused as to visits of other girls to his bachelor quarters held prejudicial misconduct.

Cross-examination of accused, on trial for rape by force, as to visits by other girls to his bachelor quarters, *held* prejudicial misconduct on part of district attorney, notwithstanding no claim thereof at trial.

9. Criminal law 🔑1186(4)—Errors in rape trial in reception of evidence and misconduct of counsel held not harmless, in view of improbability of prosecutrix's story (Const. art. 6, § 4½).

In prosecution for rape by force, errors in exclusion of testimony and limiting cross-examination of prosecutrix and misconduct of district attorney *held* not harmless, within Const. art. 6, § 4½, in view of the improbability of prosecutrix's story and the probability that conviction was result of miscarriage of justice.

Craig, J., dissenting.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Louis Biescar was convicted of rape by force and violence, and he appeals. Reversed.

See, also, 272 P. 328.

Hearing denied by Supreme Court; SHENK, J., voting for a hearing.

Nathan O. Freedman, Wm. J. Leete, and A. Wm. Christlieb, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, P. J. Defendant was convicted of the crime of rape, perpetrated by means of force and violence. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

Appellant insists vigorously that the evidence was insufficient to support the verdict of guilty. He makes no denial that he had sexual intercourse with the complaining witness at the time fixed in the charge against him, but contends that the act was performed

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★Rehearing denied. Hearing denied by Supreme Court.

with her full consent and that she submitted most willingly to his embraces. As there are some features of the evidence which tend strongly to support this claim of appellant, we deem it necessary to set down in some detail the occurrences which led to his conviction. Both appellant and his alleged victim were members of a coterie of young people who seem to have conducted themselves with great freedom in their interrelations. Some of the crowd, perhaps most of them, knew each other only by their given names or by "nicknames." At the period which is of interest here the prosecuting witness, known to her associates as Pats, was 19 years of age. One of her girl friends, to whom we shall refer hereafter as Rose, and who figures somewhat prominently in the case, was 21 or 22. Appellant was 29. Appellant and Pats became acquainted on March 17, 1928. On the evening of that day she and Rose and some others—the party was apparently composed of eight or ten persons when all had arrived, perhaps more—came to the four-room cottage in which appellant kept bachelor's hall, on a "party." Drinking and dancing were indulged in during the evening, the former to such an extent that all the guests remained in appellant's house throughout the night. Some of them slept on the floor, and the two beds in the place were fully occupied by others. It is strange to note that a brother of Pats, or perhaps of Rose, was one of the members of this "wild" party. Appellant and Pats, both having arisen in the early morning, met each other in the kitchen and at once planned a walk to a hill near the house for the purpose of plucking wild flowers. They went over the top of the hill and into a grove of trees, where appellant says they yielded to their sexual desires. Pats denies this consummation, but testifies that appellant made improper advances to her—"started things that weren't right"—and that she compelled him to desist only by threatening to scream. They soon returned to the house, where they found two of the other girls preparing breakfast for the crowd. The party did not conclude after this meal. Appellant led his guests to his father's ranch, some miles in the country, starting at about 11 o'clock in the morning, and where, some time after their arrival, all had another repast. While they were all at the ranch Pats and appellant went together to a bathhouse which was near a swimming pool on the place and entered it together. Appellant says that there they fondled each other and were again about to indulge in carnal embrace, when they were interrupted by a woman passing the bathhouse. Pats testified that on this occasion appellant made improper advances, but that she again resisted him, and that she again threatened to give warning by screaming. Just when this party of March 17–18 ended the record does not show.

Pats and appellant did not see each other after the party until May 23, upon which day the crime of which appellant was convicted is charged to have been committed. At 3 o'clock in the afternoon of that day appellant appeared in his car at the home of Rose. He had with him a gallon of wine which he took into the house, where he and Rose and her mother had a drink together. Appellant then poured out a quart of wine and gave it to Rose's mother. The girl was employed at a bakery, where she worked from 4 o'clock in the afternoon until midnight, and appellant offered to take her to the bakery in his car. They soon set out, but stopped at the home of Pats to ask her to drive with them to Rose's place of employment and return with appellant for the ride. They found Pats preparing dinner for her parents, who were working people and expected to be home at about 6 o'clock, but she agreed to take the ride, upon which they soon started. At a little distance on the trip they all had a drink of wine without stopping the car. A little later they halted at a gasoline station operated by a man with whom appellant was acquainted, and appellant asked him to join them in a drink. The two girls and the two men then partook of the wine together. Rose was then taken to the bakery and Pats and appellant started on their return. They stopped, however, at appellant's cottage, in order for him to change his clothes so that he might be in better condition to meet her "folks" when he took her home. Pats entered the house with him without objection and they at once had a glass of wine together. She then played his phonograph while he started dressing. At some stage in his preparations Pats offered to shave him and did so. They each had one more drink of the wine. After this last drink Pats, according to her testimony, started toward a davenport and her mind "became a blank." She doesn't know whether she reached the davenport or not. This, Pats says, was about 5:15 or 5:20 o'clock. She testifies that she regained consciousness at about 9 o'clock, and then found herself in bed with no clothing but a small undergarment. She says that appellant was in bed with her, entirely nude, and was endeavoring to violate her person. She testifies that she tried to fight him off, but that he choked her, beat her, called her vile names and finally accomplished his purpose, when she again lapsed into an unconsciousness from which she did not recover until nearly midnight. Appellant says, to the contrary of all this, that after the last drink he went to his bathroom; that when he returned he found Pats undressed and in bed; that he then disrobed and got into bed with her, when they immediately had sexual intercourse without resistance on her part. At the preliminary examination Pats testified that her mind "became a blank" at 4:40 o'clock, instead of at 5:15 or 5:20, as above related. At the preliminary she also testified that she first regained consciousness at "25 minutes to 12 or 20 minutes to 12," thus omitting in that relation all reference to the spirited battle which, at the trial, she said occurred at about 9 o'clock. According to the testimony at the preliminary there was one continuous period of unconsciousness of about seven hours' duration, while, according to what Pats said at the trial, there was one period of about four hours followed by another of about three, with an interval of complete consciousness and of great activity between. At any rate, and no matter which of these recitals was the truth, or whether either of them was true, appellant took Pats home in his car, starting not far from midnight.

Standing alone the story of Pats as to the wrongs she says she suffered is inherently improbable to a degree. After two experiences with appellant, those of March 18, during which, as she says, she was able to subdue his sexual ardor only by threatening to make vigorous outcry, it is strange that she was willing to place herself under his control by entering his house without protection further than her ability to scream. It is strange, in such a situation, that she was willing to indulge with him in further draughts of wine, that notorious heater of the blood. It is strange that she was so completely overcome by the amount of wine she had taken, especially as she and appellant agree that the last drink was plentifully diluted with water, unless the liquor was of an unusual potency. It is strange, if it be granted that her mind did become a blank, that she remained unconscious for either seven hours or four, especially as during the time she was undressed, with all the handling the process implied, and put to bed. Considering the lascivious inclination which appellant had already shown toward her on two occasions, considering that he had her in his power, it is strange that he did not awaken her with his attentions before either four or seven hours had passed, if he revived her in that manner at all. It is strange that her story at the preliminary examination and her recital at the trial could be so discrepant.

[1] Notwithstanding, however, the improbability of the story of Pats as to particulars, we think the record contains sufficient corroboration of that part of it to the effect that appellant violated her person by the employment of force. The father of Pats testified that he was awakened from sleep by a ring at his door bell at about 20 minutes after midnight of May 23. He went to the door and found his daughter lying on the floor of the front porch unconscious. He carried her to her bedroom and was seen doing so by his wife, who had been awakened also. The two parents, after the mother had undressed the daughter, observed scratches and bruises on various parts of her person. These were not accurately described by the parents, as they were foreigners and spoke English badly, but they were described by witnesses who testified later. The upper lid of one of the girl's eyes was discolored. A bruise the size of the palm of a hand was found on one of her arms. Her lip was bleeding. There were scratches about the face, about the neck and about the thorax, both front and back, and a bruise was present near one of her breasts. There were scratches or stripes across the lower portion of her back, her buttocks and the upper portion of her legs. Bruises or marks were seen on one of her legs between the knee and the ankle. Approximately an hour and a half after Pats reached home a physician was called to attend upon her, but he did not arrive until after 4 o'clock. He noted the marks upon her person and described them to the jury at the trial. Pats was examined by a woman who was the physician for the juvenile court, not far from noon of May 24, and she described to the jury, minutely, the marks found by her on the person of the girl. She also gave other testimony which was most damaging to appellant. She had made a careful pelvic examination of Pats, which included an examination of the "genitalia." She testified, after describing the marks on the girl's person: "On pelvic examination there was a bilateral complete laceration of the hymen probably of a—only a few hours' duration. The surfaces were still bleeding at the time I examined her." This physician also testified that she did not recall ever having known "of cases where a woman has had sexual intercourse and that her hymen has not been ruptured by having sexual intercourse." This line of testimony tended effectually to disprove appellant's statement that he and Pats had indulged in the sexual act on the morning of March 18, and, the jury believing it, cast discredit upon his entire testimony.

However improbable the details of the story told by the prosecuting witness on the stand, we are satisfied that the record presents a conflict of evidence, and that the contention of appellant that the evidence was insufficient to support the verdict cannot be upheld.

[2] It is further claimed by appellant that the trial court erred in rulings upon the admissibility of evidence while Rose was upon the witness stand. The rulings which are asserted to be erroneous were made during the cross-examination of the witness. On direct examination she had given no testimony whatever concerning the party which occurred at appellant's home on March 17 and 18. At the beginning of the cross-examination she was asked whether she was present at the party, and she answered that she was. She also testified that Pats was there. She was then asked who were present on the occasion and whether Pats had accompanied her to the house. Objections were made, but solely up-

on the ground that these questions were immaterial, and the objections were sustained. We think the rulings, coming at that stage of the trial, were correct. Only one witness had preceded Rose on the stand, the physician who reached the bedside of Pats on the early morning of May 24, and who was called out of order to testify as to her condition when he saw her at that time. When the questions were asked Rose to which the objections were made, the materiality of the occurrences at the party had not been made to appear.

The witness was then asked several questions as to happenings at the party. To each of these the objection was made that they were not proper cross-examination and the objections were sustained. These rulings were all correct. As we have already observed, no mention of the party was made during the direct examination of the witness.

[3] Pats took the stand immediately after the conclusion of Rose's testimony. During her direct examination no mention was made of the party of March 17–18. Notwithstanding that fact the witness was asked, on cross-examination, several questions concerning occurrences on that occasion, for the purpose of showing the unchaste conduct of Pats with other men. Objection was made to each of these questions on the ground that they were not proper cross-examination, and the objections were sustained. Here is a very different situation from that which was presented when Rose was on the witness stand. In People v. Degnen, 70 Cal. App. 567, 234 P. 129, a prosecuting witness in a rape case had related on direct examination, in a general way, certain events which had transpired between her and the defendant in the case, and we held that he was entitled, on cross-examination, to pursue an inquiry tending to bring out more fully the nature of the relations between the prosecutrix and himself preceding the time when the crime was charged to have been committed. We said that the defendant had the right to prove earlier misconduct of the prosecutrix with him, "if any there was, out of her own mouth, if he could, either directly or by circumstances from which the jury might justly infer that she had been guilty of misconduct, and for that purpose his counsel had the right to embark upon a searching cross-examination, limited only by the very broad lines of the direct examination." In leading up to the discussion which ended in the conclusion just stated, we said in our opinion, now employing italics which are not in the reported case: "The next question arising is whether, on the cross-examination of the prosecuting witness in a rape case, the defendant may put questions calculated to prove that she had, previous to the time set in the charge, willingly submitted herself to his carnal embrace, or, if not proving the fact, tending to affect the credibility of her story that the alleged criminal act was resisted by her, and, in fact, the credibility of her entire testimony. And we have not here a case in which the prosecutrix merely recited the occurrences of the occasion mentioned in the indictment, including her statement that she resisted appellant's assault upon her honor, *a situation which might make less clear* the right to cross-examine for the purposes indicated, but she told a story of her association with appellant from the time she became acquainted with him, in April, 1923, to the day in July of the same year upon which it is charged that his crimes were committed." We think that if, in People v. Degnen, the prosecutrix had not related on direct examination the "story of her association with appellant" from the date of her acquaintance with him, he could nevertheless have pursued practically the same line of cross-examination he sought to conduct in the case, although his right to do so might appear "less clear" than the right arising because of "the very broad lines of the direct examination." We think, under the imagined circumstances, he could have conducted the cross-examination in order "to affect the credibility of her story that the alleged criminal act was resisted by her." We are in this case confronted by the somewhat related question: Was it proper for appellant to cross-examine Pats as to the occurrences of the all-night party which commenced on March 17, for the purpose of showing her conduct with men other than the one against whom she made the charge of rape, even if she did not mention the party on her direct examination? That appellant properly could have proved such matters affirmatively and as a part of his defense testimony is certain, and that he actually attempted to do so will appear later. We thus summed up the law upon this subject in People v. Degnen: "In a prosecution for rape by force and violence unchaste acts of the prosecutrix committed with other men than the defendant may be shown for the purpose of disproving the allegation that the act charged against the defendant was perpetrated through the exercise of force, and despite the unwillingness of the prosecutrix. People v. Benson, 6 Cal. 221 (65 Am. Dec. 506); People v. Shea, 125 Cal. 151, 57 P. 885."

Undoubtedly, under the rule laid down in People v. Benson and in People v. Shea, proof may be made that a prosecutrix has had carnal connection with men other than the defendant on trial. May it be shown that she has committed acts with other men from which the jury might justly infer—let us say, to state an extreme case, from which the jury would practically be compelled to conclude—that there had been a submission of the prosecutrix to the sexual embrace of other men? That is the question presented here. People v. Benson refers to acts of "lewdness" without showing further the nature of the acts sought to be proven, and we have not been able to procure access to the record in the case for the purpose of ascertaining the nature of the questions propounded. It is said in People v. Shea that the prosecutrix "had *consented* to the having of sexual intercourse with other men" (italics ours), a form of expression which is not as definite as it might be upon the particular point which is now of interest, and we have not seen the record in that case. The court, however, cites several cases from other jurisdictions in support of the rule first laid down in this state in People v. Benson. It is said in the first of these, a criminal seduction case: "The chaste character of the witness was directly in issue, for, by the terms of the statute, she must have possessed that character in order to render the act of the defendant punishable under its provisions. In order to determine her character for chastity, her acts and conduct could have been inquired into. It is proper in such cases to extend the inquiry, not only to the fact whether the woman has had, previous to the time when the offense is alleged to have been committed, sexual connection with other men, but whether she is pure and chaste in character as to her actions and habits of life. Unchaste character may be established by such evidence. Andre v. The State, 5 Iowa, 389 [68 Am. Dec. 708]. A woman who would indulge in indecent and lewd conversation, who would knowingly associate with the abandoned and licentious, or would act with indecency, and in a manner inconsistent with virtue and purity, is not of the chaste character contemplated by the statute. Of course, want of chastity may be shown by proof of improper intimacy or direct sexual intercourse with men. It is obvious that evidence tending to establish conversation, conduct and acts of the character above stated, is competent to establish a character for unchastity. Witnesses may be introduced to prove such facts, and there is no reason why the woman alleged to have been seduced, upon cross-examination, may not be examined in relation thereto. Her character for chastity is directly in issue; she is presumed by the law to be chaste, and to rely upon this presumption, although she does not expressly testify to her own purity. Upon this issue, in order to contradict the presumption of law or her own evidence of chastity, she may be required to testify to acts tending to prove her unchastity." State v. Sutherland, 30 Iowa, 570.

In another of the cited cases, a rape case, it is said, the opening reference being to the prosecutrix: "There was no direct evidence that she allowed sexual intercourse with her, but an array of facts and circumstances was made, from which it might be determined that she had done so, the most important of which was, that she was seen under suspicious circumstances with an unknown man in the vicinity of the piles of lumber. The question whether she was the person thus seen, necessarily depended upon satisfactory proof of her identity, and the persons testifying on the subject had only seen her from a distance, and described her by her dress and general appearance only. On the trial, however, the plaintiff in error offered to show, by a witness on the stand, that the complainant was a woman of drunken and dissipated habits, sleeping, generally, in the hallway of a tenement house, and accustomed to go in there at two or three o'clock in the morning. This was excluded and exception taken, the court stating that it was not meant to exclude proof of her general reputation for truth and veracity, or any other evidence as to her moral character. The plaintiff in error was confined, therefore, to proof as to general character for morals, truth and veracity, and prevented from showing particular acts which it would seem were, in themselves, evidence of general immoral character. The plaintiff in error also offered to show, by a witness then on the stand, as follows: 'Counsel—I offer to show, now, by Mr. McCarten, that on the day in question, the fifth day of September, he met this complainant in the street; that he gave her a chew of tobacco; that she went to a liquor saloon with him in the vicinity, drank liquor with him in Myers' place, in Forty-ninth street and First avenue; after which she accompanied him to the lumber yard— * * * and endeavored to get this man to have carnal intercourse with her,' which offer was excluded and exception noted. The first offer, as to the dissipated habits of the complainant, seems to be within the principle or doctrine of Woods v. People, 55 N. Y. Rep. 515 (14 Am. Rep. 309). The fair inference to be drawn from such conduct was, that she was a dissipated and immoral woman, ready for any form of immorality, whether of sexual intercourse or otherwise, which might be demanded of her. Such conduct is not consistent with a virtuous life, and marks the existence and progress of moral depravity. If the legitimate conclusions to be drawn from general conduct, are such as to warrant the particular charge made, evidence of general conduct should be received in such a case as this, for that purpose, although each act of such conduct, considered by itself, would be proof of a particular fact. The offer made in the case cited was not to show the general reputation of the complainant, but that she was in the habit of receiving men for promiscuous intercourse, and especially for liquor. This evidence, the court said, was competent, not for the purpose of impeaching the general credibility of the witness, but upon the question whether she assented to the intercourse with the prisoner. The offer to show by McCarten what has been stated was, in part, for the purpose of contradicting the complainant. She was asked whether she did not go with him to a liquor shop and drink; and whether she did not go to the lumber yard with him, and she answered no to each inquiry. It was objected that the cross-examination, in this respect, was upon matters immaterial to the issue, and that there could be no contradiction of the replies. This view of the question was erroneous. People v. Abbot, 19 Wend. [N. Y.] 192. The issue involved the character of the prosecutrix for truth and veracity, morality and chastity, not because though she were ever so bad she might not be outraged, but because the presumptions in such prosecution as this, against the necessity of employing force, must exist when the character of the person assailed is shown to be immoral and wicked." Brennan v. People, 7 Hun (N. Y.) 171. None of the other cases cited in People v. Shea is particularly helpful here, as they all contain language general in character, like that employed in People v. Benson. It will be observed, however, that two of them, People v. Abbot, 19 Wend. (N. Y.) 192, and Woods v. People, 55 N. Y. 515, 14 Am. Rep. 309, are cited in Brennan v. People. It would appear that the Supreme Court of this state, in citing State v. Sutherland and Brennan v. People, has vouched for them as in point in People v. Shea and has adopted the doctrine enunciated by them. And justly so. If in forcible rape cases sexual intercourse with other men than the defendant may be shown, it follows that acts may be proven from which the commission of such intercourse may be inferred by the jury. The latter proof is permissible under the general rule of evidence to the effect that a fact in issue may be shown by circumstantial evidence.

It appears sufficiently clear to us that appellant had the right to go into such matters on the cross-examination of the prosecutrix. The books are full of cases to the effect that the prosecutrix in a rape case may be subjected to an unusually thorough, searching, and protracted cross-examination. The reasons upon which this rule is based have been stated in different forms. "There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless. * * *" People v. Benson, 6 Cal. 221, 65 Am. Dec. 506. "In this class of prosecutions the defendant, owing to natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence, that he should be given the full measure of every legal right in an endeavor to maintain his innocence." People v. Baldwin, 117 Cal. 244, 49 P. 186, and see People v. Costa, 24 Cal. App. 739, 142 P. 508.

[4] Despite these reasons, however, and within the ordinary principles of the law of evidence, it would seem that the questions addressed to Pats were proper cross-examination. She had testified on direct examination that she resisted to her utmost the attack made by appellant upon her. Under the authorities any witness could have been called by appellant to show, as a part of his defense, her unchaste behavior with other men, as tending to disprove her assertion that she resisted him. It seems, therefore, that she could have been questioned on her cross-examination in order to draw from her own lips, through that medium, evidence showing or tending to show the untruth of this assertion made by herself. The evidence tending to show the untruth of her assertion being in her own mind—granting that she had misconducted herself with other men—the right must have existed to search that mind, on cross-examination, to elicit the contradicting evidence. Under the law permitting a showing of previous unchastity by prosecuting witnesses in cases of rape by force, an assertion by such a witness that force was exerted and that she resisted it is in the nature of an assertion that she is a woman of chastity. State v. Sutherland, supra. There must be a right, on cross-examination, to search the mind of such a witness in order to confute her statement to that effect. Suppose she had actually said on her direct examination: "I was a chaste woman, I had never submitted myself to the embraces of any man, and I resisted the defendant with all the force at my command." Could she not then have been cross-examined in an attempt to show her previous unchastity? And yet that is what, in effect under the law of this state, she did say when she testified that she resisted. We think the court erred in sustaining the objections to the questions. In considering this point we have had before us People v. Burrows, 27 Cal. App. 428, 150 P. 382, a rape case. There certain questions were addressed to the prosecuting witness on cross-examination for the purpose of showing her unchastity. The court said: "These questions * * * were not within the proper scope of cross-examination and besides, it is clear that the character of a witness cannot be impeached in that manner." The case is not in point here, for the charge was rape upon a girl under age. Under all the authorities the questions of force and resistance were not in the case. Therefore the questions asked could not have operated to show the untruth of anything said by the prosecutrix on her direct examination.

In addition to the questions to which reference is made in the last preceding paragraphs, Pats was asked: "And is it not a fact on the night of March 17, 1928, at Mr. Biescar's home you and another young lady and two men were present, slept together that night in a bedroom at Mr. Biescar's home?"

This question was objected to "as incompetent, irrelevant and immaterial, not tending to show any prior act of sexual intercourse between this defendant and the prosecutrix." The objection was sustained. The ruling was error.

On her recross-examination the prosecutrix was asked: "Is it not a fact that on the night of March 17, 1928, that you and another girl and two fellows occupied a bedroom at Mr. Biescar's home together and slept all night together in that room?" Objection was here made that the question was not a proper cross-examination and it was sustained. This ruling also was error.

When appellant was on the witness stand he answered various questions concerning the gathering at his house which commenced on the evening of March 17. He was then asked if he knew where Pats slept that night, if he knew whether any man slept with her, and whether any man occupied the same bed with her. It was objected to each of these questions that it was incompetent, irrelevant, and immaterial, and each objection was sustained. The rulings were error.

[5] Appellant makes four assignments of misconduct alleged to have been committed by the district attorney at the trial. The first of these is shown by the following extract from the record of the cross-examination of appellant:

"Q. Have you ever been married? A. Yes.

"Q. How many times? A. Once.

"Q. When did you get married? A. 1922.

"Q. Aren't you married now? A. Yes.

"Q. You got married recently? A. About a month ago.

"Q. That is twice you have been married, isn't it? A. Yes.

"Q. You didn't mean to mislead anybody here just a second ago when you said just once, did you? A. What do you mean?

"Q. Is the question ambiguous? Didn't you state a moment ago you had been married only once? A. You asked me how many times I have been married?

"Q. You said once. A. Twice.

"Q. You were married about two or three weeks ago? A. Three weeks ago.

"Q. And you were married in 1922 to another woman? A. Yes."

The only claim of misconduct, based upon this portion of the record, is that the district attorney offended in inquiring "whether the defendant was married and how many times he had been married." We think there was no misconduct in this regard, or if there was we think that it was not such that the harm wrought by it, if there was any, could not have been removed by admonition to the jury, and none was asked for. Nor, indeed, were objections made to the questions. We shall say something hereafter, when considering the effect of section 4½ of article 6 of the Constitution upon the appeal, concerning the unfair attitude of the district attorney during the cross-examination of appellant, exhibited in part by the question, "You didn't mean to mislead anybody here just a second ago when you said just once, did you?" and by the questions which immediately followed it. It should be noted, in explanation of the answer to which the prosecutor thus took exception, that the second marriage of appellant occurred about two months after May 24, the day upon which it is charged that his crime was committed.

[6] The second claim of misconduct is founded upon this part of the record of the cross-examination of appellant:

"Q. Is it not a fact that you offered this young lady $5,000 if she wouldn't appear as a complaining witness in this case?

"Mr. Brown: I object to that on the ground it is not proper cross-examination.

"The Court: Objection sustained.

"The District Attorney: I have a right to lay a foundation for impeachment; got a right to any question upon those lines. It is a proper way to lay the foundation for impeachment.

"The Court: * * * You will have to produce some authorities on that particular point. Objection sustained without prejudice."

The question here propounded may have been a proper one, not deciding whether it was correct to ask it on cross-examination or whether it was not. It has been determined, in a rape case, that it is probably proper to receive testimony to show that the defendant has endeavored to suppress evidence damaging to him, as "a rational inference might be drawn from it that defendant thereby manifested a consciousness of guilt." People v. Davenport, 13 Cal. App. 632, 110 P. 318. Certainly, with that decision in existence, it was not misconduct to ask the question here propounded, even on the cross-examination of appellant.

[7] The following portion of the record, on appellant's cross-examination, furnishes the foundation for the third claim of misconduct:

"Q. * * * Did you ever offer to marry this young lady that has accused you of this offense? A. I don't remember.

"Q. What is that? A. I don't remember saying that.

"Q. You wouldn't say that you had not offered to marry her, would you? A. I don't remember saying that at all.

"Q. But will you state now that you had never offered to marry her since she accused you of this offense?

"Mr. Brown: I object to that as not proper cross-examination.

"The Court: Objection sustained.

"The District Attorney: Haven't I a right to show his interest in this case, whether or not he offered to marry her after a charge—accused of this offense?

"The Court: I guess he has an interest in the case all right, being a defendant.

"The District Attorney: Haven't I a right to prove his interest in the case?

"The Court: Objection sustained without prejudice to that line.

"The District Attorney: You want some authority on that, too?

"The Court: Yes."

In view of the decision cited in the last preceding paragraph, there was no misconduct in the asking of the questions here set forth, as if an offer to marry the prosecutrix had been shown, a "rational inference" might have been drawn from it that in making the offer appellant showed a consciousness of guilt. The jury might have inferred from such evidence that appellant projected a marriage in order to remove the possibility of the prosecutrix testifying as a witness against him.

[8] The fourth claim of misconduct is founded upon this part of the record of appellant's cross-examination, coming after a reference to his place of residence:

"Q. Were you living there alone? A. Yes, sir.

"Q. Batching it? A. Batching.

"Q. Accustomed to have young girls come up to your house; is that right? A. Why, not exactly.

"Q. You did have them up there, did you? A. Yes, sir.

"Q. Often? A. Why, sure I had."

We think this portion of the record shows misconduct on the part of the prosecution, as the law is well settled that the questions asked were improper. It is not permitted in a rape case to make such proof. Under such a charge "evidence tending to show the lewd, immoral and indecent conduct with women other than the prosecuting witness is inadmissible." 22 Cal. Jur. 389. It is true that no claim of misconduct was made at the trial, nor was the evidence objected to, but we think the questions were so damaging, especially when we consider the manner in which appellant answered them, that an admonition addressed to the jury by the judge would have been unlikely to remove the harm done.

[9] We are now to inquire, pursuant to the mandate of section 4½ of article 6 of the Constitution, whether the errors committed at the trial have probably resulted in a miscarriage of justice, and we have examined the entire cause, including the evidence, in order to discharge that duty. At the base of the discussion of this question lie considerations arising from the inherent improbability of the story told on the stand by the prosecutrix. We have already shown sufficiently the unsatisfactory character of that story. It becomes necessary now to pay some attention to the evidence, cited in the early part of this opinion, which was corroborative of the assertion of Pats that she resisted a forcible assault of appellant upon her chastity. The physician who made the examination of the prosecutrix at about noon of May 24 testified as to the condition of the hymen at that time, and she said that the laceration was "still bleeding at the time I examined her." There was some contradiction of this testimony. The physician who saw Pats at 4 o'clock of the morning of the 24th, after describing the marks upon her person, testified: "Otherwise no findings, no physical findings of the generative organs. I could not examine completely because the light was poor and I hadn't any instruments, no speculum with me, but as far as I could feel and see there was a tenderness, certain tenderness of the vagina, and the examination was painful. I couldn't find any blood but some mucous discharge." Although the examination made by this physician was not complete, it was thorough enough, it will be observed, for him to say that there was a mucous discharge from the vagina. This examination, as it must be assumed from the fact that the physician had no instruments, was digital. As he went as far as he could *feel* and far enough to find a "certain tenderness of the vagina," the vagina being above the hymen, and to demonstrate that "the examination was painful," he must have meant to say that his fingers were unpolluted by blood upon their withdrawal. This being so—as he "couldn't find any blood"—the jury might justly have determined that the hymen had not recently been ruptured, that it was not bleeding at that time, and that, consequently, the organic evidence of chastity had been obliterated on some earlier occasion. The jury might also have found that the laceration and blood observed by the physician who examined Pats later were the effects of some manipulation practiced by the girl, with sinister intent, after the first physician examined her and before the second saw her. This was not impossible, as questions addressed to the witnesses at the trial plainly disclosed a theory of the defense that the marks and bruises upon the upper part of the body of Pats were self-inflicted and that those on her back, buttocks and upper legs were the result of corporal punishment by her parents, rising in just wrath because of her delinquency in not having a dinner ready for them at 6 o'clock—which the evidence shows they had to prepare for themselves after their day's work—and, following such a dereliction, in not returning home until midnight or after.

In opposition to the entire testimony of Pats, appellant, who was the sole witness for the defense, told a story that was thoroughly consistent and reasonable, although marred at points, indeed, by a boastfulness and demeanor which were in a considerable degree offensive and damaging.

In considering the application of the constitutional provision to the case we think it necessary to refer briefly to the attitude of the district attorney during the cross-examination of appellant. The nature of some of his questions is disclosed by extracts from the record which are made above, and we find it unnecessary to refer to other specific instances. The Attorney General, in the midst of his argument in refutation of the claim that the prosecutor was guilty of misconduct, volunteers the statement that the methods "employed by the district attorney in cross-examining the defendant are somewhat unfair and often along immaterial matters." With this statement we agree. We add that the attitude of the officer was dictatorial, was at points insulting, and was at other times inconsiderate and harsh. We entertain no doubt that this conduct was sufficiently wide from the ordinary and proper amenities of a courtroom to have in some degree, at least, degraded appellant in the estimation of the jury.

When added to the improbable story of the prosecutrix, the errors committed at the trial were such that it is quite probable that a miscarriage of justice has resulted in the case. Especially, if appellant has been allowed to go into the details of the party of March 17–18, either upon the cross-examination of the prosecuting witness or upon his own direct examination, he might have been led to offer the testimony of other participants in the event, thus possibly furnishing some considerable corroboration of the testimony which he, as the sole witness for the defense, gave from the stand. We think, finally, that appellant had not the fair trial that is contemplated by the law.

Judgment and order reversed.

I concur: THOMPSON, J.

CRAIG, J. I dissent. The contested points in this case have been the subject of many decisions, among which there has been considerable conflict. That there is a conflict in the California decisions is pointed out in State v. Apley, 25 N. D. 298, 141 N. W. 740, 48 L. R. A. (N. S.) 269. It may be asserted without question that the weight of authority is contrary to the rule expressed in the foregoing opinion which is sustained by certain decisions in this state.

It has been held that in a prosecution for forcible rape the defendant may show that the prosecutrix has had illicit relations with other men. People v. Shea, 125 Cal. 151, 57 P. 885. However, it is there conceded that this ruling is against the weight of authority elsewhere, and the decision is based upon that rendered in People v. Benson, 6 Cal. 221, 65 Am. Dec. 506, which to my mind is a most ill-considered opinion. This also was the view of Mr. Justice McFarland, who dissented in the Shea Case. Of the authorities cited in the last-named case, I regard none as in point. When it is said that a prosecutrix in a case of this nature puts her chastity in issue by merely testifying that she resisted the defendant's force, and the announcement of this amazing rule is based upon decisions in seduction cases governed by particular statutes having to do with that wrong, it seems obvious that the opinion is open to grave doubt as to its soundness. To my mind, such a rule is abhorrent. It would be as reasonable and as right to allow proof that a defendant charged with murder or larceny has upon some other and remote occasion committed a similar offense.

But though a prosecutrix might, because our Supreme Court has so held in the Benson and Shea Cases, be shown to have consented to intercourse with some one other than the defendant, it has not been held even in this state that any proof falling short of such an act may be shown. Nor have we any decision making it proper to establish such a fact on cross-examination where the direct examination has been as limited as that in the instant case. If the evidence in question was admissible at all, it would have been proper only as a matter of defense.

To my mind, the story told by the prosecutrix is not inherently improbable. It will serve no good purpose to argue this phase of the matter in this dissent, but if her testimony is not highly improbable, and since it is concededly amply supported by corroborative evidence, I think the verdict of the jury should not be disturbed on appeal. I am quite convinced of the defendant's guilt, and believe that even if error was committed in the exclusion of evidence suggested by way of defense tending to show that the prosecutrix had been indiscreet, but not immoral, such a ruling did not affect the substantial rights of the defendant, nor result in a miscarriage of justice.

On Petition for Rehearing.

WORKS, P. J. On petition for a rehearing of this cause it is insisted that we have exceeded our powers under section 4½ of article 6 of the Constitution. It is said in the petition: "In the opinion of this court it is quite evident that it has not confined itself to the question of whether the evidence is close—that is, whether from the evidence for the prosecution and the defense it is doubtful whether appellant committed the offense—but has launched upon an attack of the reputation and character of the prosecutrix." It is difficult to perceive, as it seems to us, how this view of our opinion can be taken; but as language often appears clearer to the writer of it than to the reader, and as our expressions may seem as lacking in clarity to others as they do to petitioner, we shall endeavor to make ourselves more plain.

After the examination of the record, which is required by the Constitution, we came to the conclusion that "the evidence is close," and that "it is doubtful whether appellant committed the offense" charged against him. The improbable character of the story of the prosecutrix was one of the factors leading to this conclusion. We do not scruple to say that we do not believe the story, standing alone. Another factor conducing to the doubt as to appellant's guilt we found in the testimony of the physician who examined the prosecutrix at 4 o'clock in the morning. It is manifest that this doctor made a digital exploration of the genitals of his subject and that the excursion went into the vaginal cavity. Therefore his fingers passed beyond the site of the hymen. The Standard Dictionary says that the hymen is a membrane "which usually partially closes the vagina in virgins." Webster defines it: "A fold of mucous membrane partly closing the orifice of the vagina." The entire story of the prosecuting witness would have been condemned, if the testimony of the doctor had been believed by the jury, for his evidence is susceptible of no other construction than that the hymen of his patient had not been ruptured that night, and that the blood which the woman physician found at about noon the next day could not have come from a rupture which occurred that night. If there was no blood at 4 in the morning, it would be unreasonable to believe that there could have been blood at noon, unless it had been designedly caused to flow by some means employed in the interim.

It is to be observed here, parenthetically, that a chemist who had examined the little garment the prosecutrix wore while in the bed with appellant was called as a witness. He testified: "Q. Will you state to the jury what your examination consisted of, what your findings were? A. On the lower front part was a stain which I examined for semen, and I got a positive test for semen. The back was stained slightly with a pinkish discoloration, which proved to be from wine." It will be remembered that the first physician was not called until at least about an hour and a half after the prosecutrix reached home, following the events portrayed in her peculiar story. This was the doctor's testimony. The testimony of the father of the prosecutrix was, clearly and positively, that the period was more than two hours and a half. Her mother said it was "around" two hours and a half. If the jury had believed the testimony of the first physician, and, being properly advised during the argument of counsel, had compared it with the testimony of the second, the members of that body, acting again under proper enlightenment, could not but have wondered what happened at the home of the prosecutrix during that hour and a half, or two hours and a half. Were the marks on the person of the girl inflicted during that period?

There is a reason shown by the record why the jury might have inclined to believe the testimony of the first physician. He had already, some weeks before, treated the prosecutrix for some ailment, and he was called on the night in question because of that fact. He probably could be called, in justice, the family physician, and the jury might well have concluded that he was not likely to be hostile to his patient. To what extent the errors committed at the trial may have conspired to prevent the jury from believing him it is impossible to say. The jury quite naturally gave willing ear to the story of the prosecutrix. The tendency of juries toward such a course is pointed out in People v. Baldwin, 117 Cal. 244, 49 P. 186. To what extent did the errors at the trial aid this jury to give credence to the tale the prosecutrix told?

We said in our opinion that "questions addressed to witnesses at the trial plainly disclosed a theory of the defense that the marks and bruises upon the upper part of the body of Pats were self-inflicted and that those on her back, buttocks, and upper legs were the result of corporal punishment by her parents." As to this very positive statement, petitioner says that "there is no evidence at all tending to support it." Here is the truth of the matter: The male physician, on his cross-examination, referred to "some bruises on the back * * * and some bruises, too, in the lower back region." The cross-examination then proceeded:

"Q. Could you tell whether or not the bruise would be from a hand, or whether it would be from some stick of some kind, or club; that is, a small club? A. It could not be stated with surety.

"Q. In other words, if somebody had taken a nice-sized paddle or club, and beaten her up, could you tell whether or not it was from that, or whether or not it was from a hand; could you? A. No; I couldn't tell.

"Q. When you say you found bruises on her —that is, on the body and down—was that down across the buttocks? A. Yes.

"Q. Did you find some right across the buttocks? A. Yes, sir. * * *

"Q. * * * You found quite a few of them right across the back? A. Yes, sir.

"Q. And the ones you found across her back were running crosswise of her back? A. I don't think so. I think they were transverse.

"Q. Which way do you mean? A. In a direction of her ankle. * * *

"Q. You found them all the way down across the buttocks? A. Yes, sir."

The prosecutrix was asked on her cross-examination whether she said to appellant, when he was taking her home on the night which is of interest here, that she was sure her father would beat her up for staying out so late. She answered: "No; I didn't say anything like that." After the female physician had referred to certain marks on the person of the prosecutrix the record goes on:

"Q. From the appearance of those scratches at the time you made the examination were they in a position on [her] body—that is, having reference to the length of her arm, that they could have been caused—I mean placed where she could have done it by putting her arm up on her own body? A. Yes; she could have reached; that is, on the anterior surface.

"Q. Were there any scratches that you examined on [her] that she could not have reached by her own arms or own hands? A. I think those over the left scapula region probably were some she might not have been able to reach."

Rehearing denied.

I concur: THOMPSON, J.

I dissent: CRAIG, J.

97 Cal. App. 398

BAAR v. SMITH et al. (Civ. 6650.)★

District Court of Appeal, First District, Division 2, California. March 6, 1929.

As Modified on Denial of Rehearing April 5, 1929. Hearing Denied by Supreme Court April 29, 1929.

1. Appeal and error ⇨1097(5)—Decision of Supreme Court as to invalidity of judgment held binding on District Court of Appeal on subsequent appeal from judgment.

Decision of Supreme Court on writ of supersedeas as to invalidity of judgment *held* binding on District Court of Appeal on subsequent appeal from judgment.

2. Execution ⇨222(3)—Personal property sold at execution must be specifically designated, and number of shares must be stated when stock is sold (Civ. Code, § 1140).

Personal property to be sold at execution sale must be pointed out to the bidders and sufficiently designated, and it must not be left to future act to ascertain what property was actually sold, under Civ. Code, § 1140, and, in case of stock, number of shares to be sold must be stated; Codes being construed as if all had been passed at the same time, under Pol. Code, § 4480.

3. Execution ⇨222(3)—Judgment creditor could not excuse insufficiency of description of property sold at execution, in view of right to bring supplemental proceedings (Code Civ. Proc. §§ 714–721).

Want of necessary information to make full and complete description of shares of stock of judgment debtor sold at execution sale did not excuse failure to give sufficient description of property on part of judgment creditor, since creditor, after making levy, had right to obtain all necessary information by use of supplemental proceedings, under Code Civ. Proc. §§ 714–721.

4. Execution ⇨251(2)—Execution sale of stock in corporation standing in debtor's name or in names of others held void for gross inadequacy of price received.

Sale on execution of all stock of corporation in name of defendant, and all stock in corporation in name of defendant's wife or others belonging to defendant, *held* void for inadequacy of consideration, where stock of admitted value of $400,000 brought only $100; attack on sale being distinct from attack on levy.

5. Execution ⇨250—Sale of stock on execution for sum representing $\frac{1}{4000}$ part of its value was not rendered valid by formal compliance with statutory requirements.

That sale of stock of judgment debtor on execution was in formal compliance with requirements of statute did not render sale valid, where property was struck off for grossly inadequate sum representing only $\frac{1}{4000}$ of its value.

6. Execution ⇨29—Shares in foreign corporation were subject to execution sale where located.

Shares of stock in foreign corporation were not exempt from execution sale in state other than that in which corporation was organized, where stock certificates in question were located in the state where the execution sale was held.

7. Appeal and error ⇨1008(1)—Reviewing court could not, in action to quiet title, declare statement of ownership of shares in findings to be clerical error.

In action to quiet title to stock which passed by void execution sale, court on appeal could not declare that statement in trial court's findings as to ownership of shares was clerical error.

8. Appeal and error ⇨1050(1)—Admission of hearsay statement to prove debtor's fraudulent transfer held not prejudicial, where finding of fraudulent transfer was supported by competent evidence.

In action to quiet title to stock, admission of statement of third party concerning defendant's admission that transfer of stock was to avoid possibility of seizure of shares by his creditors, though error, *held* not prejudicial, where findings as to fraudulent transfer thereof were supported by competent evidence.

9. Appeal and error ⇨1050(1)—Admission of declarations of debtor, made after transfer of stock, to show insolvency, held not prejudicial error as to transferee, where evidence was merely cumulative.

In action to quiet title to stock transferred by debtor to his wife, admission of husband's declarations after transfer to show his insolvency *held* not prejudicial error as to transferee, where evidence was merely cumulative of competent evidence.

10. Judgment ⇨707—One not party to action could attack judgment and claim chattels attempted to be sold under execution.

One claiming corporate stock sold under execution as transferee of judgment debtor was

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★Rehearing denied. Hearing denied by Supreme Court.

not precluded from attacking judgment on which the execution issued, where not party to that action, and could assert claim to the stock in action to quiet title thereto.

11. Equity ⚷65(2)—Judgment creditor, buying property at execution sale for grossly inadequate price, was not barred from procuring equitable relief, as having unclean hands.

Judgment creditor, purchasing stock of debtor at execution sale, *held* not precluded from recovering equitable relief, under doctrine of unclean hands, though sale was void on account of gross inadequacy of price.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by L. Baar against F. M. Smith and others. Judgment for plaintiff, and certain defendants appeal. Reversed.

James F. Peck and Brobeck, Phleger & Harrison, all of San Francisco, for appellant Evelyn Ellis Smith.

Charles W. Byrnes, of San Francisco, for appellant West End Consolidated Mining Co.

Louis W. Bennett, of Oakland, for appellant F. M. Smith.

Pillsbury, Madison & Sutro, of San Francisco, for appellants Anderson, Drum, Fleishhacker, and Garthwaite.

Morrison, Dunne & Brobeck, of San Francisco, for appellants Mercantile Trust Co. of San Francisco, Brobeck, and Moffitt.

Robert R. Moody and Cyril Appel, both of San Francisco, for respondent.

STURTEVANT, J. This is an action to quiet title. The plaintiff named as defendants F. M. Smith, his wife, West End Consolidated Mining Company, Mercantile Trust Company, and several other persons. The defendants appeared and answered, and a trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff, and from a judgment entered thereon the defendants appealed, under section 953a of the Code of Civil Procedure.

[1] The judgment appealed from contained many provisions. After it was rendered on an application for a writ of supersedeas, the Supreme Court decided that the judgment was void, except in so far as it provides for the quieting of plaintiff's title to the stock. Baar v. Smith, 201 Cal. 87, 255 P. 827. The appellants present six points. In the first place they present the point that the judgment is void, except in so far as it provides for the quieting of plaintiff's title to the stock. In support of that point they cite Baar v. Smith, supra. The respondent disagrees with the appellants in this contention, and presents many arguments and cites many authorities which she claims to be to the contrary. It is a sufficient reply to state that the decision of the Supreme Court in Baar v. Smith, supra, is controlling in this court, and that we are not at liberty to depart from the ruling therein contained; furthermore, we have no disposition to do so. It remains for us to consider the additional points on the appeal of the defendant Evelyn Ellis Smith.

[2] In the next place, that defendant contends that no title passed to plaintiff's assignor at the execution sale upon which plaintiff's claim of title is founded, and that the finding in favor of plaintiff's title is therefore unsupported by the evidence. In support of that point she quotes from the execution as levied, and she quotes also from the notice of sale. The attempted description in each is the same, and is couched in the following language: "All stocks and shares of stock, and interest in stocks and shares, of the West End Consolidated Mining Company, a corporation, standing on the books of the corporation in the name of the defendant F. M. Smith, and any and all such shares, stocks and interest in stocks and shares standing on the books of said corporation in the name of Evelyn Ellis Smith and belonging to the defendant in said action, and any and all shares, stocks and interest in stocks and shares standing on the books of said corporation in the name of any other person and belonging to the defendant in this action." The record further discloses that at the time of the sale the sheriff read the notice of sale, but made no other announcement or statement, furnishing any further description or identification of the property to be sold. The judgment debtor had no notice of the intended sale and was not present. Plaintiff's agent made the only bid, which was in the sum of $100, and thereafter the sheriff executed a certificate containing the above description and made a return containing the same language. The stock which the plaintiff claimed she purchased for $100 consisted of 819,632 shares having an admitted value of $400,000. The record discloses that at the time of the levy none of the stock stood in the name of Mr. Smith; 47,200 shares stood in the name of defendant Mrs. Smith; the remaining portion of 819,632 shares stood in the names of other persons.

It is first asserted that an execution sale is not valid unless the property sold is described with reasonable certainty. "The rule is likewise elementary that personal property to be sold must be pointed out to the bidders and specifically designated, and it must not be left to any future act to ascertain what property was actually sold. * * * If shares of stock are sold the number of shares to be sold must be stated." 23 C. J. 621. The defendant cites and relies on the following cases as supporting the text: Warring v. Loomis, 4 Barb. (N. Y.) 484; Sheldon

v. Soper, 14 Johns. (N. Y.) 352; Cresson v. Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; Crandall v. Blen, 13 Cal. 15; Logan v. Hale, 42 Cal. 645; Cadwalader v. Nash, 73 Cal. 43, 14 P. 385; Keating v. Stone & Sons Live Stock Co., 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670; Blair v. Compton, 33 Mich. 416. To those authorities may be added Mulling v. Jones, 153 La. 1091, 97 So. 202, which is also in point, and which quotes with approval the doctrine stated by the Supreme Court of Louisiana: "In judicial sales there must be a * * * description of the thing sold. The law will not countenance their being made lotteries, at the bidding, and sources of confusion and strife afterwards."

Moreover, it is statutory law that to constitute a sale of personal property the same must be identified, whether it is separated or not. Civ. Code, § 1140, Blackwood v. Cutting Packing Co., 76 Cal. 212, 218, 18 P. 248, 9 Am. St. Rep. 199. The four Codes must be construed as though all such Codes had been passed at the same moment of time and were parts of the same statute. Pol. Code, § 4480. The plaintiff cites no statute, and quotes no authority, to the effect that, although a private person must identify the articles in order to make a sale of personal property, a sheriff can make one legally without identifying the articles.

[3] In excuse for the paucity of the description used, the plaintiff replies that she did not have the necessary information, and could not get the necessary information, to make the description full and complete, because she was dealing at arm's length with an unfriendly debtor. That answer is not satisfactory. After she made her levy, she had the right and the power in supplemental proceedings to obtain all of the information necessary for the purpose of making a valid sale. Code Civ. Proc. §§ 714–721; Adams v. Hackett, 7 Cal. 187, 200–204; Coffee v. Haynes, 124 Cal. 561, 57 P. 482, 71 Am. St. Rep. 99. The plaintiff had no right to turn her back on the remedies available, and cause the sheriff to make a purported sale, such as was made in this case.

In Boylan v. Kelly, 36 N. J. Eq. 331, the court cites the above case and then, at page 336, it states the reason for the rule as follows: "Sales of goods which cannot be seen or examined by bidders or at once delivered to purchasers, must, as a rule, result in a sacrifice of the interests of defendants and creditors. Sales made by massing quantities of goods and of different sorts, must be attended with like results. Both practices must antagonize *any policy for the protection* of general creditors of the debtor against fraudulent sales under the forms of law. If a sheriff may, at his discretion, so conduct sales, general creditors are obviously put at the mercy of the debtor and a single creditor." See, also, Burns v. Ray, 18 B. Mon. (57 Ky.) 392. (Italics ours.)

In the case of Odell v. Cox, 151 Cal. 70, 90 P. 194, the court was considering facts in which it appeared that property of the value of $2,000 was sold for $26.50, together with $14.55 as costs. After discussing some of its own decisions and some of the text-books, speaking through Mr. Justice Angellotti, on page 74 (90 P. 196), the court said: "By the term 'mere inadequacy of price' is meant simply an inequality in value between the subject-matter and the price. The effect of this rule is that where such inadequacy stands alone, unaccompanied by any unfairness or other inequitable incident, it will not authorize the vacating of the sale. But it is universally recognized that inadequacy of price is a circumstance of greater or less weight, to be considered in connection with other circumstances impeaching the fairness of the transaction as a cause of vacating it, *and that where the inadequacy is palpable and great very slight additional evidence of unfairness or irregularity is sufficient* to authorize the granting of the relief sought. In fact, according to very respectable authority, inadequacy of price may be so gross as in itself to furnish satisfactory evidence of fraud or misconduct on the part of the officer or purchaser, and justify the vacating of the sale." (Italics ours.)

That decision has become the leading case in this state. It was cited and followed in the case of Haish v. Hall (Cal. App.) 265 P. 1030. In that case property of the value of $1,290 was sold for $15.60. It is not clear that there was any irregularity excepting inadequacy of price. However, the inadequacy was 100 to 1. The sale was set aside. In the instant case the inadequacy was 4000 to 1. Moreover, as we have shown above, there were other grave irregularities. We think the record as made shows that the sale was void.

[5] To the foregoing contention made by the defendant the plaintiff says that "the obvious answer to this contention is that the sale was made exactly in conformity with the Code provisions regarding such sales." With this reply we do not agree. In Cummins v. Little, 16 N. J. Eq. 48, at page 56, the court said: "I accept it as a sound and clear principle that, if a sheriff abuses, to the detriment of subsequent incumbrances or of the defendant in execution, the discretion vested in him by law to make sale under execution, a court of equity will grant relief, *although there has been a formal compliance in the conduct of the sale with all the requirements of the statute.* It is not necessary that there should be actual fraud committed or meditated. The abuse of discretion in the execution of the trust is a constructive fraud, against which equity will relieve. In arriving at this conclusion, no fraud or improper motive is designed to be imputed to the sheriff. The evidence does not warrant it. The fair presumption, I think, from the evidence is, that the sheriff

had no idea of the real value of the interest that he was selling, of the circumstances which surrounded the transaction, or of the effect of the sale upon the rights of the parties interested. Otherwise, it is scarcely credible that, as a right minded man and upright public officer, he would have struck off the property as he did." (Italics ours.) The sheriff was in the act of discharging an important trust, which vested in him many highly discretionary powers, which do not appear on the face of the statute. Therefore the showing to be made includes more than a bare compliance with the expressed terms of the statute.

We do not understand that the defendant attacks the levy as distinguished from the sale. Therefore we will not go into the subject. The plaintiff cites and relies on O'Brien v. Mechanics' Ins. Co., 56 N. Y. 52. If the validity of a levy were involved, that case would be in point, but there is a broad distinction between an attack on a levy and an attack on a sale. Fortin v. Sedgwick, 133 Iowa, 233, 110 N. W. 460, 12 Ann. Cas. 337, and note.

[6] In this same connection the defendant contends that shares of stock in a foreign corporation are not subject to execution sale in a jurisdiction other than in the state under the laws of which the corporation was organized. The plaintiff replies, among other things, that the certificates of the shares of stock in question were in this state and that the rule is not applicable. 23 C. J. 328. In support of the judgment we think the trial court had before it sufficient facts from which it was entitled to draw the inference that, at the time of the levy, the certificates of the shares in litigation were within this state. There was no direct evidence to the contrary.

The trial court made several findings to the effect that the transfer of 819,632 shares from F. M. Smith to Evelyn Ellis Smith was a fraud on the creditors of F. M. Smith. In the view that we take, it will not be necessary to consider those attacks.

[7] The defendant calls attention to the fact that in finding No. III the trial court found that ever since February 23, 1921, plaintiff was the owner and entitled to the possession of the 819,632 shares, and that in finding XXVIII the trial court found that at the time of the levy of the execution Evelyn Ellis Smith was the owner of and in the possession of said shares of stock and that ever since the commencement of this action she was such owner. Thereupon the defendant contends that the findings are hopelessly conflicting. The plaintiff replies that the statement of ownership in Evelyn Ellis Smith is a clerical error. It may be. However, this court, on this record, may not so declare the fact.

[8] E. L. Ransome, in 1915, was an agent of some kind for F. M. Smith. The nature of the agency was not proved. A. W. Ransome is the son of E. L. Ransome. The son was called as a witness by the plaintiff. Over the objections of the defendant, the son was allowed to testify that in 1915 his father, holding a paper in his hand, stated to his son that the paper was a letter from F. M. Smith, in which Mr. Smith stated that the transfer in 1912 to Mrs. Smith was to avoid the possibility of the seizure of the shares of stock by the creditors of Mr. Smith. The ruling was clearly erroneous. But, in view of what has been said above, it cannot be said with certainty that it was prejudicial to the rights of Mrs. Smith.

[9] Mr. W. S. Tevis was called as a witness by the defendant, and testified to conversations held between him and Mr. Smith at various times covering the years 1910, 1911, and 1912. The declarations by Mr. Smith were on the subject of his financial ability. Some were made before the transfer to Mrs. Smith; some were made later. At least one of the declarations was made as early as September, 1911; that is, before the transfer. In the conversation held at that time Mr. Smith made the declaration that he was unable to pay a large sum which he was legally bound to pay, and which was due and payable. Conceding that the admission of declarations by Mr. Smith after the transfer to his wife were inadmissible as against her, and conceding that the trial court applied the evidence as against her (which the record does not disclose), no prejudicial error appears, because the evidence was but cumulative on the same subject on which unobjectionable evidence had been received from the witness W. S. Tevis.

[10, 11] The defendant asserts that the plaintiff should be denied all relief, because he comes into a court of equity with unclean hands. To that assertion the plaintiff replies that the defendant is making a collateral attack. No authority is cited by either party to support either of these assertions. Mrs. Smith was not a party to the action out of which the execution issued, and is not precluded from attacking that judgment in this action. 34 C. J. 526. She is a claimant to the chattels and is here in a position to make the claim. Boylan v. Kelly, 36 N. J. Eq. 331, 336. The case last cited is authority to the effect that this plaintiff has not come into court with unclean hands.

Because of the errors in holding the sale, the judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

GEARY v. STAFFORD et al. (Civ. 5862.)★

District Court of Appeal, First District, Division 2, California. April 2, 1929.

Rehearing Denied May 2, 1929.
Hearing Denied by Supreme Court May 29, 1929.

1. Appeal and error 🔑148—One not party cannot appeal (Code Civ. Proc. § 938).

One not a party is not entitled to take an appeal under Code Civ. Proc. § 938.

2. Attorney and client 🔑74½—Attorney filing answer owed duty to trial court to disclose client's real name.

Attorney at law filing answer, appearing for Richard Roe, owed duty to trial court to disclose real name of his client, whether it was himself or some other person.

3. Appeal and error 🔑914(3)—Appellate court must assume that attorney preparing answer, appearing for Richard Roe, was appearing for party substantially connected with controversy.

Appellate court must assume that attorney at law preparing an answer, appearing for Richard Roe, was in truth and in fact appearing for some party substantially connected with controversy.

4. Appeal and error 🔑882(4)—Attorney appearing for defendants and being substituted for Richard Roe and making no objection until trial cannot claim invalidity of judgment because he was not party.

Where attorney filing answer to cross-complaint for cross-defendants, including Richard Roe, was substituted for Richard Roe, and numerous papers were served on him, and no objection was made until during trial that he was not party, and he appealed from judgment, he cannot claim on appeal that judgment was void because rendered against one not party to action on assumption that he was not party.

5. Appeal and error 🔑169—Point not presented to or ruled on by trial court cannot be considered on appeal.

Point that in replevin it was improper to file cross-complaint pleading a common count for services rendered, which was not presented to trial court nor ruled on in trial court, could not be considered on appeal.

6. Appeal and error 🔑175—Cross-defendant could not assert defendant was not entitled to lien on automobile for repairs, where there was no contention that cross-defendant was owner of or entitled to possession of automobile.

Cross-defendant was not in position to assert that defendant was not entitled to lien on automobile sought to be replevined for repairs, nor to assert that if he was entitled to lien he had waived lien, where there was no contention that cross-defendant was at any time the owner of or entitled to possession of automobile.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action to recover possession of an automobile by M. E. Geary against Chris Stafford, in which defendant filed cross-complaint making G. C. Ringole a defendant, and from the judgment rendered defendant last named appeals. Affirmed.

Samuel D. Hamburg, of San Francisco, for appellant.

Rudolph J. Scholz and Robert E. Hatch, both of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover the possession of an automobile. The defendant appeared and answered and filed a cross-complaint. In the cross-complaint he set up his claim for making repairs on the automobile and claimed a lien for repairs made. He named as cross-defendants M. E. Geary, G. B. Skinner, Max Arnold, and Richard Roe. The cross-complaint was answered by all of the defendants as so named by G. C. Ringole as their attorney. A trial was had in the lower court before the court sitting without a jury, and the court made findings in favor of the cross-complainant on his cross-complaint. From a judgment entered thereon G. C. Ringole has appealed under section 953a of the Code of Civil Procedure

[1-4] 1. The defendant contends that the judgment is null and void because rendered against one not a party to the action. That point assumes that G. C. Ringole was not a party. If he was not a party he was not entitled to take this appeal. Code Civ. Proc. § 938; 2 Cal. Jur. 208. As recited in respondent's brief, the record discloses affirmatively that on October 1, 1923, three years before the action was tried, G. C. Ringole was substituted for Richard Roe. Numerous papers (including a notice of trial) showing him to be a party, were served on him, and no objection was made, and no suggestion was made that he was not a party to the action. But on February 8, 1926, during the trial, the contention was made that G. C. Ringole was not a party. The reply was made that he had been sued as Richard Roe; that as such person he had appeared; and that in the place of such person he had been duly substituted. These facts he did not deny, nor did he show to the trial court that when he filed an answer appearing for Richard Roe that he appeared for some person other than himself and give the name of that person to the trial court. He owed the duty to the trial court to disclose the real name of his client, whether it was himself or some other person. Being an attorney at law, it must be assumed that when he prepared an answer appearing for Richard Roe that he was in truth and in fact appearing for some party substantially connected with the controversy. In his brief he quotes extensively from the facts to show that he was not personally interested, but there is evidence in the record showing that the defendants were engaged in a joint venture and that this defendant was the financial backer thereof. The findings recited that he was one of the defendants and that he was substituted in the place of Richard Roe. On the record as made and as presented to this court, we think the appellant is not in a position to present the point.

[5] 2. The cross-defendant claims that no

★Rehearing denied. Hearing denied by Supreme Court.

judgment should have been rendered against him on the evidence. The record does not disclose that the judgment was so rendered on the evidence. The answer to the cross-complaint expressly admitted that Stafford performed for the cross-defendants the services for which he sued, in the cross-complaint, to be reimbursed. The issue made was solely as to the amount. In this same connection the cross-defendant claims that in an action in replevin it was improper to file a cross-complaint pleading a common count for services rendered. We will not pause to discuss the contention. No point of that kind was presented to the trial court, nor ruled on in the trial court.

[6] 3. The defendant complains because the trial court did not make a finding on who was the owner and entitled to the possession of the automobile. There was no contention presented by any one of the parties litigant that this cross-defendant was at any time the owner of, or entitled to the possession of, the automobile. For these same reasons this cross-defendant is not in a position to assert that Stafford was not entitled to a lien, nor to assert that if he was entitled to a lien that he had waived the lien.

We find no error in the record, and the judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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97 Cal. App. 393

CALIFORNIA LAND CO. et al. v. TOWN OF CORTE MADERA et al. (Civ. 6403.)★

District Court of Appeal, First District, Division 2, California. March 5, 1929.

Rehearing Denied April 4, 1929. Hearing Denied by Supreme Court April 29, 1929.

1. Municipal corporations ⚷514(3)—Direction of reassessment by judgment decreeing street improvement assessment void is required by statute (Street Improvement Act 1911, § 28, as amended by St. 1923, p. 118, § 7).

Judgment in action to avoid street improvement assessment, decreeing it to be void, properly under direction of Street Improvement Act 1911 (St. 1911, p. 746) § 28, as amended by St. 1923, p. 118, § 7, also directs a reassessment to cover the assessment involved.

2. Appeal and error ⚷882(3)—Plaintiff, alleging and relying on facts of invalidity of assessment in action to avoid it, is, on appeal from direction for reassessment, estopped to deny them.

The facts alleged in the complaint to avoid a street improvement assessment, with the prayer for general relief, being sufficient to authorize the direction for reassessment in the judgment decreeing the assessment void, defendants had a right to rely on the facts of invalidity of assessment, so urged by plaintiff in his behalf, to support the direction for reassessment, so that plaintiff is estopped, on appeal from the part of the judgment directing reassessment, to object to such relief provided for by statute in case of such invalidity of assessment and consequent decree that it is void.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the California Land Company and others against the Town of Corte Madera and others. From part of the judgment, plaintiffs appeal. Affirmed.

Hearing denied by Supreme Court: PRESTON, J., voting for a hearing.

R. M. F. Soto, of San Francisco, for appellants.

H. C. Symonds, of San Francisco, for respondents.

BUCK, Presiding Justice pro tem. This is an action by plaintiffs, property holders in the town of Corte Madera, to quiet title and enjoin the said town and its officials from issuing any bonds to cover an unpaid assessment for street work done under the improvement Act of 1911 (St. 1911, p. 730).

The case was tried by the court without a jury, and findings and judgment were made and given in favor of the plaintiffs. Thereafter, proceeding under the provisions of sections 663 and 663a, Code of Civil Procedure, the defendants moved the court to set aside and vacate the said judgment upon the grounds that, in the light of facts found, "the court must, in this suit to quiet the title of plaintiffs' lots of land against the lien of such assessment, by its judgment and decree direct the making of a reassessment to cover the assessments involved in such suit pursuant to the requirements of section 28 of the said Improvement Act of 1911." Whereupon the court, after a hearing of the motion, did order that "said judgment and said conclusions of law are hereby vacated and set aside, and other and different conclusions of law are hereby ordered and made, and another and different judgment, based upon such other and different conclusions of law, is hereby ordered to be made and entered in said action"; such other and different conclusions of law being as follows:

"That the contract entered into between the superintendent of streets of the town of Corte Madera, a defendant herein, and S. P. Brownlee, as contractor named in the amended complaint herein, which contract was entered into in the month of August, 1923, to wit, on the twenty-eighth (28th) day of August, 1923, was, and is, null and void.

"That the alleged assessment and the warrant accompanying the same, and recorded therewith on the 24th day of November, 1924, are, and each of them is, null and void.

"That the plaintiffs are respectively the owners of the several lots or parcels of land described in said amended complaint as amended according to the respective interests therein set forth, and that defendants have not, nor has any of said defendants, any right, title, estate, or interest in or to any of said lots or parcels of land by reason of said assessment filed and entered as set forth in said findings of fact.

★Rehearing denied. Hearing denied by Supreme Court.

"That the said assessment mentioned in said findings of fact is null and void, being void upon its face in making deductions to be paid by said town of Corte Madera not authorized by said resolution of intention, and being also void in being based upon the contract mentioned in said findings of fact which contract was void by reason of no notice of award of such contract having been given as required by law. That said assessment being null and void, as aforesaid, nullifies and makes void all assessments for the cost and expense of said work or improvement, including the assessments therefor against said properties of plaintiffs.

"That defendants are entitled to have a reassessment made to cover the cost and expense of the work or improvement in said findings of fact, which work or improvement was made through an attempted compliance with the Improvement Act of 1911, such cost and expense to be assessed against the real estate benefited by such work or improvement. That said assessments involved in said action, and all assessments for the cost and expense of said work or improvement being null and void, as aforesaid, a full reassessment of said cost and expense against the real estate benefited thereby is therefore necessary, and such full reassessment is hereby ordered."

Whereupon the court gave judgment decreeing that the contract of August, 1923, under which the work and labor were performed "is null and void," and that the "assessment and the warrant accompanying the same recorded on November 24, 1924," "are and each of them is null and void," and said assessment being null and void as aforesaid nullifies and makes void all assessments for the cost and expense of said work or improvement, including the assessments therefor against said property of plaintiffs." And the court further adjudicates that "defendants are entitled to have a reassessment made to cover the cost and expense of the work or improvement mentioned in said findings of fact, which work or improvement was made through an attempted compliance with the Improvement Act of 1911, such cost and expense to be assessed against the real estate benefited by such work or improvement. That said assessments involved in said action, and all assessments for the cost and expense of said work or improvement being null and void, as aforesaid, a full reassessment of said cost and expense against the real estate benefited thereby is therefore necessary, and such full reassessment is hereby ordered."

From this judgment the plaintiffs and the plaintiffs alone appeal. And it is apparent that that portion of the judgment declaring the contract and assessment based thereon to be void is in favor of plaintiffs and is in accordance with their own contentions.

[1] It is also evident, as shown by the contentions in plaintiffs' briefs, that the only portion of the judgment as to which they can successfully contend that they are or may be aggrieved is that portion which provides for a reassessment to cover the cost and expense of the work or improvement. But in the first place a sufficient basis for the duty of the court to provide for a reassessment can be found in the express provisions of the Street Improvement Act of 1911 (St. 1911, p. 746, § 28), as amended in 1923 (Stats. 1923, at page 118, § 7), which provides in part as follows: "Whenever any court of competent jurisdiction in any suit to set aside the lien of any assessment or of any bond representing any assessment, or in any suit to quiet title against the lien of any such assessment, or bond shall in its judgment decree such assessments or bonds to be void, or unenforceable, then it shall in and by its decree direct the making of a reassessment to cover the assessments involved in such suit."

[2] In the case of Ferry v. O'Brien, 188 Cal. 629, 206 P. 449, a similar provision was held to be constitutional. Furthermore, the facts alleged in plaintiffs' complaint together with the prayer for general relief were amply sufficient upon which to base the conclusion and judgment directing the statutory reassessment; and the defendants had a right to rely upon the facts and conclusions urged by plaintiff to support the foregoing finding and judgment directing the reassessment; and the plaintiffs, having relied upon and urged the invalidity of the contract and assessment, should now be estopped from objecting to the relief provided for by the statute in the case of such an invalidity. Dyer v. Scalmanini, 69 Cal. 637, 11 P. 327; Page on Taxation by Assessment, vol. 2, at page 1618 et seq.

The judgment is therefore affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

97 Cal. App. 796

CALIFORNIA INVESTMENT & FINANCIAL COMPANY (a Corporation) and Frank W. AITKEN, Plaintiffs and Appellants, v. TOWN OF CORTE MADERA (a Municipal Corporation) et al., Defendants and Respondents. (Civ. 6487.)★

District Court of Appeal, First District, Division 2, California. March 5, 1929.

Rehearing Denied April 4, 1929. Hearing Denied by Supreme Court April 29, 1929.

Appeal by plaintiffs from a judgment of the Superior Court of Marin County, Edward I. Butler, Judge, in an action to quiet title and to enjoin issuance of bonds to cover unpaid assessment for street improvements. Affirmed.

Hearing denied by Supreme Court: PRESTON, J., voting for a hearing.

R. M. F. Soto, of San Francisco, for appellants.

H. C. Symonds, of San Francisco, for respondents.

BUCK, Presiding Justice pro tem. In this case, it having been stipulated by the parties "that the appeal in the above entitled action shall be heard with the appeal in said action now numbered as 1 Civ. 6403 [275 P. 866], and argued and submitted on the transcript in this action and the briefs in said action numbered 1 Civ. 6403," and the judgment in the said action, "now numbered 1 Civ. 6403, shall govern the appeal in the above-entitled action numbered S. F. No. 12338," and, the judgment in the said action Civ. No. 6403 having been this day affirmed, it is ordered that the judgment herein be also affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

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97 Cal. App. 430

COLTHURST v. HARRIS. (Civ. 6750.)

District Court of Appeal, First District, Division 1, California. March 9, 1929.

Judgment ⚷153(2)—Motion to set aside default, not made within 6 months because of postponents by consent after notice was timely filed, held too late (Code Civ. Proc. § 473).

Where defendant filed notice of motion to set aside default judgment, and hearing of motion was several times postponed by consent and without appearance pursuant to notice of motion, motion finally made after six-month period allowed by Code Civ. Proc. § 473, expired, *held* too late.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Muriel E. Colthurst against John Harris. Judgment by default against defendant, and defendant's motion to vacate and set aside default denied, and defendant appeals, and plaintiff moves for an order affirming the judgment. Affirmed.

Joseph M. Raines, of Fairfield, for appellant.

Harry I. Stafford and Daniel R. Shoemaker, both of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from an order denying defendant's motion to vacate and set aside the default entered against him for failure to answer the complaint and to vacate the judgment entered thereon awarding plaintiff damages for personal injuries and nervous shock sustained while she was riding as a guest in defendant's automobile, which was overturned, as it is alleged, through the reckless and negligent management of the automobile by the defendant. Respondent has moved for an order affirming the judgment, but, as the motion presents the same question raised on the appeal, we deem it unnecessary to pass separately upon the motion.

The summons was served on defendant on December 30, 1926, the default for failure to appear and answer the complaint was entered on February 3, 1927, and the judgment was entered on May 9, 1927. On May 18, 1927, defendant filed a notice of motion to set aside the default on the ground that the default and judgment were taken against him and entered through the mistake, inadvertence, surprise, and excusable neglect of himself and his attorney. On May 23, 1927, an amended notice of motion to set aside the default, order for judgment, and judgment was filed and noticed for Monday, June 6, 1927. Ten days before the motion was to be heard, Attorney Stafford, representing plaintiff, in a letter to defendant's attorney, requested a continuance to June 13th, to which defendant's attorney consented. The motion was regularly on the calendar, and the court in accordance with such request on June 6th made its order continuing the motion until June 13th. On June 13th, by consent, the court continued the motion until June 21st. On June 17th defendant's attorney received a telegram from plaintiff's attorney asking a continuance for one week, and, defendant's attorney consenting, the court continued the motion as requested. On June 24th defendant's attorney received another telegram from plaintiff's attorney requesting a continuance of one week from June 27th, and, defendant's attorney consenting, the motion was accordingly continued. Because of such continuance and the absence of the trial judge, the hearing of the motion went over until July 19th, when the court made its order continuing the motion until August 8th. The matter was then continued until August 15th at the request of appellant's counsel. The matter was finally heard on August 15th, and on September 12th the court made its order "that the affidavits filed

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★Rehearing denied. Hearing denied by Supreme Court.

present sufficient ground for the granting of the motion, but owing to the lapse of time, that the court has no jurisdiction to entertain the motion, and the motion is therefore denied." It is conceded that at no time from the filing and service of the notice of motion to set aside the default until August 15th—twelve days beyond the six months' period allowed by the statute (Code Civ. Proc., § 473)—did defendant appear in court and move the court to grant his application.

Appellant contends that, as the motion was filed with the court, was regularly on the calendar on three occasions before it was finally argued and submitted on August 15, 1927, the motion was called to the attention of the court, and the court had to be and was made acquainted with the proceeding, and therefore the application was made within the meaning of section 473 of the Code of Civil Procedure, even though the continuance to August 15, 1927, when the motion was finally made, was beyond the six months' period. In this we do not agree with appellant. Section 473 of the Code of Civil Procedure provides that the court may "relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken." "A motion is properly an application for a rule or order, made viva voce to a court or judge. It is distinguished from the more formal applications for relief by petition or complaint. The grounds of the motion are often required to be stated in writing and filed. In practice the form of the application itself is often reduced to writing and filed. But making out and filing the application itself is not to make the motion. * * * The court must be moved to grant the order." People v. Ah Sam, 41 Cal. 645, 650; Spencer v. Branham, 109 Cal. 336, 340, 41 P. 1095. In Jones v. Superior Court, 78 Cal. App. 163, 166, 248 P. 292, 293, in which case a petition for rehearing by the Supreme Court was denied, the court says: "To make an application is to make a motion (Code Civ. Proc. § 1003). To appear in court and announce one's readiness to make a motion is not the making of the motion any more than would be the service of notice that one will make a motion. That the latter procedure is insufficient is well established (Herrlich v. McDonald, 80 Cal. 472, 22 P. 299; Thomas v. Superior Court, 6 Cal. App. 629, 92 P. 739; Wheelock v. Superior Court, 67 Cal. App. 601, 227 P. 931). * * * The only provision of law under which respondent Bryant might proceed is explicit in its requirement that one who would avail himself of its aid shall not merely direct the court's attention to his presence in court in the proceeding in which he is interested, but shall move for the particular relief desired, that is, orally request that the court take action as indicated in his notice. (People v. Ah Sam, 41 Cal. 645; Spencer v. Branham, 109 Cal. 336, 41 P. 1095.)"

Appellant relies upon Townsend v. Parker, 21 Cal. App. 317, 131 P. 766, and Bettencourt v. Superior Court, 32 Cal. App. 607, 163 P. 682. In the Townsend Case, counsel for the respective parties appeared in court for the hearing upon the motion to vacate and set aside the default, and the hearing was continued to a later date beyond the statutory period. In that case the court says: "From an inspection of this record it will appear that the defendant did move on the eighth day of January, and that the plaintiff had notice of his intention so to do and requested a continuance to a future date. If the defendant was within the ten days' statutory limitation on the 8th the motion was made in due time, and the court, notwithstanding the continuance, had jurisdiction." In the Bettencourt Case, counsel for the respective parties appeared in court within the time limited, and it was ordered by consent of the attorneys for the parties that the motion be continued to a date beyond the time limit of the statute, at which time, as stated in the opinion, the minutes of the court show the presence of the attorneys, and recite: "And the motion to vacate and set aside the interlocutory decree of divorce, coming on regularly to be heard at this time, the same was argued by the respective counsel, and the court being fully advised, orders that said motion be granted." Further the court says: "Petitioner claims that from the foregoing record it appears that the application for relief was not made within six months after the thirteenth day of March, 1916, at which time the six months' period mentioned in section 473 began to run; and therefore that the superior court was without jurisdiction to make the order of September 16th. If the record of proceedings had on September 11th is sufficient to support the inference that the application for relief was made on the eleventh day of September, then the fact that the continuance was had and the order was not made until September 16th would not impair the jurisdiction of the court. Notice that an application or motion will be made to the court at a specified time, even though such notice be filed as well as served, is not itself an application or motion."

In the present case defendant's attorney did not appear and move the court pursuant to his notice of motion, nor did the attorneys for the parties appear in court pursuant to such notice and continue the matter to a later date for hearing, but the case was continued beyond the six months' limit of time by consent, and therefore the cases cited by appellant are not in point here.

The orders and judgment appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

97 Cal. App. 442

GRAY v. LITTLE et al. (Civ. 3676.)★

District Court of Appeal, Third District, California. March 11, 1929.

Rehearing Denied April 10, 1929.

1. **Bankruptcy 🔑303(5)—Finding that partner of bankrupt had no knowledge at time of transfer that bankrupt was indebted to others held supported by evidence.**

In bankruptcy trustee's action to set aside transfer as fraudulent, finding that partner of bankrupt to whom transfer was made had no knowledge of bankrupt's insolvency, or that he or his agents knew that bankrupt was indebted to others, *held* supported by evidence.

2. **Bankruptcy 🔑166(4¼)—Knowledge of insolvency invalidating transfer cannot be charged because creditor pressing for payment, knows debtor is financially embarrassed.**

That creditor knows his debtor to be financially embarrassed and is pressing him for payment of claim, is not sufficient to charge him with having reasonable cause to believe debtor to be insolvent, or to invalidate as fraudulent transfer of property from debtor to creditor, but creditor must have such knowledge of the facts as to induce a reasonable belief of insolvency.

3. **Bankruptcy 🔑303(1)—Bankruptcy trustee has burden to show that creditor, receiving transfer shortly before bankruptcy had reason to believe that preference would result.**

Burden is on trustee in bankruptcy to show that creditor, to whom transfer alleged to be fraudulent was made, shortly before bankruptcy, had reason to believe that a preference would result.

4. **Bankruptcy 🔑303(5)—Evidence held to sustain finding that bankrupt's transfer of property to partner was followed by actual and continued change of possession.**

Evidence *held* to warrant finding that transfer of assets to bankrupt's partner was followed by actual and continued change of possession, notwithstanding bankrupt was retained as employee in business as against bankrupt's trustee's contention that transfer was fraudulent.

5. **Fraudulent conveyances 🔑147(1)—Court will, in determining whether or not sufficient delivery has been made, consider fact that vendee was in possession of property at time of transfer (Civ. Code, § 3440).**

Where the vendee is in possession of the property at the time of transfer, the court will consider the fact in determining whether or not a sufficient delivery has been made within Civ. Code, § 3440, providing that transfers not accompanied by immediate delivery and followed by actual and continued change of possession shall be conclusively presumed to be fraudulent.

6. **Fraudulent conveyances 🔑145—Employment of vendor by vendee after sale is not conclusive that transfer was fraudulent (Civ. Code, § 3440).**

The employment of the vendor by the vendee after transfer of business is a circumstance to be carefully weighed by the court, but is not conclusive that there was no delivery or actual or continued change of possession, absence of which, under Civ. Code, § 3440, would make transfer fraudulent.

7. **Bankruptcy 🔑149—Solvent partner of bankrupt has right to administer partnership assets (Bankr. Act, § 5, subd. (h); 11 USCA § 23(h).**

Under Bankruptcy Act, § 5, subd. (h), 11 USCA § 23(h), a solvent partner of one adjudged a bankrupt has the right to settle up the partnership business and account to the bankruptcy trustee for bankrupt's interest.

8. **Courts 🔑366(1)—Federal court is bound by interpretation of state statute by highest state court.**

The interpretation placed by the highest court of the state upon its statutes is conclusive on the federal court.

9. **Bankruptcy 🔑303(5)—Evidence held to establish partner's lien on bankrupt's share of partnership assets for amount in excess of value of assets transferred by bankrupt (Bankr. Act, § 5, subd. (h); 11 USCA § 23 (h); Civ. Code, § 2405).**

Evidence in bankruptcy trustee's suit to set aside transfer as fraudulent *held* to warrant court's finding that partner receiving transfer from bankrupt partner was entitled at the time of the transfer to a lien on bankrupt's share of partnership assets for sum in excess of value of such share, in view of Bankruptcy Act, § 5, subd. (h), 23 USCA § 23(h), entitling partner of one adjudged bankrupt to settle partnership business, and Civ. Code, § 2405, providing for such lien.

10. **Fraudulent conveyances 🔑47—Transfer of cleaning and dyeing business without filing and recording of seven-day notice held valid (Civ. Code, § 3440).**

Civ. Code, § 3440, requiring recording of seven-day notice of sale, applies only where transfer is of stock in trade in bulk otherwise than in usual course of trade or the transfer of fixtures or store equipment of designated businesses, and has no application to the sale or transfer of a partnership in a cleaning and dyeing business.

11. **Bankruptcy 🔑305—Cancellation of transfer by bankrupt to partner will not be decreed, where partner was entitled to lien on bankrupt's share of assets greater than its value (Civ. Code, § 3543).**

Cancellation of transfer of bankrupt's property to partner at suit of trustee will not be decreed, where transferee in any event would have a lien on the partnership assets for more than bankrupt's interest therein, since, in view of Civ. Code, § 3543, the law neither does nor requires idle acts.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Eugene L. Gray, as trustee in bankruptcy of the estate of William M. Brown, bankrupt, against F. D. Little and an-

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★Rehearing denied.

other, to set aside a transfer as fraudulent. From an adverse judgment, plaintiff appeals. Affirmed.

Frank A. Duryea, of Marysville, for appellant.

W. P. Rich, of Marysville, for respondent.

JAMISON, Justice pro tem. This action was brought by appellant as trustee in bankruptcy to set aside a transfer made by the bankrupt within four months of the bankruptcy proceedings, and during the alleged insolvency of the bankrupt, upon the ground that a voidable preference was thereby created.

It appears from the evidence that respondent and William M. Brown, for a period of four years prior to May 24, 1926, were copartners engaged in the cleaning and dyeing business in the city of Marysville, under the name of Brown's Cleaning & Dyeing Works; respondent owning a one-third interest in said partnership, and said William M. Brown owning a two-thirds interest therein, said Brown receiving a salary of $200 per month and respondent a salary of $175 per month. During the last of April, 1926, and in May of that year, an audit of the business of said partnership was had, which disclosed that William M. Brown had abstracted from the funds of said partnership, up to May 22, 1926, $11,766.04, that debts of said partnership were outstanding to the amount of $618.19, and that the partnership owed respondent back salary amounting to $1,188.01. Respondent becoming aware, through this audit, that William M. Brown had, without his previous knowledge, abstracted the aforesaid sum from the funds of the partnership, demanded of said Brown that he pay the same back to the partnership. This Brown was unable to do. It was then agreed to dissolve the partnership, and it was further agreed that Brown should transfer his two-thirds interest in said partnership to respondent, and, as a consideration therefor, respondent agreed to assume and pay all partnership indebtedness and to release said Brown from all claims for the money Brown had withdrawn from the partnership. Thereupon, on the said 24th day of May, 1926, the said William M. Brown executed a bill of sale to respondent for his two-thirds interest in the business and assets of said partnership. Said Brown, believing that he might be able to purchase back from respondent the said business and assets of said partnership, suggested that respondent give him an option to that effect, which respondent did on May 25, 1926; the purchase price being placed in said option at the sum of $8,553.63, and the said option running until July 1, 1926. Brown was not able to raise the money to comply with the terms of the option. On May 25th Brown signed a notice that the sale of his two-thirds interest in the business and assets of said partnership would be consummated on July 6, 1926, and on June 29, 1926, this notice was duly recorded. At the time the bill of sale was executed, Brown was insolvent and had creditors whose debts against him amounted to several thousand dollars.

[1] The amended complaint contained four counts. The first count, after alleging the insolvency of Brown, stated that the transfer of Brown's two-thirds interest in the business and assets of the partnership was a preference in favor of respondent, and that respondent had reasonable cause to believe that the said transfer would effect a preference. The trial court found that at and before the date of said transfer respondent was unaware that said Brown was bankrupt; that respondent had no knowledge of the financial condition of said Brown until about the 6th of July, 1926. The court further found that it was not true that said transfer resulted in giving respondent a preference, whereby he obtained a greater percentage of his claim than other creditors, or that at the time of said transfer he had reasonable ground to believe that the said transfer would effect such or any preference. The findings are supported by the testimony of respondent, who testified that, at the time said transfer was made to him by Brown, he had no knowledge that Brown had any creditors other than himself; that, after the transfer and before the option expired, Brown told him that he had succeeded in raising $4,500 in cash; that out of this he would have to take $1,300 for a bill he owed, leaving $2,700 which he could apply on the option; that on one occasion, some time during the existence of the partnership, a customer, instead of paying a debt he owed the partnership, presented an account owing him by Brown; that respondent spoke to Brown about it, and Brown settled the account. The only other evidence tending to show that respondent was aware of Brown's financial condition was the testimony of the said William M. Brown, called as a witness for appellant, who testified that two days before the option expired, about the last of June, 1926, he informed respondent that he had $4,500, and offered it to him with his note for the balance named in the option, telling him that, if he did not accept those terms, he (Brown) did not intend to turn everything over to respondent and let the rest of his creditors hold the sack. Respondent denied having had this conversation with Brown. This was all of the evidence that showed or tended to show, at any time prior to July 6, 1924, that respondent had any knowledge that Brown was indebted to others than himself. Nor is there any evidence that any agent of respondent had any such knowledge prior to July 6, 1926. We are of the opinion that the evidence supports the findings of the court as hereinbefore set out.

[2, 3] The fact alone that a creditor knows his debtor to be financially embarrassed and is pressing for a payment of his claim is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent. Sharpe v. Allender (C. C. A.) 170 F. 589; Page v. Moore (D. C.) 179 F. 988. Mere suspicion that the debtor may be insolvent is not sufficient to render payments received by a creditor voidable as preference, but he must have such knowledge of facts as to induce a reasonable belief of insolvency. Bassett v. Evans (C. C. A.) 253 F. 532; City National Bank v. Slocum (C. C. A.) 272 F. 11; Homan v. Hirsch, 106 Or. 98, 211 P. 795. It is not enough that a creditor has cause to suspect the insolvency of the debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. Grant v. National Bank, 97 U. S. 81, 24 L. Ed. 971; In re Campion et al. (D. C.) 256 F. 902. In the case last cited the court said that the burden is on the trustee in bankruptcy to show that the creditor to whom the transfer was made shortly before bankruptcy had reason to believe that a preference would result. The trustee has failed to sustain this burden in this case. William M. Brown testified that the gross value of the partnership was $10,000 or $12,000. L. F. Albrecht testified that he figured the gross value of the assets at $10,000. Respondent testified that the value of the business and assets of the partnership was less than $6,000. The evidence disclosed that the lease on the premises occupied by the partnership had expired; that parts of the equipment and appliances used in the partnership business were attached to the leased premises and could not be removed without the consent of the landlord, and no such consent had been obtained; that the value of this equipment and appliances was about $3,000; the debts against the partnership amounted to about $1,800. The court found that, at the date of the transfer, the assets of the partnership did not exceed the sum of $5,000. The consideration for this transfer was the release of said Brown from his part of the partnership debts, the said debts amounting to the sum of $1,806.24, and Brown's part being $1,204.18, and the release of Brown from paying to respondent one-third of the $11,766.04 abstracted by Brown from the funds of said partnership, making the total amount from which Brown was released the sum of $5,126.18. As the trial court found that the assets of the partnership at the date of the said transfer did not exceed the sum of $5,000, it would seem that the consideration passing to Brown upon said transfer not only exceeded his interest in said assets, but also exceeded the full value of the partnership property.

[4-6] The second count of the complaint alleges that the transfer was not followed by the actual and continued change of possession of the business and equipment of the partnership, but that to all intents, appearances, and purposes Brown continued in possession and control until about the 6th day of July, 1926. It appears from the evidence that up until the dissolution of the partnership on May 24, 1926, the work of the business of said partnership was divided between said Brown and respondent, Brown doing the inside work and respondent the outside work; the inside work presumably being the dyeing, cleaning, and pressing of garments intrusted to said partnership, and the outside work being the collection of the garments to be dyed, cleaned, or pressed, and the delivery of them after the work was done. It further appears that after the transfer respondent hired Brown to continue the inside work of said business but that after the said transfer respondent managed and controlled the business, signing, with his own name alone, all checks upon the partnership fund, and generally conducted the business as the sole proprietor thereof; that he informed his employees, members of his family, acquaintances, and others that he had purchased the interest of his said partner in said partnership business, and was the sole owner thereof, and Brown testified that this was generally known. Section 3440 of the Civil Code provides, in substance, that every transfer of personal property is conclusively presumed to be fraudulent if made by a person having at the time possession or control of the property, and not accompanied by an immediate delivery, and followed by actual and continued change of possession of the thing transferred. In this case respondent and Brown were, at the date of the transfer, in joint possession of the partnership property. Upon the execution of the bill of sale, respondent took sole possession of said property, and thereafter managed and controlled it as the sole owner thereof. The court found that respondent took possession of said property on May 24, 1926, and thereafter continued in possession of same, and that it is not true that the transfer of said property to respondent was not accompanied by immediate delivery of said property to him, or that same was not followed by the actual and continued change of possession. In the case of Hassell v. Bunge, 167 Cal. 365, 139 P. 800, the court, after stating that the delivery and change of possession required must be a visible and apparent change of the custody of the property such as to give evidence to the world of the claims of the new owner, must be actual and not merely constructive, and must be open and unequivocal, carrying with it the usual marks and indications of ownership, also said: "Whether, under these tests, there has been a delivery and change of possession is a question of fact, to be determined by the trial court or jury upon a consideration of all of the evidence. The

finding upon this, as upon other issues of fact, is conclusive on appeal, unless, reading the evidence in the light and with the inferences most favorable to the conclusion reached below, the appellate court can say that that conclusion is without substantial support in the record." Feeley v. Boyd, 143 Cal. 282, 76 P. 1029, 65 L. R. A. 943; Jarvis v. Webber, 196 Cal. 86, 236 P. 138. Where the vendee is in possession of the property at the time of the transfer, the court will consider the fact in determining whether or not a sufficient delivery has been made. Banning v. Marleau, 101 Cal. 238, 35 P. 772; Hogan v. Cowell, 73 Cal. 211, 14 P. 780. While the employment of the vendor by the vendee after the sale is a circumstance to be carefully weighed by the court or jury, it is not conclusive, and may be explained. Hickey v. Coschina, 133 Cal. 81, 65 P. 313; Vail v. Nichibei Bussan Co., 65 Cal. App. 60, 223 P. 577.

After a careful examination of the evidence, we cannot say that there was not substantial evidence to support the findings of the court upon the matter of delivery of the possession of the property by Brown to respondent at the time of the transfer, and of actual and continued possession of same thereafter by respondent.

[7-9] Respondent claims that he has a lien arising from said partnership superior to the rights of the creditors of Brown, upon whatever interest Brown may have in the partnership property. It appears that Brown, at the date of the dissolution of the partnership, owed it the said sum of $11,766.04 which he had abstracted from its funds as aforesaid. The debts existing against said partnership at the date of its dissolution amounted to the sum of $1,806.20. Conceding that upon a settlement of the partnership business Brown would be liable for only one-third of the money he abstracted, there would still exist a liability against him of this one-third, amounting to the sum of $3,922, and two-thirds of the other partnership debts amounting to $1,200, or a total of $5,122; said last-named sum being largely in excess of the value of Brown's two-thirds interest in said partnership. Section 5, subd. (h), of the National Bankruptcy Act, 11 USCA § 23(h), provides that, in the event one member of the partnership be adjudged a bankrupt, the partner or partners not adjudged bankrupt shall settle the partnership business and account for the interest of the partner adjudged bankrupt. Therefore in the case under consideration, respondent, not being adjudged bankrupt, would have the right to settle up the partnership business, and, upon such settlement, account to the trustee in bankruptcy for whatever interest bankrupt Brown was found to have in the partnership business. Section 2405 of the Civil Code is as follows: "Each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance if any due to him." In the case of Crane Co. v. Dryer, 9 Cal. App. 290, 98 P. 1072, Justice Hart delivering the opinion of the court, said: "Undoubtedly the code rule proceeds from, and is therefore in perfect harmony with, the soundest principles of equity, for what conceivable reason, unless one not founded in common sense, can be suggested why a member of a partnership should not be authorized to require and compel the applicaton of the partnership property to the discharge of the partnership debts, in preference to the payment by such means of the individual debts of the members of such partnership?" Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605; Duryea v. Burt, 28 Cal. 569; Storey on Partnership (7th Ed.) § 97.

It is a well-settled proposition of law that the interpretation placed by the highest court of the state upon its statutes is conclusive upon the federal courts. Smiley v. State of Kansas, 196 U. S. 447, 25 S. Ct. 289, 49 L. Ed. 546; Crocker v. Scott, 149 Cal. 575, 87 P. 102.

The question of respondent's lien upon the partnership property was an issue before the court. Upon this issue the court found in favor of respondent. This finding is supported by the evidence.

[10] The fourth count of the amended complaint alleges that no notice of the sale was filed and recorded as required by the provisions of section 3440 of the Civil Code. That section requires the recording of the seven-day notice only where the transfer is of a stock in trade in bulk, otherwise than in the usual course of trade, or the transfer of the fixtures or store equipment of a baker, café or restaurant owner, garage owner, machinist, or retail or wholesale merchant.

The business carried on by the said partnership was a cleaning and dyeing business. No merchandise in bulk, or otherwise, was kept for sale or sold. They were not merchants, nor did their business fall under any of the classes mentioned in section 3440 of the Civil Code, which prohibited a sale of the fixtures without first giving the seven-day notice. Therefore, upon a sale of the fixtures, equipment, and appliances of the said business the seven-day notice of such sale was not required to be given.

[11] Appellant in his brief claims that the findings were in some respects conflicting. We do not find any merit in these contentions. The relief demanded by appellant in this action is the cancellation of the transfer of the partnership property to respondent; that respondent, as the surviving partner, be required to forthwith settle up the partnership business and account to appellant for the interest found to be in favor of said William M. Brown.

It is apparent from the evidence and the findings of the court that, even if such relief were granted to appellant, it would be a mere idle act, for the reason that the lien which the law gives the respondent, as hereinbefore set forth, would consume the interest of said Brown in the assets of said partnership, and there would be nothing left to turn over to appellant. The law neither does nor requires idle acts. Section 3543, Civ. Code.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

97 Cal. App. 481

In re McLAUGHLIN'S ESTATE. (Civ. 3714.)

District Court of Appeal, Third District, California. March 12, 1929.

1. Wills 🔑753—Bequest of interest in property left testator as part of certain estate held specific (Civ. Code, § 1357).

Bequest of "all my interest in and to that certain property left me as a part of" certain estate *held* to be specific in its nature, under Civ. Code, § 1357.

2. Wills 🔑750—In determining whether legacy or bequest is specific, same test applies to both real and personal property.

In determining whether legacy or bequest is specific, same test is applied whether gift consists of real or personal property.

3. Wills 🔑767—Specific devise is deemed abrogated where testatrix's entire interest was sold subsequent to execution of will, and proceeds mingled with general assets.

Where entire interest of testatrix in real estate devised was sold by her and conveyed to strangers subsequent to execution of will, and proceeds were mingled with general assets of estate, devise which was specific must be deemed to have been abrogated.

4. Wills 🔑771—Devisee under specific devise is not entitled to proceeds of sale of property by testatrix, in absence of language in will authorizing it.

Where testatrix, subsequent to execution of will, disposes of real estate devised, devisee is not entitled to proceeds, in absence of language in will authorizing sale, or specifically bequeathing proceeds, since that would amount to converting specific devise into legacy.

5. Wills 🔑764—Under bequest of testatrix's interest in certain estate, mingling of cash received from estate with testatrix's general assets had effect of adeeming bequest as to such money.

Under bequest of property left testatrix as part of certain estate, mingling of cash received from such estate with general assets of testatrix's estate, whereby its identity was lost, *held* to have effect of adeeming bequest as to such part of estate.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

In the matter of the estate of Mary Quinn McLaughlin, also known as Mrs. J. D. McLaughlin, formerly Mary Quinn, deceased. From a decree directing distribution, Helen Harvey Holm appeals. Modified and affirmed.

See, also, 275 P. 875.

White, Miller, Needham & Harber, of Sacramento, for appellant.

McLaughlin & McLaughlin and H. Nelson French, Ralph H. Cowing, and John A. McGilvray, all of Sacramento, for respondent.

Robt. H. Schwab, of Sacramento, in pro. per.

THOMPSON, J. This is an appeal by Helen Harvey Holm, a niece of the deceased, from a decree of distribution.

Upon the death of Alice Quinn Harvey, who was a sister of this deceased and the mother of appellant, her estate was probated. By means of an omnibus clause in the decree of distribution in that estate, Mary Quinn McLaughlin received an undivided one-eighth interest in the west one-half of lot 6 of the block bounded by O, P, Tenth and Eleventh streets, in the city of Sacramento, together with the sum of $99.91 in cash. Subsequently Mary Quinn McLaughlin executed a holographic will, among the terms of which she devised and bequeathed "to Helen Harvey all my interest in and to that certain property left me as a part of the Alice Quinn Harvey estate." It was stipulated that, subsequent to the acquiring of this interest in the Harvey estate and subsequent to the execution of her will, Mary Quinn McLaughlin sold and conveyed her interest in the real property for the sum of $2,484.13, which proceeds, together with said sum of $99.91 cash, was mingled with the funds of the estate of this deceased. Upon distribution of the estate of Mary Quinn McLaughlin, on the theory that the foregoing devise and bequest of her interest in the property of the Harvey estate was adeemed by the subsequent sale and mingling of the proceeds thereof with the common funds of her estate, the probate court distributed this property to the heirs pursuant to section 1386 of the Civil Code. From that decree this appeal is prosecuted.

[1-3] The bequest in the present case was specific in its nature. Section 1357, Civ. Code; 28 R. C. L. 345, § 341. It included the testatrix's entire interest in both the real and personal property which was derived from the Harvey estate. In determining whether a legacy or bequest is specific, the same test is applied whether the gift consists of real or personal property. Estate of Painter, 150 Cal. 498, 89 P. 98, 11 Ann. Cas. 760, Estate of De Bernal, 165 Cal. 223, 230, 131 P. 375, Ann. Cas. 1914D, 26. The entire interest of the testatrix in the Sacramento lot, having been sold by her and conveyed to strangers, subsequent to the execution of her

will, and the proceeds thereof having been mingled with the general assets of the estate, the bequest must be deemed to have been abrogated. Estate of Benner, 155 Cal. 153, 99 P. 715; 2 Alexander on Wills, 1084, § 744; 2 Page on Wills (2d Ed.) 2211, § 1329; 1 Woerner on Law of Adm. 146, § 53.

[4] In the event of such sale of real estate, in the absence of language in the will which authorizes a sale or specifically bequeaths the proceeds of such sale, the devisee is not entitled to the proceeds, for the reason that the sale completely divests the testator of all interest in the property originally bequeathed. To be permitted to resort to the proceeds of such sale in the absence of specific authority would amount to the converting of a specific devise into a general legacy. Thompson on Wills, 382, § 434; 2 Page on Wills, supra, § 1331; Ametrano v. Downs, 170 N. Y. 388, 63 N. E. 340, 58 L. R. A. 719, 88 Am. St. Rep. 671. In Thompson on Wills, supra, it is said: "A distinction exists between the bequest of a thing in specie and the bequest of its proceeds; in the one case the sale of the article will work an ademption, in the other it will not." In 2 Page on Wills, supra, § 1336, it is said: "If the terms of the will show that testator contemplates some change in the form of the gift, or even a sale and reinvestment of the proceeds, and that he intends to pass the proceeds, or the property in which the proceeds are reinvested, to the original beneficiary full effect will be given to such provision," otherwise the bequest is revoked.

In the case of Ametrano v. Downs, supra, the court says: "Had the deceased voluntarily alienated her property by deed it is entirely clear, under the authorities in this state, that the devisee would have no claim to the proceeds of the sale" (citing authorities). "'If a testatrix devises real estate and sells the same before the will takes effect, the proceeds of the sale will become personal estate, and no court can substitute the money received by the testatrix for the land devised.' * * * 'When the testator had converted real estate, which he had devised as such, into personalty, or had converted the subject of a specific bequest of personal property into real estate, there was a revocation of the will or an ademption of the bequest.' * * * The correctness of this doctrine has never been challenged." Under circumstances like those which exist in the present case, the intention of the testatrix to specifically bequeath the proceeds of the sale of real property must be shown by the terms of the will, or she will be presumed to have revoked the bequest.

[5] The testatrix also received $99.91 in cash from the Harvey estate, which was mingled with the general assets of her estate and its identity was thereby lost. This had the effect of adeeming the bequest of that portion of the Harvey estate which was represented by cash. Estate of Babb, 200 Cal. 252, 257, 252 P. 1039; 28 R. C. L. 345, § 341; 2 Page on Wills 2208, § 1327. Nusly v. Curtis, 36 Colo. 464, 85 P. 846, is authority for holding that a specific bequest of the proceeds of a certain life insurance policy was adeemed by the subsequent collection of the money by the testator who mingled the funds with other assets of the estate.

By the terms of the decree from which this appeal was taken, the undivided one-fourth interest in the property known as the Quinn Building, located on lot 8, at I and J, Fourth and Fifth streets, in Sacramento, Cal., was distributed to the appellant. It is conceded that she was entitled to one-fourth of the accrued rent from this property which aggregated the sum of $838.37. By mistake only one-sixth of this sum was distributed to the appellant. The decree should be and is hereby modified, so as to give to the appellant her proper proportion of said accrued rent, which is the sum of $209.59.

It is also conceded that the appellant was entitled to have distributed to her the additional one-sixteenth undivided interest in and to the east 38 feet of the south 79½ feet and the east 31½ feet of the north 80½ feet of lot 10 in that block bounded by K and L, Twelfth and Thirteenth streets, in the city of Sacramento, Cal. This was omitted from the decree of distribution, which should be and is hereby modified and amended accordingly.

As hereinbefore modified, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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97 Cal. App. 485

In re McLAUGHLIN'S ESTATE.
(Civ. 3715.)

District Court of Appeal, Third District, California. March 12, 1929.

1. Wills 🔑753—Bequest of testatrix's interest in certain mortgage held specific (Civ. Code, § 1357).

Bequest of all of testatrix's interest in certain mortgage *held* specific in its nature, under Civ. Code, § 1357.

2. Wills 🔑750—In determining whether legacy or bequest is specific, same test is applied, whether gift be realty or personalty.

In determining whether legacy or bequest is specific, same test is applied, whether it be gift of real estate or personal property.

3. Wills 🔑439—Cardinal rule in construing wills is to ascertain testator's intention (Civ. Code, § 1317).

Cardinal rule for construction of will, or terms thereof, is to ascertain intention of testator, under Civ. Code, § 1317.

4. Wills ⚷764—Ademption is accomplished when change with respect to subject-matter of gift results in satisfaction or abolishing of it.

Ademption, which ordinarily applies to special and not to general legacies, is accomplished when change with respect to subject-matter takes place, resulting in satisfaction or abolishing of gift, and it may occur through conduct of testator from which his intention is evident, or from which it may be presumed.

5. Wills ⚷764—Alteration in subject of bequest, not wholly destroying its identity, is insufficient to adeem it.

Alteration in subject of bequest, which does not wholly destroy its identity, is insufficient to adeem it.

6. Wills ⚷767—Testatrix's attempt to dispose of all property, leaving no residuary estate, may indicate lack of intent to destroy bequest of mortgage by accepting deed to mortgaged property (Civ. Code, § 1326).

Testatrix's action in attempting to dispose of all property, leaving no residuary estate, may indicate lack of intent to destroy bequest of mortgage by subsequently accepting deed to property on which mortgage lien attached, since construction of will is preferred which leaves no intestacy, under Civ. Code, § 1326.

7. Mortgages ⚷137—Mortgage creates interest in property to extent of attachment of lien to secure enforcement of obligations secured.

While mortgage in California is not regarded as conveyance of any actual title, it does create interest in property to extent of attachment of lien to secure enforcement of obligation for payment of which it is executed.

8. Wills ⚷767—Testatrix's acceptance of deed to mortgaged property held not ademption or revocation of revise to husband of her interest in mortgage thereon (Civ. Code, § 1303).

Testatrix's acceptance of deed to conveyance to mortgaged property *held* not to constitute ademption or revocation of devise to husband of testatrix's interest in mortgage on such property, under Civ. Code, § 1303.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

In the matter of the estate of Mary Quinn McLaughlin, also known as Mrs. J. D. McLaughlin, formerly Mary Quinn, deceased. From a decree directing distribution of lots to heirs over the opposition of J. D. McLaughlin, an appeal is taken. Reversed, with direction.

See, also, 275 P. 874.

McLaughlin & McLaughlin, of Sacramento, for appellant.

White, Miller, Needham & Harber, H. Nelson French, Ralph H. Cowing, and John A. McGilvray, all of Sacramento, for respondent.

Robt. H. Schwab, of Sacramento, in pro. per.

THOMPSON, J. This is an appeal from a decree of distribution, which was made upon the theory that a specific devise of property was adeemed or abrogated by a subsequent change in the character of the property. The motion of Robert H. Schwab, one of the distributees in the above-entitled estate, to dismiss the appeal so far as it affects the north ½ of the west ½ of the east ½, the west ½ and the north 75 feet of the east ¼ of lot 8 in block bounded by I and J and Fourth and Fifth streets in the city of Sacramento, Cal., in which the appellants claim no interest, is hereby granted.

March 15, 1923, the testatrix, Mary Quinn McLaughlin, executed a holographic will, by the terms of which she disposed of all her property to several named legatees and devisees. Unless the devise involved in this case was adeemed and canceled, there was no residuary estate which remained undisposed of. Among other specific devises, the will provided: "Give and devise to my beloved husband J. D. McLaughlin all of my interest in that certain mortgage against the east half of the north 100 feet of lot 4 block P and Q, 7 and 8 street, Sacramento, California, occupied by Rose Ann Callahan."

At the time of the execution of this will Rose Ann Callahan owed the testatrix $7,800, which was secured by a promissory note and deed of trust, dated December 12, 1919. Subsequent to the execution of the will, and on July 17, 1925, in consideration of the entire satisfaction of said indebtedness, the real property described in the trust deed and in the cause of the will which is involved in this appeal, was conveyed in fee to the testatrix, who continued to hold title thereto until her death which occurred October 1, 1926. Upon proceedings duly had the will was admitted to probate, and J. D. McLaughlin, the surviving husband of said deceased, was appointed and qualified as executor thereof. In the course of administration, over the opposition of said devisee, J. D. McLaughlin, the said Sacramento lots were distributed to the heirs of said deceased, pursuant to the provisions of section 1386 of the Civil Code. From that decree this appeal was perfected.

[1-3] The bequest in the present case was specific in its nature. Section 1357, Civ. Code; 28 R. C. L. 289, § 263. In determining whether a legacy or bequest is specific, the same test is applied whether it be a gift of real estate or personal property. Estate of Painter, 150 Cal. 498, 89 P. 98, 11 Ann. Cas. 760, Estate of De Bernal, 165 Cal. 223, 230, 131 P. 375, Ann. Cas. 1914D, 26. The cardinal rule for the construction of a will, or the terms thereof, is to ascertain the intention of the testator. Section 1317, Civ. Code; Estate of Wilson, 184 Cal. 63, 193 P. 581. An ademption of a legacy or bequest is accomplished when a change with respect to the

subject-matter takes place, which results in the satisfaction or abolishing of the gift. It may occur through the acts or conduct of the testator, from which his intention is evident or from which it may be presumed. 28 R. C. L. 344, § 338; 2 Page on Wills (2d Ed.) 2206, § 1325; 1 Bouvier's Law Dict. 134; Morse v. Converse, 80 N. H. 24, 113 A. 214. It ordinarily applies to special and not to general legacies. 28 R. C. L., supra.

[4, 5] While it is true that the ademption of a specific legacy or bequest may occur from some change in the character of the property involved without the express intent of the testator, ordinarily the purpose will appear by a construction of the terms of the will in the light of the subsequent acts and conduct of the testator. 28 R. C. L., supra; Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498; Wilmerton v. Wilmerton (C. C. A.) 176 F. 896, 28 L. R. A. (N. S.) 401; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; Estate of Cooper, 95 N. J. Eq. 210, 123 A. 45, 30 A. L. R. 673. In 3 Woerner's Law of Administration, 1523, § 446, it is said a legacy is adeemed when, by some act of the testator the thing devised has ceased to exist in the form in which it is described in the will, for the reason that, upon the death of the testator, there is nothing answering the description of that property which may be delivered to the legatee. When, however, the property bequeathed is altered or converted into a different form by operation of law, there is no ademption of the legacy. An alteration in the subject of the bequest which does not wholly destroy its identity is insufficient to adeem it.

[6, 7] In the present case the lack of intent to destroy the bequest on the part of the testatrix, by subsequently accepting a deed of conveyance to the property upon which the mortgage lien attached, may be indicated by the fact that she attempted to dispose of all her property, leaving no residuary estate. The construction of a will is preferred which leaves no intestacy as to any part of the estate. Section 1326, Civ. Code; Estate of Henderson, 161 Cal. 353, 361, 119 P. 496. In the present case we find nothing in the record to indicate that the testatrix had any intention to revoke or change her original devise to her husband by subsequently accepting a deed to the mortgaged premises. In truth, just the contrary appears to have been her purpose. While in California it is true that a mortgage is not regarded as a conveyance to the mortgagee of any actual title to the real property (17 Cal. Jur. 714, § 19), yet it does create an interest in the property to the extent of the attachment of a lien to secure the enforcement of the obligation for the payment of which it is executed (17 Cal. Jur. 709, § 16, and page 712, § 18). In the present case the testatrix, having executed an holographic will, probably lacked legal advice informing her of the technical distinction between actual title to real property and the mere equitable interest which is created by a mortgage lien. When she devised "all my interest in that certain mortgage against the east half of the north 100 feet of lot 4," etc., she evidently intended to dispose of that portion of her estate represented by the mortgage indebtedness, plus the power to enforce its collection. The only change that occurred in the character of the property was technical in its nature. She accepted a deed to the mortgaged land in lieu of her equitable lien, and in satisfaction of the debt. Since she thereafter made no change in her will, it may reasonably be inferred that she assumed the mortgaged land would be substituted for "all of my interest in the mortgage."

[8] The accepting of a deed of conveyance in consideration of the exact indebtedness secured by a mortgage on the same premises, furnishes no evidence of the intent of a testatrix to accomplish an ademption of a devise of the interest in the property represented by the mortgage, where the testatrix retains the property to the time of her death, and subsequently makes no change in the terms of her will. In 40 Cyc. 1046, § C, it is said: "The weight of authority is to the effect that a change, subsequent to the making of the will, in the form of property devised or bequeathed does not prevent the operation of the provisions of the will and the property in its changed form passes to the devisee or legatee." To the same effect section 1303 of the Civil Code provides that: "A conveyance, settlement, or other act of a testator, by which his *interest* in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession." In accordance with this principle is has been held that an exchange of specifically devised shares of stock for other shares is not an ademption. Havens v. Havens, 3 N. Y. Super. Ct. 324. Neither is the exchange of stock for notes of the corporation an ademption. Estate of Frahm, 120 Iowa, 85, 94 N. W. 444. Nor the exchange of stock for bonds. Spinney v. Eaton, 111 Me. 1, 87 A. 378, 46 L. R. A. (N. S.) 535. A devise of testator's right, title, and interest in a tract of land, which the testator had bought at a foreclosure sale, passes the money which the original owner subsequently paid to redeem it. Rue v. Connell, 148 N. C. 302, 62 S. E. 306; 2 Page on Wills (2d Ed.) 2214, § 1330.

In Van Wagenen v. Brown, 26 N. J. Law, 196, the syllabus says: "If a mortgagee make a will devising *all his interest* in certain mortgaged premises, the devisee takes the same legal estate in the premises that the testator had * * * and such estate will not be affected by the subsequent acquisition of the testator of the equity of redemption by foreclosure or any other means." In Waldo v. Hayes, 96 App. Div. 454, 89 N. Y. S. 69, it was held that the bequest of a specific diamond brooch was not adeemed by subsequently applying it as part payment upon a more valuable brooch, but that the latter article of jewelry was a mere substitution which would pass by the terms of the will.

In the case of Van Wagenen v. Baldwin, 7 N. J. Eq. 211, the seventh clause of the testator's will provided that, I give "to Thomas Rowland what might be realized and received on a bond and mortgage for $900. * * *" Subsequently the testator accepted a deed to the mortgaged premises. The court said: "The bequest * * * to Thomas Rowland of what might be realized and received on the bond and mortgage given by * * * Baldwin for $900, held by the testator when the will was made, and in payment and satisfaction of which the testator afterwards received a deed for the lands covered by the said mortgage, was an effectual devise to the said Thomas Rowland, in fee, of the said mortgaged premises."

Tolman v. Tolman, 85 Me. 317, 27 A. 184, cited by the respondent, is not authority for the general assertion that the acceptance of a deed to mortgaged premises by a testatrix who has bequeathed all her interest in a mortgage under circumstances like those of the present case, has thereby adeemed the legacy. That case involved the construction of the following language of a will: "If, at my death, *any portion of the notes remain unpaid,*" etc. None of these notes remained unpaid. They were all canceled and the land upon which they were secured was reconveyed to the testator who subsequently deeded it to another grantee, taking other notes for an entirely different indebtedness. The court quite properly held that these latter notes were not bequeathed by the terms of the original clause of the will.

Jepson Estate, 181 Cal. 745, 186 P. 352, cited by respondent, is not applicable to the facts of this case. That case involved a legacy of $12,000 in cash. The court says: "Unquestionably the legacy under consideration in the instant case would have been specific had its subject been described as the mortgages themselves rather than as a given sum of money."

The case of Wyckoff v. Perrine, 37 N. J. Eq. 118, relied upon by the respondent, mereby involved a question as to whether the legacy was specific or demonstrative in its nature. The will did provide for a legacy which was to be offset by an indebtedness due the testatrix from the husband of the legatee. It appears, however, that at the time of the death of the testator that debt had been discharged by a previous adjudication of the bankruptcy of the debtor. The court said: "It is certain the debt which was the subject of the legacy, did not exist at the time of the testator's death. So much of it as had not been paid to the testator out of the bankrupt's assets was extinguished by his discharge in bankruptcy, so that the subject of the gift did not exist at the time of the testator's death."

In the present case the subject of the gift to the husband of the testator was more than a mere debt. It included all her interest in the debt plus her equitable interest in the land and the legal authority and means of enforcing the payment of the debt. It is true that the acceptance of the deed to the mortgaged land did involve a complete change in the parties to the legal title, but this combined property right of debt and mortgage lien was not wholly divested by the accepting of the deed for the exact amount of the debt. The equitable interest of the testatrix was merely enlarged to a fee title. The extinguishment of the debt was the accomplishment of an important part of the very thing which was devised, and by means of which that devise was made more certain and valuable. This did not constitute an ademption of the devise or a revocation under the provisions of section 1303 of the Civil Code. It was clearly the purpose of the testatrix to convey this land to her husband by this clause of her will.

The judgment is reversed and the trial court is directed to distribute said estate according to the foregoing views.

We concur: FINCH, P. J.; PLUMMER, J.

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97 Cal. App. 492

UNITED STATES FIDELITY & GUARANTY CO. v. SMITH. (Civ. 6448.)

District Court of Appeal, First District, Division 2, California. March 12, 1929.

1. Pleading ⚿121(3)—In action by trustee's surety, trustee could not deny execution of application for bond on information and belief only.

In action brought against trustee by surety on his bond to recover attorney's fees and costs expended in defending action prosecuted against it by reason of having become surety, execution of application for bond could not be denied by defendant on information and belief only, since it was presumptively in his knowledge.

2. Appeal and error ⚿1047(5)—Where photographic copy of application for bond was used during trial, failure to permit defendant to examine original when filed held not prejudicial error, where examination was permitted in reviewing court (Code Civ. Proc. § 956a, added by St. 1927, p. 583).

In action against trustee by surety on trustee's bond to recover attorney's fees and costs expended in defending certain action, in which photographic copy of application for bond was used under agreement that original should later be substituted, failure to give defendant opportunity to examine original, when filed, though error, *held* not reversible, where reviewing court permitted examination, under Code Civ. Proc. § 956a, added by St. 1927, p. 583.

3. Principal and surety 🔑175—Under terms of bond, trustee held liable to surety for counsel fees and expenses in successfully defending action under plea of limitations (Civ. Code, § 2778, subd. 3).

Under trustee's bond, providing that trustee should save surety harmless from counsel fees and expenses sustained in consequence of having executed bond, trustee *held* liable for such expenses in suit, which surety defeated by pleading limitations, as against trustee's claim that suit was based on false claim, where surety defended action necessarily and in good faith, since it was not necessary for trustee to have actually breached duty before he could be called on to indemnify surety, under Civ. Code, § 2778, subd. 3.

4. Limitation of actions 🔑56(3)—Surety's action against principal to recover expenses of defending action held not barred, where expenditures were made within year.

Action by surety on trustee's bond, brought against trustee to recover attorney's fees and costs of defending certain action, *held* not barred by limitations, where action in which expenditures were made was commenced less than four years before, and expenditures were made less than year before, commencement of action, since cause of action did not accrue until expenditures were made.

5. Principal and surety 🔑190(3)—In surety's action against principal for expenses of defending action, principal held not entitled to set off value of his services as counsel in defending such action.

In action by surety on trustee's bond, brought against trustee to recover attorney's fees and costs of defending certain action under provision of bond that trustee would save surety harmless from such expenses, trustee cannot claim set-off for his services as counsel in defending such action, since, if surety paid him any amount, he would be required under indemnity covenant to immediately pay it back.

6. Appeal and error 🔑907(5)—Reviewing court assumes that judgment received in evidence, but not incorporated in bill of exceptions or transcript, would contain showing as determined by trial court.

Where judgment was received in evidence at trial, but was not incorporated in bill of exceptions or transcript, reviewing court must assume that it would contain showing as determined by trial court's findings.

7. Appeal and error 🔑878(6)—Complaint of plaintiff, not appealing, that he did not receive full amount, cannot be considered.

In surety's action against principal to recover certain attorney's fees and costs, in which defendant only appealed from judgment, plaintiff's complaint that court failed to allow full amount which undisputed evidence showed it had expended cannot be considered.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the United States Fidelity & Guaranty Company against J. L. Smith to recover attorney's fees and costs. Judgment for plaintiff, and defendant appeals. Affirmed.

J. L. Smith, of San Francisco, and W. L. Southwell, of San Jose, for appellant.

Thos. M. Foley, of San Francisco, for respondent.

KOFORD, P. J. The respondent recovered judgment for $423.75 against the defendant for attorney fees and costs expended by respondent in defending a certain action at law prosecuted against it by reason of having become surety upon a bond given by appellant to the creditors of Force-Hewitt Company for the faithful performance of his duties as trustee for said creditors. The execution of the bond was admitted by the answer.

[1] The execution of the application for the bond was denied on information and belief only. It was presumptively in his knowledge and could not be so denied (Curtis v. Richards, 9 Cal. 33, 38), although it was evidently treated at the trial as sufficient. The trial court's finding No. 3 describes the covenant upon which defendant's liability in this action is founded as follows: "That it is true that in the application for said bond and undertaking executed by said J. L. Smith, it was agreed in writing among other things, that the defendant, J. L. Smith, would indemnify and save the plaintiff harmless from any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature which the said plaintiff shall have or may for any cause at any time sustain or incur, or be put to for or by reason or in consequence of said company having executed the said bond as surety." The court also found that W. J. Somers Company, one of the creditors of said Force-Hewitt Company, obtained a judgment against appellant as such trustee and that within four years prior to the commencement of this action and while said bond was in full force and effect respondent was sued as surety on said bond by George B. Somers as assignee of said W. J. Somers Company; that respondent in good faith employed attorneys to defend the suit and did expend $600 for their attorney's fee, which was reasonable, and $123.75 necessary legal costs in defending said action; that each of the allegations in defendant's answer and cross-complaint were untrue and gave respondent judgment for $423.75. This, apparently, was only one-half of the $600 attorney fees paid out by respondent; but this is only a sur-

mise, because the judgment does not specify whether the $423.75 is for costs, or attorney fees, or for both, or all for attorney fees and none for costs.

[2] At the trial respondent was unable to produce the original application for the bond, but produced a photographic copy of it instead. Upon objection being made by appellant, and after some argument, it was agreed to go forward with the trial, using the photographic copy, instead of the original, but with the agreement that the original would be produced before judgment was rendered. The trial then proceeded to the end, and was submitted without continuance; reference being again made to the original application, which had been agreed to be produced, but nothing was said by either party or the court at that time about how or when the original application would be produced, and nothing was said about any continuance of the trial for that purpose. After the lapse of more than a month respondent produced and handed to the clerk of the trial court ex parte the said original application, applied to the court, and obtained findings and judgment. The exact understanding in respect to just how the said original application was to be produced, and under what circumstances, is not clear in the record. Appellant's understanding is stated to be that a further hearing of some kind should have been held. The respondent's counsel apparently thought he was carrying out the agreement by merely filing the document with the clerk before judgment; but it appears to us that appellant should have been given an opportunity to examine the original application and to point out any discrepancies or defects that he might be able to find in the same.

Upon the oral argument in this court appellant, who appeared in propria persona and by attorney, was asked by the court what injury he had suffered by reason of the irregularity, and he stated that, without examining the document, he would be unable to state. Thereupon this court ordered certified and transmitted to it from the clerk of the trial court the identical photographic copy used at the trial, which had been produced here, but not certified, and upon the following day, under authority of Code of Civil Procedure, § 956a (St. 1927, p. 583) permitted respondent to produce here the said original application. Appellant was sworn and identified his signature upon the same, and was granted leave to indicate any discrepancies between the photographic copy duly certified by the clerk and said original. None were pointed out, and the photographic copy appears to us to be a faithful and exact reproduction of the original. Appellant has not here suggested any defense which he could have made in the trial court, if the same procedure had been adopted by the trial court, nor offered any such defense here. We therefore hold that no injury or reversible error occurred at the trial in respect to this incident.

[3] Appellant contends that the suit against the respondent, indemnity for the expense of which the judgment herein was given, was based upon a false claim, and hence appellant's agreement to indemnify respondent contained in his application for the bond does not include that suit. The testimony shows that, after Somers & Co. obtained a judgment against appellant, it then sued respondent on the bond. The respondent herein filed in that action a demurrer, which was overruled. Judgment went against respondent for failure to answer over. Then respondent appealed. The District Court of Appeal reversed the trial court's judgment. The Supreme Court first affirmed the trial court, and later in bank reversed the trial court, holding that the cause of action of Somers & Co. against respondent was barred by the statute of limitations. Somers v. United States Fidelity & Guaranty Co., 191 Cal. 542, 217 P. 746. That opinion sets out a copy of the bond, and holds that, because the bond was a contract of suretyship and guaranty, instead of a contract of indemnity, the cause of action accrued against the respondent herein sooner than otherwise, and consequently was barred by the statute of limitations.

Digressing for the moment, it should be noted that in the opinion denying a rehearing the court points out that it had previously decided that Somers & Co. was a creditor of "the assignor and the obligee included in the bond," which, by reference to the previous decision, found in 65 Cal. Dec. 12, means that the court found that Somers & Co. was a creditor of Force-Hewitt Company. We mention this in passing, because it is claimed by appellant herein that the evidence at the trial of this case fails to show this fact.

Returning now to the appellant's point, based on the assertion that the said action against respondent was founded on a false claim, the opinion of the Supreme Court in Somers v. United States Fidelity & Guaranty Co., 191 Cal. 542, 217 P. 746, shows clearly that the obligation sued upon was covered by the bond, and the respondent herein successfully defended the suit only because of the statute of limitations. That the defense was not maintained without a struggle is clear, from the fact that three decisions on appeal were written in the case. Regardless of this fact, however, the language of appellant's covenant of indemnity, contained in the application for the bond, recited in the findings above noted, is broad enough to cover that litigation.

The respondent defended the action necessarily and in good faith, as shown by the findings and the evidence, and this brings the case under the provisions of Civil Code, § 2778, subd. 3, and of appellant's covenant in the bond application. 31 Cor. Jur. 436. By this covenant appellant agreed to save respondent harmless from counsel fees and expenses which respondent might sustain "by reason or in consequence of said company (respondent) having executed the said bond as surety." If it was necessary for appellant to have actually breached his duty as trustee before he could be called upon to indemnify respondent for the expense of the second action, which was against respondent as surety, such breach was established by the judgment of Somers & Co. against him which preceded the action against respondent.

[4, 5] This cause of action was not barred by the statute of limitations. The action was based upon appellant's written obligation. The action in which such expenditures were made was commenced less than four years before this action. The cause of action, however, did not accrue until the expenditures were made, and that occurred less than one year before the commencement of the action.

Appellant also claims that he was personally employed as counsel, to be associated with respondent's regular attorneys of record; that he acted in that capacity; that his services were reasonably worth more than the amount paid respondent's said regular counsel; that upon an implied contract respondent owes him as much as is claimed from him; and that therefore the two items offset one another. It should be perfectly obvious that, if respondent should pay appellant any amount for counsel fees thereupon by force of appellant's indemnity covenant, he would be obliged to immediately pay it back to respondent as indemnity. It offsets itself. The court furthermore found to be untrue all the allegations of appellant upon which this claim is based.

[6] The remaining points raised by appellant constitute attacks upon the sufficiency of the evidence to show the necessity and good faith of the expenditures made by respondent in defending the litigation as found by the court. It is claimed that it is not proven that Somers & Co., which obtained the judgment against appellant, were creditors of Force-Hewitt Company. That judgment was received in evidence at the trial, but appellant has not incorporated it in his bill of exceptions or transcript. We must assume, therefore, that it showed that the plaintiff therein was a creditor of Force-Hewitt Company, as determined by the trial court's findings herein and by the Supreme Court when reviewing the judgment in Somers v. United States F. & G. 191 Cal. 542, 217 P. 746. The evidence also supports the findings declaring the good faith, necessity, and reasonableness of the respondent's expenditures in employing attorneys and disbursing costs. That respondent waived its judgment against Somers & Co. for costs of suit in return for a dismissal of the action does not mean that such costs cannot be recovered from appellant. From what appears in the record, it was necessary and expedient, and resulted in keeping down the total amount for which appellant became liable. It was done in good faith, to finally dispose of the litigation.

[7] Respondent's complaint that the court failed to allow the full amount of attorney fees and costs which the undisputed evidence and findings show it to have expended cannot be considered by this court, because respondent did not appeal.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

97 Cal. App. 354

LOOP BLDG. CO. v. DE COO. (Civ. 3740.)★

District Court of Appeal, Third District, California. March 4, 1929.

Rehearing Denied April 3, 1929.

1. Evidence 🔑158(26)—Pleading 🔑121(4) —Plaintiff's corporate existence was sufficiently proved by plaintiff's offer of parol testimony, where answer merely denied incorporation on ground of defendant's want of information or belief.

Allegation in complaint of corporate existence and capacity of plaintiff was sufficiently proved, where answer denied incorporation on ground that defendant had no information or belief sufficient to enable him to answer, and offer was made to prove corporate capacity of plaintiff by parol testimony, to which defendant objected.

2. Trial 🔑174—Motion for nonsuit must point out precise grounds on which it is based.

Motion for nonsuit, under Code Civ. Proc. § 581, subd. 5, must point out to trial court and counsel the precise grounds on which it is based.

3. Corporations 🔑117, 121(2)—Offer to restore stock held not essential to rescission, and suit for recovery of purchase-money payment, where evidence showed stock certificate had never been delivered.

Where evidence showed that there had never been any acceptance of stock certificate by plaintiff of its assignor, or any one else in its behalf, offer of restoration on plaintiff's part was not essential to rescission and recovery of amount paid for stock, since plaintiff never acquired control of stock.

4. Corporations 🔑121(6)—Right to recover money paid for stock held question for jury, under evidence of defendant's acceptance of payment and refusal to comply with purchase contract, unless plaintiff's assignors took additional amount of stock within limited time.

Right of plaintiff to recover payments made for purchase of stock *held* question for jury, under evidence that defendant received and retained part payment and sought to collect balance, and that defendant refused to sell block

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★Rehearing denied.

of stock agreed on, unless plaintiff's assignors would take additional stock to be purchased within limited time, and order granting defendant's motion for nonsuit was therefore erroneous.

5. Corporations ⚷118 — Seller's express refusal to perform contract rendered tender and demand on buyer's part unnecessary.

If seller of stock expressly refused to go ahead with agreement, tender of balance of purchase price and demand for stock on part of buyer became unnecessary.

6. Trial ⚷165—Material facts which evidence tends to prove must be assumed true on motion for nonsuit.

In determining motion for nonsuit made at close of plaintiff's case, material facts which evidence tends to prove must be assumed to be true for the purposes of the motion, irrespective of whether court itself believes the testimony presented.

7. Trial ⚷143—Substantial conflict in evidence on material issues, when evidence is all in, precludes granting nonsuit.

If, after evidence on both sides is all in, there is a substantial conflict in the evidence on material issues, nonsuit cannot properly be granted.

8. Pleading ⚷126—Answer which attempted to deny allegations of complaint by incorporating their exact language, preceded by denials, held negative pregnant, which admitted allegations of complaint (Code Civ. Proc. § 462).

In suit to recover payments made on purchase price of stock, answer incorporating exact allegations of complaint, preceded by denials, and denying that defendant stated he would not abide by option agreement, unless purchase of practically all stock, or at least 1,000 shares thereof, should be financed or completed within 10 days, *held* negative pregnant, which conceded truth of allegations of complaint, under Code Civ. Proc. § 462.

9. Contracts ⚷261(6)—Failure or refusal of party fully to perform his part of contract, or clear intention to violate provisions thereof, gives other party right to rescind (Civ. Code, § 1689).

Refusal or failure of party to contract fully to perform his part of the contract constitutes partial failure of consideration, which justifies other party in rescinding, under Civ. Code, § 1689, as does clear intention of party to contract to violate provisions thereof.

10. Contracts ⚷261(6)—Annexation of unwarranted condition to offer of performance of contract amounts to refusal to perform, which permits other party to rescind (Civ. Code, § 1689).

If one who is bound to perform contract annexes an unwarranted condition to offer of performance, there is in effect a refusal to perform, justifying other party in rescinding, under Civ. Code, § 1689.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by the Loop Building Company against C. A. De Coo. From a judgment of nonsuit, plaintiff appeals. Reversed, with directions.

Ray Howard, of Los Angeles, for appellant.
R. L. Horton and John F. Poole, both of Los Angeles, for respondent.

McDANIEL, Justice pro tem. This appeal presented by a bill of exceptions is from a judgment of nonsuit. The action is to recover the sum of $1,080 from defendant on an offer to purchase $5,000 worth of capital stock of the Interstate Lumber Company, a corporation. The case was tried upon the complaint, to which there were a number of exhibits attached as a part thereof, and the answer, purporting to deny all of the averments of the complaint, and setting up an affirmative defense by alleging that he has at all times been ready, able, and willing to perform the contract or agreement sued upon, but that plaintiff and its alleged assignors have not.

[1] At the beginning of the taking of testimony, when defendant C. A. De Coo was called under section 2055 of the Code of Civil Procedure, objection was interposed to the taking of any evidence against defendant on the ground that the complaint does not state a cause of action against said defendant. The objection was overruled. An offer to prove the corporate capacity of the plaintiff corporation was then made by counsel for the plaintiff by parol testimony. An objection thereto was made, which seems not to have been ruled upon by the court, because of the understanding that proof on the point would be offered at a later time. The plaintiff, however, offered no additional proof, preferring to rest upon the pleadings. In his points and authorities respondent contends that this failure of proof was fatal to plaintiff's case, but as the answer denies the due incorporation of the plaintiff, upon the ground that he has no information or belief sufficient to enable him to answer, we must hold that, under the settled authorities of this state, plaintiff's corporate existence and capacity were sufficiently proved. In Brinkley-Douglas Fruit Co. v. Silman, 33 Cal. App. 643, 166 P. 371, the court reiterates the principle stated by the authorities as follows: "The rule is universal that matters of public record and within reach of the defendant cannot be denied upon the ground that defendant had no information or belief concerning them." It was further held therein that "the denial of the incorporation was, therefore, evasive and raised no issue." That case also holds that corporate existence may be proved by parol. Appellant also cites William Wilson Co. v. Trainor, 27 Cal. App. 43, 45, 148 P. 954.

At the conclusion of plaintiff's case in chief

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the motion for a nonsuit was made, as appears from the following:

"Mr. Poole: If your honor please, according to this decision I am going to cite, I think I will have to make a motion for a nonsuit. This action is for recission, if your honor please, and the Code and the authorities, of which I have ample, say that you must offer to return what you have got, and put the party in statu quo.

"The Court: That is true, if this is to be termed an action of rescission, of course.

"Mr. Poole: Surely. Well, they didn't do it. He never even made a rescission. If the plaintiff has an action anywhere, any time, any place, it is an action for breach of contract on the part of Mr. De Coo for damages—not for a rescission.

"The Court: Well, it might be deemed to be an action for money had and received.

"Mr. Poole: But it is not an action for money had and received. It is an action for rescission, your honor—claimed to be a rescission.

"The Court: What a person calls his action does not necessarily make it so."

The court reserved its ruling on a motion for a nonsuit and directed the defendant to proceed with the defense and produce his testimony, which was done. It will be noted, from the foregoing excerpt from the record, that the only proposition pointed out as a basis for the motion was that there had been no offer on the part of defendant to make restitution by returning to plaintiff that which was received by the defendant to put the parties in statu quo. In explanation of the court's quoted statement that the action might be deemed an action for money had and received, it should perhaps have been noted hereinbefore that plaintiff also asked in its complaint for a decree of declaratory relief under section 1060 of the Code of Civil Procedure. It was plaintiff's desire to have a declaration of its right to recover said sum of $1,080, because in a suit then pending on appeal, being entitled "Interstate Lumber Company, a Corporation, v. Loop Building Company, a Corporation," the defendant therein (plaintiff here) had set up in his cross-complaint an action for money had and received based upon the same transaction herein involved.

The trial court, on the trial of the said suit, adjudged that the cross-complainant (plaintiff here) was not entitled to maintain in that suit a cross-complaint against the said cross-defendant (defendant here). The judgment as to that matter against cross-complainant was without prejudice. The appeal of said case has been heard and the judgment affirmed. Interstate Lumber Co. v. Loop Building Co. (Cal. App.) 275 P. 262. For reasons hereinafter to appear, we think that plaintiff's rights may be fully and finally determined on a retrial of the issues in this case and that a new trial herein should be granted. It, therefore, will be unnecessary to further notice the prayer of the complaint herein for a decree of declaratory relief. The effect of this judgment will be that he gets full opportunity to present his cause of action, if he have one, upon its merits.

As indicated, we believe that the action of the trial court in granting judgment of nonsuit must be reversed. After the submission of all the evidence in the case the court rendered the following judgment of nonsuit:

"This cause having come on regularly for trial on the 23d day of June, 1926, Ray Howard, Esq., appearing for plaintiff herein, and John F. Poole, Esq., appearing for C. A. De Coo, the defendant herein, and motion for a nonsuit being made upon the close of the taking of the evidence in the above entitled action, and the case having been duly submitted to the court, and the court finding that plaintiff's complaint herein does not state a cause of action against this defendant, and that no evidence was introduced sustaining the allegations of plaintiff's complaint herein:

"Now, therefore, it is hereby ordered, adjudged, and decreed that defendant's motion for a nonsuit be and the same is hereby granted, and judgment of nonsuit entered. It is further ordered that defendant have judgment for his costs taxed in the sum of $9."

In the recent case of Scott v. Sciaroni, 66 Cal. App. 577, 581, 226 P. 827, 829, the rule pertaining to judgments of nonsuit is stated as follows:

"A court 'may grant a nonsuit only when, disregarding conflicting evidence and giving the plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff.' Estate of Caspar, 172 Cal. 147, 150, 155 P. 631 [632].

"Respondent contends that the judgment of nonsuit was properly entered on the ground of insufficiency of the complaint in various particulars. There are two answers to this contention. First, the grounds now urged were not stated in the motion for a nonsuit and, second, insufficiency of the complaint is not a statutory ground for granting a nonsuit. Code Civ. Proc. § 581, subd. 5; Keefe v. Keefe, 19 Cal. App. 310, 125 P. 929; Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 P. 352."

[2, 3] It is settled law in this state that a motion for nonsuit must point the attention of the court and counsel to the precise grounds upon which it was made. Mattson v. Mattson, 181 Cal. 44, 183 P. 443; 9 Cal. Jur. 548, § 3030, and notes. The one point emphasized by counsel for the respondent in support of his motion for nonsuit was that plaintiff herein at the time of his attempted recall of his offer and rescission of the contract on his part did not offer to restore that which he had received under the contract. There was no merit in that contention, because the undisputed evidence from an examination of the record shows that the defendant never parted with anything and plaintiff had received nothing under the assumed contract of sale and purchase. It is true that, as secretary of the Interstate Lumber Company, after receipt by him of the $1,080, he had caused a certificate of stock to be issued to defendant's assignor, Roland E. Loop, in the amount of 100 shares of the par value of $1,000. But the evidence throughout for the plaintiff is undisputed that there has never been any acceptance of this certificate of stock by Mr. Loop or by the plaintiff corporation or any one else in its behalf and no delivery thereof has ever been made; and therefore that having received nothing, it would be unnecessary for plaintiff to make any offer with respect to this stock over which it never had any control and which remained in the full possession and control of defendant.

A fair examination of all of the testimony on the part of plaintiff discloses that money was paid to defendant upon the terms stated in Exhibit C as follows:

"December 22, 1921.

"Mr. C. A. De Coo, 467 Pacific Electric Building, Los Angeles—Dear Sir: Inclosed find check of Mr. Roland E. Loop for $1,080, which, together with a check for $4,058.33, to be handed you by Interstate Lumber Company, will make the total sum of $5,148.33. This amount represents the purchase price of five hundred (500) shares of your interstate Lumber Company's stock, plus interest at 7 per cent. from the date when that company took possession of the City Lumber Company's yard, which complies with your contract with Mr. J. H. Smith.

"This Interstate Company's check will represent the proceeds of the notes aggregating $5,000 (less $1,000 paid) given by [should be 'to'] Messrs. Loop and Henry and myself. Please issue the five hundred (500) shares in the following manner: To Roland E. Loop 200 shares, to Louis Henry 100 shares, and to Ray Howard 200 shares.

"As we have agreed, it will be necessary for the Interstate Lumber Company to make a loan at the California Bank for sufficient to enable it to pay this amount, and you and Mr. Smith are to arrange it and sign the necessary papers at the bank. I am inclosing copy of a resolution with the signatures of Mr. Loop and myself, pursuant to the by-laws, and you and Messrs. Smith and Shannon should sign your names to the same in duplicate on the original which I have handed Mr. Smith. As soon as the Interstate Lumber Company is in a position to take up these notes, please notify me and I shall surrender the same to it immediately, as I have them in my possession with the necessary indorsement. We would prefer not to present them to the California Bank, where they are made payable, for the reason that it might reflect upon the company's credit at the bank. We are sending you the $5,000, instead of the $3,000, which you desired the other day, and trust the arrangement is satisfactory.

"Yours very truly, Ray Howard."

[4, 5] This first letter was followed by a letter dated January 10, 1922, being Exhibit D. It is unnecessary to quote it, as it simply changes the original offer, by directing that it be modified, so that all of the $5,000 worth of Interstate Lumber stock be issued to Mr. Roland E. Loop, one of the assignors of the plaintiff corporation. There is testimony that, while Mr. De Coo in his answer, through his testimony, in response to his examination, denied that he ever considered himself bound to sell any stock to plaintiff or its assignors under and in accordance with the terms of said two letters, denied that he had accepted those letters as binding in any way upon him. Nevertheless, it does appear that he did accept the offer, for the reason that he received and retained the $1,080 payment and he sought to collect the balance of the $5,000 transaction from the Interstate Lumber Company as directed and expressed his willingness to accept the balance whenever it should be tendered. It also affirmatively appears, from all of the testimony on behalf of plaintiff, that the arrangement so agreed and acted upon, as stated by the said parties, was by mutual consent, if not modified, at least held in abeyance, pending certain conferences to be thereafter held. Mr. Howard as a witness testified that at the last conference on February 24, 1924, Mr. De Coo, the defendant, made the positive statement that he would not sell the $5.000 worth of stock, unless the plaintiff's assignors took at least a block of $10,000 worth of his stock, and unless all of his stock be purchased within ten days. He adds in this regard the following:

"At that time I told him that we were only able to take $5,000, and that that was all we were contracting for, and that we could not consider taking any $10,000 worth of his stock; and in view of his not agreeing with us on our policies, and not allowing us to sit as directors, that we would withdraw from the proposition; and accordingly, the next day, I wrote him, to confirm that, the letter marked Exhibit F here, dated February 25, 1922."

The court evidently regarded this as a very important point, and stated, when Louis Henry, a witness on behalf of plaintiff, was on the stand, as follows:

"The Court: I think we might shorten this litigation materially, if counsel for the defendant is willing, by a stipulation that the testimony of these other gentlemen as to matters within their own knowledge will be the same as that of Mr. Howard, except as to the matter of this conversation. I say, now, that that appears to me to be the turning point of this litigation, in my present attitude. I am satisfied that, if there were no such refusal, in my own mind, at this time, that there is no right of recovery in this action; but, if there was an absolute refusal made, I am clearly satisfied that there is a right of recovery—irrespective of any other question involved. Cannot we rest this case right on that proposition? In other words, there is no purpose in taking time by other parties concerning any other features of this case, in view of my fixed opinion that the right of recovery, if any, hinges upon the fact that Mr. De Coo at that time and place said he would not transfer these 500 shares of stock, because, in the absence of a showing of some character which would put him in default, there could be no right of recovery, I am sure; but if there was an expressed refusal upon his part to go ahead with the agreement, then any tender and demand, of course, becomes unnecessary"

[6, 7] We are convinced that the court's view so expressed was the correct view of the situation upon the facts then before the court. There was other evidence on the part of plaintiff which failed to corroborate Mr. Howard fully as to the conversation and as to the declared intention to refuse to perform on the part of the defendant. There was also conflicting testimony on the part of the defendant Mr. De Coo upon that, but these matters of contradiction we purposely are not considering, under the rule that should govern the court in acting upon a motion for nonsuit. It has been held as follows: "It is clear that it makes no difference, where the motion for a nonsuit is made on the close of plaintiff's case, whether the court itself believes the testimony presented or not, for, as is obvious, the material facts which the evidence tends to prove must be assumed to be true for the purposes of the motion, just the same as the material facts alleged in a pleading must be so treated in the consideration of a demurrer to such pleading." Bush v. Wood, 8 Cal. App. 647, 97 P. 709. A nonsuit cannot properly be granted, when the evidence on both sides is all in, if there is a substantial conflict in the evidence upon the material issues. 9 Cal. Jur. 563, and notes.

[8] It is interesting to notice in this particular the averment of plaintiff's complaint, together with the denial in defendant's answer. The complaint, in paragraph IX, alleges: "And said defendant never notified said parties of his readiness to complete said sale, but on the contrary he then announced to all of said parties that he would not abide by said option agreement at all, unless the purchase of practically all of his said stock, or at least 1,000 shares thereof, on the terms provided in said option, should be financed or completed within 10 days, and that said requirement was not provided for in said option agreement, nor otherwise agreed upon, nor reasonable; and defendant then further announced that he would not accept said remaining balance on said promissory notes as payment of the remaining purchase price on said block of 500 shares; and at all times thereafter defendant failed, neglected and refused to do anything further under said contract, except that he offered to sell to said Loop 100 shares of said stock for said $1,080."

The answer to those averments from paragraph X of the answer is as follows: "Denies that this defendant never notified said parties of his readiness to complete said sale; denies that he then announced to all of said parties that he would not abide by said option agreement of all, unless the purchase of practically all of his said stock, or at least 1,000 shares thereof, on the terms provided in said option, should be financed or completed within ten days; denies that said requirement was not provided for in said option agreement, nor otherwise agreed upon, nor reasonable; denies that defendant further announced that he would not accept said remaining balance on said promissory notes as payment of the remaining purchase price on said block of 500 shares; denies that at all times thereafter defendant failed, neglected or refused to do anything further under said contract, except that he offered to sell to said Loop 100 shares of said stock for said $1,080."

That denial is, in our opinion, an excellent example of a negative pregnant, which concedes the truth of the allegation. Under section 462 of the Code of Civil Procedure: "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true. * * *"

[9] A refusal or failure of a party fully to perform his part of the contract constitutes a partial failure of consideration which under section 1689 of the Civil Code gives the other party a right to rescind. 6 Cal. Jur. 236; Woodward v. Glenwood Lumber Co., 171 Cal. 513, 153 P. 951; Cal. Sugar, etc., Agency v. Penoyar, 167 Cal. 274, 139 P. 671. Clear intention by one party to violate the provisions of a contract justifies a rescission. Minaker v. Cal. Canneries Co., 138 Cal. 239, 71 P. 110; Jensen v. Goss, 39 Cal. App. 427, 179 P. 225.

[10] If one who is bound to perform a contract annexes an unwarranted condition to his offer of performance, there is, in effect, a refusal to perform. Woody v. Bennett, 88 Cal. 241, 26 P. 117. It may be said in conclusion that, while we believe the complaint in this case was filled very largely with irrelevant, redundant, and immaterial matters, and that much of the testimony adduced tended only to create a smoke screen likely to becloud the issues, nevertheless, on close analysis, the issue is a very simple one.

As the plaintiff asked permission to amend his pleadings in the event that the court should hold that he had not stated facts sufficient to constitute a cause of action for rescission, or for declaratory relief of his right to the return of the $1,080, and as we believe that the ends of justice will be subserved by having a determination of the real issue upon proper amended pleadings, it is ordered that the judgment of nonsuit be reversed, with direction to the trial court to permit the parties to amend their pleadings, if they be so advised.

We concur: FINCH, P. J.; THOMPSON, J.

97 Cal. App. 474

MARSH BROS. & GARDENIER, Inc., v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 5907.)★

District Court of Appeal, First District, Division 1. California. March 12, 1929.

Rehearing Denied April 11, 1929. Hearing Denied by Supreme Court May 9, 1929.

1. Injunction 🔑244—Defendant held not entitled to sue on injunction bond until mandate from federal Supreme Court was filed in District Court of Appeal (Code Civ. Proc. § 958).

In action on bond for damages sustained by reason of injunction, it cannot be said that court decided that plaintiff, which was defendant in injunction suit, was entitled to judgment prayed for so as to authorize action on bond until mandate from United States Supreme Court was filed in state District Court of Appeal under Code Civ. Proc. § 958.

2. Injunction 🔑158—Questions decided on motion for preliminary injunction are reviewable on final hearing.

All questions decided on motion for preliminary injunction are open for review on final hearing.

3. Judgment 🔑270—Oral judgment by superior court is ineffectual until entered as provided by statute (Code Civ. Proc. § 664).

Any oral judgment made by superior court prior to entry of judgment by clerk was ineffectual until entered under provisions of Code Civ. Proc. § 664.

4. Injunction 🔑251—In action on injunction bond in suit to restrain street improvement, defendant had burden to prove assessment was recorded before issuance of restraining order.

In action on bond for damages sustained by reason of injunction in suit to enjoin making, issuing, or recording of assessment, warrant, and diagram respecting street improvement and to restrain issuance of bonds in connection therewith, burden was on defendant to show that recording of assessment had been made before issuance of restraining order, in view of presumptions as to verity of record, and that apparent alterations must be construed as mistakes corrected as soon as made.

5. Injunction 🔑251—In action on injunction bond in suit to restrain street improvement, evidence supported finding that warrant, assessment, and diagram were not recorded before issuance of restraining order.

In action on bond for damages sustained by reason of injunction in suit to enjoin making, issuing, or recording of assessment, warrant, and diagram respecting street improvement, evidence *held* sufficient to justify finding that warrant, assessment, and diagram had not been recorded before commencement of action and issuance of restraining order.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action on bond for damages sustained by reason of a temporary restraining order and an injunction pendente lite brought by Marsh Bros. & Gardenier, Inc., against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Johnson & Shaw, of Oakland (R. M. F. Soto, of San Francisco, of counsel), for respondent.

WARD, Justice pro tem. This is an appeal by the defendant from a judgment rendered against it for $2,341.03 as damages suffered by reason of a temporary restraining order and injunction pendente lite issued in a certain action entitled Butters et al. v. City of Oakland, a Municipal Corporation, et al., wherein the United States Fidelity & Guaranty Company (a corporation), as surety, executed undertakings in the sum of $450 upon the restraining order and in the sum of $2,000 upon the injunction pendente lite.

Marsh Bros. & Gardenier, Inc., plaintiff and respondent herein, were awarded a contract to do certain street work in Oakland, Alameda county, under proceedings taken pursuant to what is known as the "Improvement Act of 1911" (St. 1911, p. 730) on the district plan, with serial bonds to be issued to represent assessments of $25 each or over for the cost of such work. The details of such proceedings are fully set out in the appendix to appellant's brief, pages 2–11, pars. IV to XVI, inclusive. After this assessment was made the warrant, diagram, and other necessary written instruments were recorded. An appeal was taken by certain property owners to the city council. After hearing thereupon, the council allowed the appeal, and directed that a new assessment be made. The council fixed the aggregate amount of such assessment and prescribed the amount to be apportioned to each separate lot. The council also directed the issuing of a new warrant and assessment and diagram and to assess the sum of $27,978.68 upon the subdivisions of land designated upon said diagram

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★Rehearing denied. Hearing denied by Supreme Court.

of said assessment district, which diagram was approved by the city council by resolution No. 11025 (N. S.). In accordance with such resolution, the superintendent of streets on the 4th day of January, 1916, was ready to record the assessment, diagram, etc., and about to issue such assessment, warrant, and diagram, etc., to the plaintiff and respondent herein, but upon said date certain persons, to wit, Charles Butters et al., as plaintiffs, commenced an action in the superior court of the state of California, in and for the county of Alameda, against the city of Oakland, its superintendent of streets, its treasurer and the plaintiff and respondent herein, as defendants, praying for a judgment and decree of the superior court perpetually enjoining and restraining the superintendent of streets from making, issuing, or recording said assessment, warrant, and diagram, and restraining the treasurer of the city of Oakland from issuing serial bonds in connection therewith. Upon this complaint a temporary restraining order was issued, directed to the defendants and an order to show cause why an injunction pendente lite should not be issued and thereafter a permanent injunction.

The defendant and appellant herein furnished a bond in the sum of $450 containing the condition that the surety "would pay to said parties enjoined such damages not exceeding the sum of $450.00 as such parties might sustain by reason of the said temporary restraining order if the Superior Court finally decided that the said plaintiffs were not entitled thereto." Upon hearing upon the order to show cause an injunction pendente lite was issued which contained the following: "It is hereby ordered, that pending the determination of the above entitled action and until the further order of this court the said defendants, their deputies, agents, employees, and all persons acting upon or under them and each of their authority or control, or in the aid and assistance of each of said defendants, be and they are hereby restrained and enjoined from doing any of the acts hereinabove mentioned." It will be noted that the "defendants" were restrained. The plaintiff and respondent herein was one of such defendants. The acts referred to were the identical acts referred to in the restraining order. Also "all persons * * * in the aid or assistance of each of said defendants be and they are hereby restrained," etc. Appellant herein thereupon issued the second bond for $2,000.

The Butters Case was tried and judgment entered on November 3, 1916, against the plaintiffs therein. Notice of appeal was filed on February 26, 1917, and on June 22, 1921, the District Court of Appeal affirmed the judgment. 53 Cal. App. 294, 200 P. 354. On August 19, 1921, the Supreme Court of the state of California denied a petition for a hearing before such tribunal. On September 28, 1921, a writ of error to the United States Supreme Court was allowed and on the following day issued and directed to the justices of the District Court of Appeal of the state of California in and for the First Appellate District. On November 12, 1923, the Supreme Court of the United States (263 U. S. 162, 44 S. Ct. 62, 68 L. Ed. 228) affirmed the judgment and on December 24, 1923, the mandate of said Supreme Court was filed in the office of the clerk of said District Court of Appeal. On August 20, 1924, the present action was commenced.

[1-3] The vital point in this case is: When did the superior court finally decide that the plaintiffs were not entitled to the judgment prayed for in Butters et al. v. City of Oakland et al.? Counsel for appellant has elaborated extensively upon the various decisions in this state, beginning with Elliott v. Osborne, 1 Cal. 396, and Russell v. Elliott, 2 Cal. 245, and down on through the long list, but no citation has been called to our attention covering the facts as we view them in the present proceeding. Had an action been instituted upon the first bond (restraining order) when the second bond was given upon the injunction pendente lite, the plaintiff herein would undoubtedly have been directed to await the determination of the injunction proceedings upon the merits. During that period there would have been good reason for any court to determine that the issuance of the injunction pendente lite was a justification of the giving of the bond upon the restraining order. The injunction pendente lite was merely a continuation of the existence of the restraining order under another name for a further period of time for which an additional bond was required, but the propriety of the issuance of the first order could not be determined until the hearing upon the merits. The restraining order and the injunction pendente lite are identical in wording, save the necessary changes as to dates, amounts, etc., but the parties and acts enjoined are the same. All questions decided on a motion for a preliminary injunction are open for review on the final hearing. Rodgers v. Pitt (C. C.) 129 F. 937. "An order dissolving or discharging a restraining order in such a case is not necessary, and it falls with a denial of the motion for a preliminary injunction, or becomes merged in the latter if granted." Knight v. Cohen, 5 Cal. App. 296, 90 P. 145. "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him." Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391. See, also, Kendall v. Foulks, 180 Cal. 171, 179 P. 886. Had the instant action on the first and second bonds of the appellant herein been

instituted upon the entry of judgment or upon its affirmance by the District Court of Appeal in the Butters matter, a showing that the case was on appeal, or that the remittitur from the reviewing court had not been filed in the superior court, would have effectually prevented a recovery at that time. A point is made that the superior court made an oral judgment at some time prior to the entry of judgment by the clerk, but, if so, this was ineffectual until entered under the provisions of section 664, Code of Civil Procedure. The appeal, the writ of error, and the petition for hearing before the Supreme Court were all initiated by the surety's principal and were all within the rights and powers of such principal to do, and must be deemed to have been contemplated and approved by the surety, as each move was an effort to protect the surety by an attempt to obtain a decision which would reverse the trial court and determine finally that the applicant was entitled to the injunctive relief. If this effort had been successful, respondent could not have maintained the present proceeding. The surety's principal prevented a final determination of the action in which the two bonds were written as to the courts of this state until the mandate from the United States Supreme Court was filed in the District Court of Appeal of this state. At every step in the course of these appeals and reviews, respondent was powerless to claim that the action had been finally determined, settling once and for all whether the restraining order involving the $450 bond, or the injunction pendente lite involving the $2,000 bond, had been improperly issued. High on Injunctions, § 1649, says: "But if the bond is conditioned for the payment of such damages as may be sustained if the court shall finally decide that the plaintiffs were not entitled to the injunction, no right of action accrues, until the final determination of the suit." To the same effect, see Dougherty v. Dore, 63 Cal. 171; Dowling v. Polack, 18 Cal. 629; Clark v. Clayton, 61 Cal. 634, and section 529, Code Civ. Proc. In Penny v. Holberg, 53 Miss. 569, the court said: "So long as the suit remains in court undetermined, it is always possible, however improbable, that cause may be shown to reinstate and render perpetual the injunction in whole." In a case wherein an appeal is taken there is no final determination until the remittitur from the reviewing court is filed in the original action by the clerk in the court where the judgment roll is filed, or the order appealed from is entered. Section 958, Code Civ. Proc.

[4, 5] Appellant contends that the court erred in admitting in evidence the assessment roll and book without explanation as to certain alterations appearing upon its face as to the date of recordation of the assessment. As we view the matter, since every presumption of verity must be accorded a record, and apparent alterations and interlineations must be construed as mistakes corrected as soon as made, rather than as a tampering with the record, which would be unlawful, the burden was upon the defendant to show that such recording had been made before the issuance of the restraining order. The trial court had before it the actual record. It saw the erasures and interlineations and yet it decided, in effect, that the time of such recordation was subsequent to the grant of the restraining order and the injunction pendente lite, and we cannot feel justified in overriding that conclusion, or in stating that the lower court was in error in admitting that record. This leads us to the next point, namely, Was the assessment recorded prior to the issuance of the restraining order? If, in fact, the assessment had been recorded prior to the issuing of the restraining order and the giving of the bond, then the bond was given without any consideration, and, if so, this should have been specially pleaded.

In asking for and obtaining both the temporary restraining order and the injunction pendente lite and the recitations in both these restraining orders, as well as in the prayers of the complaint, original and amended, we find the use of present participles, the desire being plainly evidenced that it was the "making" or "recording" or "delivering" of the warrant and assessment which was sought to be prevented and for which the surety in its bond pledged to pay its money if the defendant was prevented and damaged thereby. From the time of the making of the restraining order to the time of the grant of the injunction pendente lite a two months' period of time elapsed and it seems strange that no discovery was made that the warrant, etc., had actually been issued and recorded prior to the time when the restraining order was issued and served. If those acts had been done, respondent herein would have been able to collect his money. Considering all of the evidence, documentary and otherwise, we believe that it was sufficient to justify the finding that the warrant, assessment, and diagram had not been recorded prior to the commencement of the Butters Case and the issuance of the restraining order.

Appellant has laid great stress upon the point that, if the making and issuing of the new warrant, assessment, and diagram by the superintendent were enjoined, it could not be recorded nor delivered, nor the certificate issued to the treasurer, nor the bonds issued by the treasurer, and when they in fact secured such an enjoining, the other defendants, including this plaintiff and respondent, were not enjoined from doing anything, and hence could not be damaged by the injunction. To state this argument should show its speciousness. The restraining order and the injunction pendente lite were directed to all the defendants, including the defendant Marsh Bros. & Gardenier, Inc. It could not get its bonds which constituted the payment for its work unless the warrant, assessment and diagram were made and issued by the superintendent of streets. Marsh Bros. & Gardenier, Inc., could not compel the recording of something which was not made or issued, nor could it compel the delivery of a nonexistent thing to itself, nor could it compel the issuance of the certificate to the treasurer, nor the issuance of the bonds thereupon by any known process of law and equity. Marsh Bros. & Gardenier, Inc., would have been met at the very threshold with this restraining order and the injunction pendente lite. The act known as the "Improvement Act of 1911" contains no provision by which the new warrant, the assessment, the diagram, the recording or the delivery thereof, or the issuance of the certificate to the treasurer, or the issuance of the bonds could be done piecemeal for the benefit of a contracting party so that the land of the Butters et al., plaintiffs in the other proceedings, could be exempted or reserved for later action. There is no provision by which Marsh Bros. & Gardenier, Inc., could obtain a supplemental assessment upon the same district as reimbursement. Plaintiff herein should not be penalized for legal error, if such there might be, in including lands not properly assessable —a matter over which plaintiff has initiatively no control.

What we have said upon the first point answers the remaining contentions of appellant.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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97 Cal. App. 344

SWANSON et al. v. CITY OF ORANGE et al.
(Civ. 6179.)

District Court of Appeal, Second District, Division 2, California. March 2, 1929.

1. Municipal corporations 🔑33(1)—City council, before annexing territory, must determine whether territory is inhabited or not (Annexation Act 1913, and amendments thereto).

Before city council can proceed under Annexation Act 1913 (St. 1913, p. 587), and amendments thereto, for the annexation of inhabited territory, it was under necessity of determining whether or not territory proposed to be annexed was inhabited or not inhabited, and it must have some evidence before it upon which to base a decision.

2. Certiorari 🔑58—On writ of review, evidence outside of return was erroneously received and could not be legally considered (Annexation Act 1913, and amendments thereto).

On writ of review to review action of city council calling election for annexation of territory under Annexation Act 1913 (St. 1913, p. 587), and amendments thereto, testimony locating parcels of land within territory and designating number and names of persons living thereon, which was outside of and independent of the return, was erroneously received and could be legally considered by the court.

3. Municipal corporations 🔑34—City clerk's certificate held proper and sufficient evidence upon which city council could base its jurisdiction to call annexation election (Annexation Act 1913, and amendments thereto).

On proceedings for annexation of territory under Annexation Act 1913 (St. 1913, p. 587), and amendments thereto, city clerk's certificate that petitioners were qualified electors residing within district and constituted more than one-fourth of qualified electors *held* proper and sufficient evidence upon which city council could base its jurisdiction to call annexation election.

4. Municipal corporations 🔑33(8)—City council, having been shown to have jurisdiction to call annexation election, court on writ of review can go no further unless palpable fraud shown from face of proceedings (Annexation Act 1913, and amendments thereto).

It having been shown through city clerk's certificate that city council had acquired jurisdiction to call annexation election under Annexation Act 1913 (St. 1913, p. 587), and amendments thereto, court on writ of review can go no further unless palpable fraud shown from face of proceedings.

5. Municipal corporations 🔑33(6)—City council, in annexation proceedings, held to have had sufficient evidence from which to determine that territory was inhabited (Annexation Act 1913, and amendments thereto).

On writ of review to review proceedings for annexation of territory under Annexation Act 1913 (St. 1913, p. 587), and amendments thereto, where evidence showed that small tract of about 65 acres upon which at least thirteen voters resided was petitioning for annexation, it cannot be said that city council was without sufficient evidence from which to determine that territory was inhabited.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Certiorari by Sigfred W. Swanson and others to review an order of the City of Orange and Ross Miller and others, as City Council of the City of Orange, calling an election for the annexation of certain territory. From a judgment annulling the resolution calling the election, the defendants appeal. Reversed, and writ discharged.

H. L. Dearing, of Orange, and Drumm & Tucker, of Santa Ana, for appellants.

Scarborough, Forgy & Reinhaus, of Santa Ana, for respondents.

STEPHENS, Justice pro tem. Proceedings under the Annexation Act of 1913 (Stats. 1913, p. 587) and amendments thereto for the annexation of certain territory to the City of Orange, a city of the sixth class in the county of Orange, were had up to the point where the city council of said city had passed a resolution calling an election in the territory proposed to be annexed. A petition was filed in the superior court, and upon it (the petition is not before us) a writ of review of the above referred to proceedings was issued, without notice to the defendants or either of them. The writ contained the following passages: "Whereas, it has appeared to us by the verified petition of the above-named plaintiffs that lately, to-wit, on the 30th day of April, 1923, before you, or a majority of you, composing at the time the City Council of the City of Orange, such proceedings have been had that you, or a majority of you, have irregularly and without authority or jurisdiction in the premises, called an election for the purpose of determining whether certain territory should be annexed to the City of Orange in accordance with the provisions of the Annexation Act of 1913, and amendments thereto; that said territory is not inhabited territory but includes both inhabited and uninhabited territory; and whereas, it is alleged by said plaintiffs that your proceedings therein have been irregular, without authority and in violation of the statutes in such cases made and provided. * * *"

The defendants, with counsel, appeared upon the day fixed in the writ and moved to quash upon the ground that the allegations contained in the petition were insufficient to support the writ. The motion was overruled, and the defendants immediately filed their return, which showed that the several steps required by the Annexation Act of 1913 had been followed; that is, the outside territory had petitioned to be annexed, the petition had been checked and found sufficient by the city clerk and so reported to the city board, and the board had called an election in the outside territory. Petitioners for the writ thereupon offered in evidence a map showing the boundaries of the territory proposed to be annexed. The map also had delineated upon its face lines showing several holdings, with names of the purported owners, and small drawings indicating improvements. To this offer defendants objected upon the grounds that the map was irrelevant, incompetent, and immaterial, that by it petitioners were seeking to introduce testimony outside of the record, and that the review was confined to the return. The objection was sustained, but through stipulation the map was later allowed to go in for the limited purpose of showing the outline boundaries of the territory proposed to be annexed, drawn to scale, and to show such territory's geographical relation to the city of Orange. Respondents' brief herein greatly enlarges this stipulation, without warrant, however, from the transcript. The petitioners also offered, and the court received over the objections of defendants, oral testimony which will be more particularly referred to hereinafter.

Judgment was entered annulling the resolution calling the election, for the reason that the city council "did act in excess of its jurisdiction and power," and the defendants appeal to this court.

"A writ of review may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officers, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." Section 1068, Code Civ. Proc.

A review of the appellate court opinions of this state will reveal a growing liberality in the consideration of the use of this writ, but will also reveal a close adherence to the basic principles thereof. There are no deviations from the following pronouncement in Borchard v. Supervisors, 144 Cal. 10, 14, 77 P. 708, 709: "It is too well settled to require the citation of authorities that the writ of review runs to inferior tribunals, boards, or officers exercising judicial functions solely to correct errors in excess of jurisdiction, or, in other words, to confine such tribunals and officers, exercising judicial functions, to their proper jurisdiction. It may not be used to correct errors or irregularities within the jurisdiction of the inferior tribunal, nor will it ever lie to review a purely legislative or executive act." So, too, it may be said that the opinions adhere to the doctrine expressed so well in Los Angeles v. Young, 118 Cal. 295, 50 P. 534, 62 Am. St. Rep. 234: "But it may be set down as a universal rule that, as the province of the writ of certiorari is to review a record of an inferior court, board, or tribunal, and to determine from the record whether such court, board, or tribunal has exceeded its jurisdiction, evidence dehors the record, and contradicting it, is never permitted. * * * If the jurisdiction of the inferior tribunal depended upon a question of fact, that fact was never tried de novo upon its merits, but the inquiry thereupon was limited strictly to the evidence upon which the inferior tribunal acted." Imperial Water Co. v. Supervisors, 162 Cal. 14, 25, 120 P. 780; Halpern v. Superior Court, 190 Cal. 384, 212 P. 916; Corrigan v. Superior Court, 72 Cal. App. 383, 236 P. 364; Camm v. Justice's Court, 35 Cal. App. 293, 170 P. 409.

Evidence supplemental to the record has been received, as in the case of Los Angeles v. Young, supra, wherein the reviewing court permitted the server of a demurrer to testify that the initials "H. H. Y." stood for himself, whose name was H. H. Yonkin, and to further testify that he served the demurrer on a person in W. E. Dunn's office who accepted it and indorsed Dunn's name upon it. The Supreme Court, upon appeal from the reviewing court, said that this "was not, perhaps, improper," as it was in the nature of facts upon which the trial court acted. The reviewing court had also received the testimony of Dunn which was offered to and did tend to contradict the truth of the return, and upon this evidence the Supreme Court reversed the case. Coombs v. Industrial Accident Commission, 76 Cal. App. 565, 245 P. 445.

[1] There are three distinct and independent acts prescribing the procedure for the annexation of territory to an existing city. They are, the act of 1889 (St. 1889, p. 358), the act of 1899 (St. 1899, p. 37), and the act of 1913 (St. 1913, p. 587). The act of 1899 relates to the annexation of uninhabited territory, whereas the act of 1913, with which we are concerned in the instant case, relates to inhabited territory. It is obvious that, before the city council could proceed in the matter now under consideration, it was under the necessity of determining whether or not the territory proposed to be annexed was inhabited or not inhabited. It is also obvious that it must determine whether such territory included both sorts. It is the trend of the decisions that this duty is judicial in nature. Capuchino Land Co. v. Trustees, 34 Cal. App. 239, 167 P. 178; Miller & Lux v. Supervisors, 189 Cal. 254, 208 P. 304; Imperial Water Co. v. Supervisors, 162 Cal. 14, 120 P. 780, and Cook v. Civil Service Com., 160 Cal. 589, 117 P. 663. It follows, therefore, that, before the city council could take any action, it must have some evidence before it upon which to base a decision. The case of Stumpf v. Board of Supervisors, 131 Cal. 364, 63 P. 663, 82 Am. St. Rep. 350, holds such evidence must conform to the rules of evidence in court, but this course has not been followed, and is expressly overruled in Miller & Lux v. Board of Supervisors, supra.

[2] It is now important to examine the evidence received in the instant case over the objection of the defendants. If such examination reveals it to be but supplementary to the return, as respondents contend, no error has been committed. If, on the other hand, it proves to be "evidence dehors the record," it has no place herein and can be of no use in this proceeding.

The introduction of the map, as per stipulation, furnished a convenient outline drawing of the territory proposed to be annexed. A witness testified, over the objection of the defendants that the territory consisted of approximately 65 acres. This testimony added nothing, for the reason that the map, as it went in, was made up from information contained in the petition to annex and the acreage was computed from the same data. But the same cannot be said as to the other evidence introduced and received. Such evidence located the several parcels of land within the territory and designated the number and the names of the persons living thereon; it referred to the improvements and their location within such territory; it described roads and the length of time and by whom they had been used. The map was used and referred to contrary to the stipulation and to the earlier ruling of the court. All of this testimony was outside of and independent of the return. There is no claim that it is evidence upon which the city council acted. Even if it were so claimed, such evidence would have to reach the reviewing court through the return. A supplementary return may be made under the sound discretion of the court. The introduction and reception of this testimony was erroneous and could not legally have been considered in this proceeding. For our consideration of this appeal we must sustain or reverse the judgment as though none of this testimony had ever been in the case.

[3, 4] It is now incumbent for us to consider whether or not the city council had any evidence before it upon which to base its decisions upon these judicial or quasi judicial questions, for it has been held that jurisdiction has not been acquired without some evidence. Miller & Lux v. Supervisors, supra, and Garvin v. Chambers, 195 Cal. 212, 232 P. 696.

We find, however, that the return to the writ includes the city clerk's certificate, the effective part thereof being as follows: "That I have carefully examined the petition for annexation to the city of Orange of certain West Orange territory, signed by Wm. H. McMurphy and twelve other petitioners, and filed in my office on this day, and have checked said names with the official registration of voters of Orange County, and have determined therefrom the total number of qualified electors within the district described in said petition, and find that said petitioners are all qualified electors residing within said district, and that they constitute more than one-fourth in number of the qualified electors residing within said district." The cases of People v. Town of Ontario, 148 Cal. 625, 84 P. 205, and Wolfskill v. City Council of Los Angeles, 178 Cal. 610, 174 P. 45, hold squarely that such a certificate is proper and sufficient evidence upon which a city council may base its jurisdiction to call the annexation election. It having been shown that the city council had acquired jurisdiction through the evidence of the clerk's certificate, the reviewing court could go no further unless palpable fraud shone from the face of the proceedings, as in People ex rel. City of Pasadena v. City of Monterey Park, 40 Cal. App. 715, 181 P. 825. For further authorities as to the sufficiency of such certificate, see Camm v. Justice's Court, 35 Cal. App. 293, 170 P. 409, Chambers v. Board of Supervisors, 57 Cal. App. 401, 207 P. 288, and Fleming v. Superior Court, 196 Cal. 344, 354, 238 P. 88.

[5] Respondents cite the cases of Capuchino Land Co. v. Trustees, 34 Cal. App. 239, 167 P. 178, and People v. City of Lemoore, 37 Cal. App. 79, 174 P. 93, as authority for holding here that the territory proposed to be

annexed consists of both inhabited and uninhabited territory. In the Capuchino Case, the petition sought the review and annulment of annexation proceedings on the ground that the territory consisted of two kinds; one kind being habitable and inhabited and lying on one side of a railway, the other being uninhabitable and uninhabited and lying on the other side of the railway and next to a salt bay. The uninhabited parcel was almost as great in area as the city to which annexation was sought. The reviewing court annulled the proceedings, and the appellate court sustained the judgment, remarking that the return showed the above delineated facts upon its face. The case of People v. City of Lemoore was in quo warranto, and no return or answer was ever made to the complaint, as the case reached the appellate court after the defendants had declined to answer after general demurrer overruled. This case has no bearing upon the points to be decided in the instant case, unless, under the rules laid down in it, the evidence introduced herein shall be considered as to its probative value. As to this we think a careful reading of the cited case, construed in the light of the Supreme Court's comment upon denying a hearing before that court, would be authority for the conclusion that the evidence in the instant case does not support the finding of the reviewing court.

Very much the same situation as in the instant case, considering the objectionable evidence, was presented to the Supreme Court in People v. Town of Ontario, supra. The court in that case, through opinion written by Mr. Justice Angellotti, says that there is probably no annexation or original incorporation wherein there are no vacant parcels of land, but that this does not change the nature of the territory so that the act providing for the annexation of uninhabited territory should be used for the uninhabited parcels, and the act providing for the annexation of inhabited territory should be used for the inhabited territory. Of course, where the property is different in kind and situation, as in the Capuchino Case, the rule would change with the reason therefor. In the instant case a small tract of about 65 acres contiguous to the city of Orange, and upon which at least thirteen voters resided, was petitioning for annexation. It cannot be said that the city council was without sufficient evidence from which to determine that the territory was inhabited.

The return to the writ shows the proceedings to be regular and legal in every respect, and that the city council did not exceed its jurisdiction in calling the election nor did any of the members of the city council.

The judgment is reversed, and the writ discharged.

We concur: WORKS, P. J.; CRAIG, J.

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97 Cal. App. 569

BARSOTTI v. IMPERATRICE et al.

(Civ. 3326.)

District Court of Appeal, Third District. California. March 15, 1929.

1. Sales 🔑377—Complaint alleging nonpayment for grapes delivered under contract to pay on completion of delivery of larger quantity contracted for did not state cause of action.

Complaint alleging that defendants failed and refused to pay plaintiff for two carloads of grapes delivered, according to contract providing for payment on completion of delivery of four carloads contracted for, did not state cause of action for breach of contract.

2. Sales 🔑181(1)—Burden was on seller, suing for breach of contract by nonpayment for grapes delivered, to prove that they were of quality agreed on.

In action for breach of contract by failure to pay for grapes delivered, burden was on plaintiff to prove that they were of quality agreed on.

3. Sales 🔑181(12)—Evidence held not to show that grapes delivered were of quality agreed on.

In action for breach of contract by failure to pay for grapes delivered, plaintiff's testimony that grapes were "first-class" and "A-1," and proof that they were rated as United States grade No. 1, *held* not to show that they were of quality agreed on, in view of defendant's evidence that they were mouldy, rotten, and leaky, with some red and green berries.

4. Sales 🔑166(1)—Refusal to accept grapes, not of quality agreed on, is not breach of contract.

Buyer's refusal to accept grapes, which are not of quality agreed on, does not constitute a breach of contract.

5. Appeal and error 🔑1050(1)—Admission of testimony as to "unjust" deal between defendants and witness' mother in answer to impeaching question as to conversation with defendant held prejudicial error.

In action for breach of contract by failure to pay for grapes sold to copartnership, admission of testimony as to what witness termed a "very unjust" deal between defendants and her mother, in answer to general question as to conversation with one defendant for purpose of impeaching his testimony that he did not tell witness he had been member of partnership, *held* prejudicial error.

6. Witnesses 🔑388(10)—Impeaching question should embrace substantially the very statement denied by impeached witness and ask categorical answer whether statement was made, giving time, place, and persons present.

The proper method of impeachment is to formulate question so as to embrace the very statement, at least in substance, which witness sought to be impeached has denied making, and to ask impeaching witness for a categorical answer whether statement was made, giving time, place, and persons present.

7. Witnesses ⚷388(9)—Question whether witness had conversation with defendant, without indicating subject-matter, held improper for impeachment purposes as opening door to incompetent and immaterial evidence.

Question whether witness had conversation with defendant at time mentioned, without indicating subject-matter thereof, *held* improper for purpose of proving admission by defendant as party; being so framed to open door to admission of incompetent and immaterial evidence.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Nello Barsotti against J. D. Imperatrice, M. A. Caldaralla, and E. T. Osborn, individually, and as copartners, doing business under the firm name and style of M. A. Caldaralla Company. From a judgment against defendants Caldaralla and Osborn, they appeal. Reversed, with direction.

Conley, Conley & Conley, of Fresno, for appellants.

Barcroft & Barcroft, of Madera, for respondent.

FINCH, P. J. This action involves a contract for the sale by the plaintiff to the defendant M. A. Caldaralla Company, a copartnership, of four carloads of grapes. The complaint originally contained three counts. In the first it is alleged that the defendant Imperatrice gave his personal check to the plaintiff in payment of the agreed price of the first carload, but that the check was "dishonored and the payment thereof refused." In the second count it is alleged that the carload of grapes referred to in the first count and a second carload were delivered to the defendants, of the total agreed value of $1,849.77, only $500 of which has been paid. In the third count it is alleged that, upon the delivery of the two carloads of grapes mentioned, the defendants "breached and violated said contract in that they failed and refused to pay plaintiff for said grapes according to said contract or at all. That by reason of the breach and violation of said contract by the defendants as aforesaid, plaintiff, in order to minimize loss to himself, after due diligence, found a buyer for 43 tons of grapes, which was the amount thereof remaining undelivered to defendants and originally covered by said contract, and plaintiff received the purchase price of $57.50 per ton for said grapes. That said price was the highest price obtainable for said grapes in Madera, California, on said date." Deducting the amount alleged to have been received for the 43 tons of grapes from the amount they would have brought at the agreed price of $60 a ton leaves an alleged loss of $107.50. Judgment was demanded for the amount of this loss and the alleged unpaid balance due for the first two carloads of grapes, or a total of $1,457.27. The fourth count, added by amendment, is, in substance, a combination of the other three, and it need not be further noticed. A copy of the contract is attached to, and made a part of, the complaint. It provides:

"This certifies that Nello-Barsotti * * * has sold to M. A. Caldaralla Co. all the hereinafter mentioned fruit crops buyers shall find suitable for local eastern markets, * * * delivered at Madera Team, not later than Sept. 10 to start, * * * price 60.00 F. O. B. Madera in car. * * * The seller agrees to pick and deliver all of said fruits at his own expense, in good condition, entirely free from mildew, or smut, or rain, or sand damage, and free from any damage, whatsoever, and at the times directed by the buyer. The buyer agrees to pay for said fruit upon completion of the delivery thereof and presentation of weight tags therefor, at the office of the buyers at 419–421 Davis Street, San Francisco, California. * * * This contract is understood by both parties to constitute an absolute sale, but until delivery has been completed seller agrees to assume all risks of loss or damages of whatsoever kind or nature to any undelivered part of said crop. Time is of the essence of this agreement and no understanding other than herein expressed shall vary or modify the transaction."

The first count of the complaint stated a cause of action, if any, against defendant Imperatrice personally. The trial court granted his motion for a nonsuit. Judgment was entered against defendants Caldaralla and Osborn for the amount demanded, and they have appealed.

[1] The only breach of the contract by the defendants alleged in the complaint is that they "failed and refused to pay plaintiff for said grapes," the grapes which had been delivered, "according to said contract or at all." Since the contract provides for payment "for said fruit upon completion of the delivery thereof," and the complaint shows that the delivery had not been completed, the facts alleged therein do not show a breach of the contract by the defendants, and are not sufficient to constitute a cause of action.

The evidence shows that the first carload of grapes left Madera for San Francisco September 6 at 8:30 a. m., and the second carload September 8 at 11:25 p. m. September 9, M. A. Caldaralla Company wired the plaintiff: "Car Grace number 32,587 (the first car) arrived September ninth all molded and fermented will not accept it you had no right to hold that car there three days for payment according to the contract advise me what you want done with this car." On the next day the plaintiff replied: "Refer to telegram grapes were not held on track for nonpayment your agent shipped the car himself." Subsequently the plaintiff sold the remainder of the grapes to E. E. Desmond, and then, September 15, he sent the Caldaralla Company the following telegram:

"Because of your failure to perform under your grape contract with me dated Aug. 26, 1925, I now declare contract cancelled." The plaintiff testified: "When I find out that I could not get any more shook from Mr. Caldaralla and I had some of those grapes and I went to work and entered into a contract with E. E. Desmond, and then I sent that telegram;" and that the reason he stopped shipping grapes to the Caldaralla Company was because that company did not furnish him boxes for the grapes. Jack Placia, who was employed by the Caldaralla Company to ship grapes from Merced to San Francisco, testified that, after the shipment of the second carload, he offered to furnish boxes, and that the plaintiff replied: "I don't want any more boxes, because I am through with Mr. Caldaralla." The contract provides that the seller shall pick and deliver the grapes "at the times directed by the buyer." By reason of that provision, the evidence is uncertain as to whether the buyer was in default in failing to furnish boxes at any time prior to plaintiff's sale of the remainder of the grapes to Desmond. But, if it be conceded that the evidence is sufficient to prove that the Caldaralla Company was so in default and that the respondent may rely upon such breach of the contract without having alleged it, the judgment must be reversed on other grounds.

[2-4] The complaint does not allege that the grapes delivered to the defendants were of the quality specified in the contract. The "further and separate defense" of the defendants alleges that the grapes so delivered were "mildewed and moulded and in bad condition." The burden was on the plaintiff to prove that such grapes were of the quality agreed upon. The contract provides that the grapes shall be "in good condition, entirely free from mildew, or smut, or rain, or sand damage and free from any damage whatsoever." The defendants introduced evidence to the effect that such grapes were "mouldy, rotten and leaky, * * * in very bad shape, * * * very soft," with some red berries and "quite a few" green berries; that "most of the grapes was red berries and soft berries and the poorest Zinfandel grade in the county." In plaintiff's behalf, the man who had charge of picking the grapes testified that, when the grapes were picked, their condition was "pretty good"; that he did not see any red or green or soft berries among them or any sand on them. The plaintiff testified: "I know they were good grapes. I know they were first-class grapes. * * * Q. You don't know anything about grapes, do you, or the grape business, do you? A. No, sir. * * * Q. You will say that those grapes were all sound and not in a decayed condition and not mouldy? A. I will say that they was A-1 grapes. I don't know about mouldy, but what was there was very good grapes." There was other evidence to the effect that the grapes were all United States grade No. 1. The plaintiff testified that he sold the remainder of the grapes, consisting of two carloads, for the Eastern market; that they were inspected by a United States inspector, who graded one carload as No. 1 and the other as No. 2. No attempt seems to have been made to contradict the testimony of defendants' witnesses that the grapes were "mouldy," and, as stated, the plaintiff testified that he did not "know about mouldy." No evidence was introduced by either party as to whether or not the grapes were free from mildew. Statements that the grapes were "first class" and "A-1" do not show that they were of the quality specified in the contract; no definition or explanation of those terms appearing in the evidence. Different persons would attach different meanings to those terms. Neither does proof that the grapes were rated as United States grade No. 1 establish that they were of the quality agreed upon. Grapes may be so graded when they contain 5 per cent. of seriously damaged grapes and 2 per cent. thereof are affected by mold or decay. If the grapes were not of the quality agreed upon, the defendants' refusal to accept them did not constitute a breach of the contract.

[5] Imperatrice testified that he was not a member of the defendant partnership. Counsel for plaintiff asked him if he ever held himself out as such a member. On his replying in the negative, he was asked if, during the preceding summer, he did not say to Mary Faso that he "had been a partner of Caldaralla, but the partnership had been disbanded." Imperatrice answered that he had not made the statement. Thereafter counsel for the plaintiff called Miss Faso as a witness and asked her whether she had a conversation with Imperatrice at the time mentioned. The question in no manner indicated the subject-matter of the conversation referred to. She replied in the affirmative, and was then asked to relate the conversation. Counsel for the defendants said: "We object upon the ground that the proper foundation has not been laid, and it is incompetent, irrelevant and immaterial." Counsel for plaintiff replied: "It is an impeaching question." The court overruled the objection and the witness answered: "There was a deal made between my mother and some other man here in this town, some other business man, and it seems like that this deal was made and Mr Imperatrice, to my understanding is the man that was so dealing with my mother, and dealing for pears, that was sold to Mr. Caldaralla and Mr. Imperatrice. They were sold by the ton, and was to receive a check for these pears, and the deal was received on consignment, which was against the agreement that was made. * * * This time that I was talking to Mr. Imperatrice, that is the first time I ever met the man. * * * He

said, 'I have bought some fruit from you,' and I said, 'you have, * * * what is it?' * * * So I went on and told him the deal was very unjust because they were bought by the ton and received a check on consignment, and so he made this statement to me that Caldaralla, he was with Mr. Caldaralla, that is, Mr. Imperatrice was working in partnership together, but, during this time that the deal on the pears was made, why the partnership disbanded."

[6, 7] The admission of this testimony was erroneous and highly prejudicial. It may be granted that the plaintiff had the right to show that Imperatrice had said that he and Caldaralla had been partners, but the rambling statement of the witness concerning what she termed the "very unjust" deal of the defendants with her mother was inadmissible for any purpose. "The proper method of impeachment is to formulate the question so as to embrace the very statement, at least in substance, which the witness whom it is desired to impeach has denied making, and to ask the impeaching witness for a categorical answer whether the statement was made giving 'the circumstances of times, places, and persons present.'" McLaughlin v. Los Angeles Ry. Corp., 180 Cal. 527, 539, 182 P. 44, 49. While counsel for plaintiff stated that the question put to Miss Faso was an impeaching question, it would have been improper if asked for the purpose of proving an admission of Imperatrice as a party, being so framed as "to open the door to the admission of incompetent and immaterial evidence." 27 Cal. Jur. 73. As stated, the question did in fact open the door to evidence which was not only incompetent and immaterial but highly prejudicial, and which probably influenced the minds of the jurors against the defendants. Respondent contends that the prejudicial part of the testimony "applied entirely to Imperatrice," against whom no judgment was rendered. It appears, however, that Caldaralla, according to the testimony of Miss Faso, participated in the deal which she testified "was very unjust."

The judgment is reversed, and the trial court is directed to grant the plaintiff leave to file an amended complaint, if he is so advised.

We concur: THOMPSON, J.; PLUMMER, J.

206 Cal. 689

TOMBLIN v. HILL et al. (L. A. 9288.)

Supreme Court of California. March 15, 1929.

Rehearing Denied April 11, 1929.

1. Attorney and client 🔑63—Relation of attorney and client is one of special confidence and trust.

Relation of attorney and client is one of special confidence and trust, and dignity and integrity of legal profession demands at all times protection of interests of dependent and confiding clientage.

2. Attorney and client 🔑125—Client whose attorney purchased client's property at judicial sale, thus becoming trustee, can take advantage thereof by acting promptly on reimbursing attorney for his outlay and services.

Where attorney purchased client's property at judicial sale, thus becoming constructive trustee of property, client by acting promptly can take advantage of purchase made by attorney, subject only to burden of reimbursing attorney for his outlay and reasonable amount for his services.

3. Attorney and client ⚷125—Client, by delay and acts and conduct held estopped from questioning attorney's title to property purchased by attorney at judicial sale.

Where plaintiff, seeking to establish trust in real property against attorney who purchased property at judicial sale, had full knowledge of purchases made by attorney, knew that if she did not redeem within required time her right would be lost, and acquiesced in and ratified such purchase, and did nothing for over a year, *held*, that plaintiff is estopped by her delay and her acts and conduct to question attorney's title to the property.

In Bank.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by M. Marie Tomblin against Frank C. Hill and others to establish trust in real property and for an accounting. Judgment for defendants, and plaintiff appeals. Affirmed.

Superseding opinion in 269 P. 944.

Otto A. Gerth, Hugh L. Dickson, and Duke Stone, all of Los Angeles, for appellant.

Hewitt, Crump & Penn, of Los Angeles, for respondents.

PRESTON, J. Plaintiff in this action sued defendants Frank C. Hill and Comelia Beauvais, seeking to have them declared trustees for her benefit of the legal title to a certain piece of real property situate in the city of Los Angeles. She alleged the relation of attorney and client between defendant Hill and herself respecting said property; also, that with the intent of securing the title to said property for himself, he, through the agency of others, purchased a sheriff's certificate theretofore issued at the execution sale of said property had upon a judgment against plaintiff and in favor of one Olive Pearl Phillips; defendant Hill being attorney for plaintiff in the legal proceedings leading to said judgment. She further alleged that with intent to defraud her and to acquire said property for himself, said defendant purchased various other judgments theretofore rendered against her, which were a lien against said property purchased; also a $12,000 mortgage held against said property by the Security Trust & Savings Bank.

Defendants answered with a general denial, alleging that neither they nor either of them held said property in trust for plaintiff, nor had they acted in fraud of her rights therein. And while admitting the relationship of attorney and client between defendant Hill and said plaintiff, they at the same time alleged that all acts done and performed by said Hill in connection with said subject-matter were done with the full knowledge and consent of plaintiff. As a separate defense they pleaded that on or about October 8, 1923, plaintiff had full knowledge of all that was done by defendant Hill respecting said transactions and was fully cognizant at that time that unless she redeemed the property within the time provided by law, to wit, by January 2, 1924, her right thereto would be lost and the title would vest in said defendant Hill, and further pleaded laches and estoppel on the part of said plaintiff in that from the 8th day of October, 1923, and throughout the year 1924 she had dealt with said defendant Hill as one about to acquire ownership of said property, and that she was guilty of laches in not asserting her title to said property prior to expiration of the period for redemption and in dealing with him subsequent to said time and until May 11, 1925, as the owner thereof. The answer also set up the defense that plaintiff was not the real party in interest, in that her equity of redemption had passed to still another judgment creditor by the name of Collins, who, under judgment against her for the sum of $25,000, had also caused said property to be exposed to execution sale and had purchased thereat and secured a sheriff's deed thereunder.

The court sustained the contentions of defendants upon all grounds and found said special defenses to be true. Plaintiff has appealed. There is little, if any, dispute as to the facts. It is clear that the truth of the transaction was substantially as follows:

The property in question was of the value of about $50,000 or $55,000. The financial affairs of plaintiff were in such a condition that some five or six judgments were in existence against her, the total amount thereof aggregating, if not exceeding, the value of said property. She was practically in a hopeless condition as to her ability to redeem the property. She was indebted to defendant Hill in a considerable amount for his services as her attorney, having paid nothing to him on account of various valuable services rendered to her. Said execution sale took place on January 2, 1923. Early in the month of March, 1923, plaintiff departed for the East with the avowed intention of securing the necessary funds to redeem said property and to pay said obligations. Prior to said execution sale, however, defendant Hill had advised her to have some person purchase said property at the sale. This she did not do. On or about April 27, 1923, judgment creditor Phillips, who had purchased at said sheriff's sale, assigned her right, title, and interest in said property under the sheriff's certificate, to the Union Bank & Trust Company, which was acting in the matter for defendant Hill, and said bank later assigned said certificate of sale to defendant Beauvais to whom the sheriff's deed was made. But admittedly all these parties were acting for defendant Hill.

The exact motive of defendant Hill is not clear. Perhaps he was acting because of the claim of said Phillips that he had agreed to see that she would not lose anything by making the loan to plaintiff and to save himself from a complete loss of his claim for compensation in the event plaintiff was unable to extricate herself from her financial entanglements. He paid to Mrs. Phillips full value for the assignment of the certificate. In May, 1923, said Security Trust & Savings Bank assigned its mortgage to the agent of said Hill, and said Hill also purchased two or three other smaller judgments against plaintiff which were liens upon said real property.

But the court found, and it is undoubtedly a fact, that defendant Hill was acting without intending to prejudice the rights of plaintiff respecting said property. This is manifestly true for on or about October 8, 1923, on which date plaintiff was still in the East, he informed her in detail of what he had done in the premises and why he had so done, and solicited her consent to his acquiring the property for himself in the event she was unable to effect redemption thereof. During the remaining period for redemption he repeatedly warned her that unless redemption of the property was made before January 2, 1924, she would lose all her rights therein, and she admittedly knew that in case of such loss, said Hill would succeed to the title to said property. Being unsuccessful in the East in her efforts to secure any funds whatsoever with which to redeem said property, plaintiff returned to Los Angeles on or about December 10, 1923, and had interviews with defendant Hill between that date and January 2, 1924. She called upon her brother-in-law and a friend to attend the office of said Hill with her. The matter was there thoroughly gone into, and again she understood that if she did not make redemption before January 2, 1924, title to said property would vest in defendant Hill. She was unable to redeem, but defendant Hill, still willing to aid her, continued to offer her the right to acquire the said property, and on or about February 15, 1924, agreed to waive all claims for attorney fees and agreed to have all claims and demands of defendant Beauvais therein waived if plaintiff could effect a transfer of the property so as to get something for herself out of the transaction. Plaintiff accordingly secured a proposed purchaser, Pomona College, which was willing to pay $52,500 for the property. But by this time plaintiff's indebtedness had grown to exceed the sum of $63,000. Seeing, therefore, that nothing could result to her financially out of such a sale, it was abandoned about the month of May, 1924. Plaintiff thereafter made no claim whatsoever to said real property or any interest therein until the institution of this suit on the date aforesaid, May 11, 1925. At no time during the pendency of said negotiations did plaintiff ever offer to pay defendant Hill any amount as attorney fees, nor did she during said time or at any other time offer to pay or reimburse him for any sums advanced in connection with the matter. Nor does the evidence show that she was ever able at any time to pay all or any part of said advancements. She rests her legal claim solely upon the contention that a constructive trust arose in her favor by reason of the fact that defendant Hill was her attorney in the legal proceedings which were the basis for the judgment in favor of said Phillips against her and the execution sale thereon and purchase of the sheriff's certificate by him thereunder.

[1] We see no occasion to disturb the time-honored holding of courts everywhere that the relation of attorney and client is one of special confidence and trust and that the dignity and integrity of the legal profession demands at all times the protection of "the interests of a dependent and confiding clientage." As was said by the Court of Appeals of Missouri in speaking of this principle in the case of Addison v. Cope, 210 Mo. App. 569, 578, 243 S. W. 212, 215: "It is better to remain on safe and secure professional ground, to the end that the ancient and honored profession of the law and its representatives may not be brought into disrepute. Courts have consistently held the members of the profession to the strictest account in matters affecting the relation of attorney and client."

However, in this case the sin of the defendant Hill was at most technical. It consisted solely in acting without the express consent of the client, but it was not done to transgress any right of hers. The claims were not purchased at a discount. There was nothing in the transaction that would impeach his loyalty to her in any pending or future employment or cloud or bias his judgment with respect to her interest. He fully disclosed to her everything he had done. Nevertheless, the rule of law above referred to, though sometimes harsh in its operation, was meant for the good of the attorney and the profession. It will not stop to weigh the situation to see whether or not detriment has been suffered by the client, but will without hesitation grant unto the client the full rights to take advantage of a purchase so made by the attorney even though the attorney be acting in the utmost good faith.

"The law does not stop to inquire into the fairness of the sale or the adequacy of price, but stamps its disapproval upon a transaction which creates a conflict between the self-interest and integrity of the trustee. The rule embraces not only direct purchases, but also indirect purchases through third persons, and applies regardless of whether the sale is private or under decree, or whether the cestui que trust is an infant or an adult. * * *" 39 Cyc. p. 366. "It is a general principle that a trustee will not be allowed to acquire an interest adverse to the trust, and that when he does purchase in his own name an outstanding title, incumbrance, or claim against the estate of his cestui que trust, or any other interest in the trust property, such claim will be held to inure to the benefit of the cestui que trust." 39 Cyc. p. 298.

[2] In other words, plaintiff, had she acted promptly, had the undoubted right to take advantage of the purchase made by defendant Hill, subject only to the burden of reimbursing him for his outlay and a reasonable amount for his services. This holding is implied in Fisher v. McInerney, 137 Cal. 28, 69 P. 622, 907, 92 Am. St. Rep. 68; Wickersham v. Crittenden, 93 Cal. 17, 29, 28 P. 788. See, also, Cavagnaro v. Don, 63 Cal. 227, and Page v. Neglee, 6 Cal. 241.

[3] However, this proposition does not dispose of the cause, but it is lost in the consideration of the matter next herein set forth. The court found that on or about the 8th day of October, 1923, plaintiff had full knowledge of the purchases made by defendant Hill and of his purpose in so making them, that she likewise from that day and during the remaining period of redemption knew that the same would expire on January 2, 1924, and that if she did not redeem during said time her right would be lost; that she also knew that the defendant Hill had to a certain extent been acting in his own right in the matter and that unless she did so redeem all rights to said certificate of purchase would inure to him and said sheriff's sale would vest title to said property in him or his agents. The court further found that by her acts and conduct plaintiff acquiesced in the purchase of said sheriff's certificate and note and mortgage by said Hill as his own property and for his own benefit and ratified the same.

There is no escape from the conclusion that these findings of fact are supported by the evidence, nor is there any question that on sound legal principles this defense must be sustained. The motives actuating plaintiff do not clearly appear, but it is certain that a rise in value of the property or some other special circumstances caused the institution of this action, for when the transaction with the Pomona College failed, plaintiff doubtless at that time abandoned all hope of acquiring anything for herself out of said property.

"A client's right to claim the benefit of any purchase by his attorney must be exercised within a reasonable time; it is impliedly waived unless so exercised, particularly where there has been no moral turpitude in the conduct of the attorney, or where a delay in the assertion of the client's rights will affect the position of the parties to the transaction, or the value of the property." 6 Cor. Jur. p. 685.

"* * * While statutes of limitation are not controlling in this respect, nevertheless, the client's right to claim the benefit of a purchase made by his attorney must be exercised within a reasonable time; laches being recognized as an available defense where such claims are asserted. A client must notify his attorney promptly of his election to claim the benefit of the purchase especially where delay will affect the position of the parties or the value of the property. The client cannot, however, be charged with laches until he has, or should have had, knowledge of the facts." Thornton on Attorneys at Law, vol. 1, § 173, pp. 306, 307. See, also, 2 R. C. L. p. 970, § 46, p. 973, § 50; Marsh v. Whitmore, 21 Wall. (88 U. S.) 178, 22 L. Ed. 482; McLean v. Maloy, 136 Md. 467, 111 A. 91; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

Finding nothing to impeach the finding of good faith on the part of defendant Hill, we hold that plaintiff is estopped by her delay and by her acts and conduct to question at this time the title to said property in this proceeding. These views make it unnecessary to consider the point that plaintiff is not the real party in interest because of the execution sale of her equity of redemption and the purchase thereof by one Collins and the vesting of title thereunder in him.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

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206 Cal. 697

PASADENA ICE CO. v. REEDER et al. ★
(L. A. 9212.)

Supreme Court of California. March 20, 1929.

Rehearing Denied April 19, 1929.

1. Injunction ⟹55—Right of person to pursue any vocation he may choose is property right zealously guarded by equity courts.

The right of a person to pursue any calling or profession he may choose to follow is a property right which has ever been zealously guarded by courts of equity.

2. Injunction ⟹55—Solicitation of business from customers of former employer whom employees as such had dealt with personally held restrainable.

Where former employees of ice company entered into agreement between themselves for conducting rival company, and some were assigned to territories they had covered for former employer for purpose of soliciting customers, and one who had been telephone operator for former employer solicited patronage over telephone, acts of former employees violated duty owed to former employer not to use to its prejudice confidential information gained during their term of service with it, notwithstanding some had been out of former employ for over year, and hence acts were subject to be restrained by court of equity.

★For opinion on rehearing, see 276 P. 995.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by the Pasadena Ice Company against J. Wallace Reeder, doing business as the Purity Ice Company, and others. Judgment adverse to defendants, and they appeal. Affirmed.

Haas & Dunnigan and H. E. Forster, all of Los Angeles, for appellants.

S. J. Parsons, of Los Angeles, and Raymond G. Thompson, of Pasadena, for respondent.

CURTIS, J. The plaintiff is a corporation engaged in the business of selling and delivering ice in the city of Pasadena and neighboring communities. The defendants are all former employees of the plaintiff. The defendant Reeder entered plaintiff's employ in 1910 and continued therein until the fall of 1925. He worked for plaintiff in a number of different capacities during said time, but "in the office end of it." At the time he quit said employment, he was assistant manager of the plaintiff company. In March, 1925, Reeder engaged in the ice business for himself in the city of Pasadena, and carried on said business under the name of the Purity Ice Company. He may also have carried on said ice business under other names than the Purity Ice Company in connection with the other defendants, but this fact is not material. We will refer to his activities in the ice business in the city of Pasadena as all being carried on under the name of the Purity Ice Company. The defendant Ziesche was an employee of the plaintiff for a period of sixteen years, and during the last five years of his employment with the plaintiff was superintendent of delivery. He severed his connection with plaintiff in September, 1923, and became associated with the Purity Ice Company in March, 1925. In the absence of Mr. Reeder, Ziesche was in charge of the business of the Purity Ice Company, and designates himself as a "sort of a manager. I have not been given any title." The defendant Lyon was employed by the plaintiff as telephone operator from March, 1922, to August, 1924. Since the last-named date, and after Reeder began doing business as the Purity Ice Company, she has been employed by some of the defendants to assist them in soliciting orders for the sale and delivery of ice. The remaining defendants were employed by plaintiff as drivers of its several delivery trucks, and while in such employ had charge of various routes in the territory above described, in which the plaintiff sold and delivered ice to the residents and inhabitants thereof. The term of employment by plaintiff of these various defendants varied from ten or eleven years in some instances to a much shorter period of time in others. Practically all of them associated themselves with the Purity Ice Company in March, 1925. At that time some of them had been out of the employ of the plaintiff for over a year, while others for a less period of time, and, in the case of the defendant Phelps, he quit plaintiff's employ in March, 1925, and immediately entered into a business arrangement with the Purity Ice Company. Under the plan adopted by Reeder in operating the business of the Purity Ice Company, he would sell outright ice in wholesale quantities to persons who in turn would retail the ice thus purchased by them to individual customers, and it was in accordance with this plan that the individual defendants herein, other than Reeder, Ziesche, and Lyon, became associated in business with the Purity Ice Company and thereafter carried on the business of selling and delivering ice to the inhabitants of the city of Pasadena and vicinity. Each of these defendants owned the delivery truck used by him in his business and bought ice direct from the Purity Ice Company in wholesale lots and then retailed it direct to consumers. Each of these defendants, while in the employ of plaintiff, had a separate district or territory which he supplied with ice, and, after leaving plaintiff's employ and associating himself with the Purity Ice Company, as above set forth, he began the sale and delivery of ice in the same territory in which he had worked as an employee of the plaintiff, and solicited the business and patronage of the former customers of plaintiff, whom he had formerly supplied with ice.

The above facts were found by the trial court, and upon such findings the court entered its judgment permanently enjoining the defendants "from canvassing or soliciting the sale of ice from, or supplying ice to, any of the former customers of said plaintiff so canvassed or solicited, and heretofore served with ice by the plaintiff through the defendants, or any of them, or otherwise, during the time that the said defendants, or any of them, were in the employ of the plaintiff and selling and serving ice for the plaintiff as stated in plaintiff's amended complaint." From this judgment the defendants have appealed under the so-called alternative method in accordance with the provisions of section 953a of the Code of Civil Procedure.

Appellants' brief contains no supplement setting forth any of the evidence or other parts of the record on appeal. Practically none of the evidence is set forth in appellants' brief. Respondent in its brief takes the position that as the record stood at the time of the filing of its brief there was nothing before the court for it to answer. To meet this objection, the appellants in their reply brief printed the findings of the court and extracts from the evidence in the case, and ask to have these matters considered as if they had been made a part of their opening brief or had been included in a supplement thereto. No objection to this request has been made by the respondent, and no motion has been made to dismiss the appeal for appellants' failure to comply with the provisions of section 953c, providing for the printing by the parties of such portions of the record as they desire to call to the attention of the court. While this practice is not to be commended, and should not be encouraged, in the absence of any objection by the respondent to the court's consideration of the portions of the evidence and of the record set forth in appellants' reply brief, we will treat the record before us for all purposes as if said matters had been incorporated in appellants' original brief. Notwithstanding respondent's contention that there was nothing before this court for it to answer, it has in its brief replied to the arguments made by the appellants for a reversal of the judgment. It in turn failed to set forth in its brief, or in any supplement thereto, any of the evidence or record in the action upon which it relied. Under these circumstances we must conclude that the respondent is content with the statement of the evidence and such additional matters as appear in appellant's reply brief, and that the same may be considered by us as the record on appeal herein. We have, however, not restricted our investigation of the record to that portion contained in the appellants' reply brief, but have looked into the reporter's transcript in an endeavor to ascertain the true facts of this case. This procedure we think is proper, at least under the circumstances of this particular case, where the parties have failed to set out in their briefs the record with any degree of completeness.

In the case of Empire Steam Laundry v. Lozier, 165 Cal. 95, 102, 130 P. 1180, 1183 (44 L. R. A. [N. S.] 1159, Ann. Cas. 1914C, 628), this court quoted with approval the following language from Witkop & Holmes Co. v. Boyce, 61 Misc. Rep. 126, 112 N. Y. S. 874: "'In recent years there has been developed, by the adjudications of our courts and by legislation, a considerable body of law looking toward the protection of the business world against unfair competition, and if we correctly interpret these decisions a court of equity stands ready to restrain such acts. We, therefore, are of the opinion that, independent of any express contract between the parties, equity will restrain the acts of which the plaintiff complains, and which the defendant threatens and claims the right to do. This arises out of a violation of duty having its origin in the relation of employer and employed, and an implied contract that an employee will not divulge confidential knowledge gained in the course of his employment, or use such information to his employer's prejudice.'"

In the case of Empire Steam Laundry v. Lozier, supra, the trial court enjoined a former employee of the laundry company, who had accepted employment with a rival laundry, from in any manner soliciting or receiving laundry work from any of the persons who were, at the time the employee quit the employ of the plaintiff in said action, "customers of the plaintiff along the route assigned by plaintiff to defendant while the defendant was in the employment of plaintiff." This court affirmed the judgment of the trial court in that action. That case has been followed by the more recent cases of Cornish v. Dickey, 172 Cal. 120, 155 P. 629, New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990, Ann. Cas. 1918C, 1022, and Mackechnie Bread Co. v. Huber, 60 Cal. App. 539, 213 P. 285. In the MacCann Case, however, the court limited the injunction to the "soliciting" of business, and refused to enjoin the defendant from the "receiving" of business voluntarily brought to him by patrons of his former employer. That case also quotes with approval the following language from the case of People's Coat, Apron & Towel Supply Co. v. Light, 171 App. Div. 671, 157 N. Y. S. 15: "There is no evidence that Light had a written list of them [the plaintiff's customers]. There was in his head what was equivalent. They were on routes, in streets and at numbers revealed to him through his service with plaintiff. Their faces were familiar to him and their identity known because of such employment. He had entry and introduction and solicited them, not as strangers, but as persons known to him. He used what he had gained through plaintiff to take away its customers."

[1, 2] Appellants concede the force and effect of these authorities and the applicability of the legal principles therein enunciated to the facts of the particular cases to which they were applied. They seek, however, to differentiate the present case from those just cited by the fact that the appellants here, or at least many of them, left the employ of respondent some time prior to their entering into business relations with the Purity Ice Company, and that in the case of some of the appellants more than a year elapsed from the time they ceased to be employees of the plaintiff until they associated themselves with a rival company. In this connection the appellants assert that the unfairness on the part of an employee soliciting business from the patrons of his former employer, and to prevent which a court of equity will interpose its restraining order, "would seem very largely to depend on whether the former employer had a reasonable opportunity and time within which to permit his help to become fully acquainted with the customers on the route in question before such customers were again solicited by his former servant or employee." We find no such distinction made in any of

the cases, or other authorities dealing with this question. On the other hand, it is definitely stated, in practically every instance to which our attention has been called, that the unfair competition, against which the courts will protect the employer, consists in the use by the employee to the prejudice of his former employer of the confidential information gained by the employee during his prior employment as to the business secrets of his former employer. It is the wrongful use by the employee of the business secrets of the employer which the courts have held constitutes the injury to the employer. This injury may result as well after the employer has succeeded in securing new employees to take the place of his former ones as well as before. It may well be that the injury may not be as great in one instance as in the other, but, so long as the employer sustains substantial injury in his business by such acts of his former employees, he is entitled to the protection afforded by the law in cases of that character. We appreciate the suggestion of counsel that great caution should be practiced by the courts in the exercise of their power to enjoin and restrain a person from pursuing any calling or profession he may choose to follow. This right is a property right, and has ever been zealously guarded by courts of equity. New Method Laundry Co. v. MacCann, supra. It should not be taken from a person, except upon a clear and most convincing showing that in exercising his right to labor, he is violating an express duty he owes to others. Such a case we think has been made out by the respondent against the appellants in the present action.

The evidence shows without contradiction that the organization perfected by the appellants, if permitted to function in the manner intended by its members, would work most serious injury to the business of the respondent. At the head of this organization is the appellant Reeder, who, at the time he quit respondent's employ, and for some years prior thereto, was the assistant manager of the respondent. In such position he must have gained an intimate and complete knowledge of the business of respondent as carried on in the territory the appellants selected as the scene of their operations. As Mr. Reeder's chief assistant, he selected the appellant Ziesche, who for a number of years just prior to leaving the employment of the respondent was superintendent of deliveries. In this position Ziesche must have become familiar with all the different routes over which the respondent operated, as well as the general needs and requirements of the customers served on these routes. The remaining appellants, except the appellant Lyon, were former delivery men of the respondent, each having had charge of a particular route. As such they became personally acquainted with the customers of the respondent, their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said former customers. These former delivery men under the plan of the organization selected their former routes, and along said routes solicited customers in the territory where they sold and delivered ice for the respondent, and from respondent's former patrons. Undoubtedly the principal, if not the sole, purpose of assigning said delivery men to their old routes was to enable them to use the knowledge gained by them as employees of respondent in winning over to them the customers of the respondent and thus to take away and deprive the respondent of the business enjoyed by it along said routes. That this would result in serious damage to respondent's business we think no one would deny or gainsay. That these acts of the appellants were a clear violation of the duty owed by them to their former employer we have no doubt, and, accordingly, were subject to be restrained by a court of equity. The above authorities, as well as others from textwriters and the courts of the different states, furnish ample support for the judgment of the trial court.

Judgment affirmed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

206 Cal. 714

CALIFORNIA FIREPROOF STORAGE CO. v. CITY OF SANTA MONICA et al. (L. A. 8995.)

Supreme Court of California. March 25, 1929.

1. Automobiles 🔑73—License ordinance held not invalid as applied to truck owners with office in another city on ground effect was extraterritorial.

Ordinance of city of Santa Monica, imposing license tax on automobile truck owners transporting freight, etc., based upon annual tonnage of freight transported, *held* not invalid as attempt to impose tax on persons doing business outside of city or on ground that its effect was extraterritorial, as applied to truck owners with office in Los Angeles, but doing an extensive business in city of Santa Monica.

2. Eminent domain 🔑2(11)—License ordinance held not invalid as applied to truck owners with office in another city as attempt to take property without compensation.

Ordinance of city of Santa Monica, imposing license tax on automobile truck owners transporting freight, etc., based upon annual tonnage of freight transported, *held* not invalid as applied to truck owners with office in Los Angeles, but doing an extensive business in city of Santa Monica, on ground that it was an attempt to take private property without compensation for public use.

3. Automobiles 🔑73 — Ordinance, imposing license tax on truck owners, based on tonnage transported, held not invalid as being for revenue purposes in guise of police regulation.

Ordinance of city of Santa Monica, imposing license tax on automobile truck owners transporting freight, etc., based upon annual tonnage of freight transported, *held* not invalid, on ground that it was enacted for taxation and revenue purposes in the guise of police regulation.

4. Automobiles 🔑73—License ordinance held not invalid as applied to truck owners with office in another city as being unreasonable and discriminatory.

Ordinance of city of Santa Monica, imposing license tax on automobile truck owners transporting freight, etc., based upon annual tonnage of freight transported, *held* not invalid as applied to truck owners with office in Los Angeles, but doing an extensive business in city of Santa Monica, on ground that it was oppressive, unreasonable, and arbitrarily discriminatory.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action to enjoin collection of license tax by the California Fireproof Storage Company against the City of Santa Monica and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Hardy, Elliott & Aberle, of Los Angeles, for appellant.

Chester L. Coffin, of Santa Monica, for respondents.

SEAWELL, J. The city of Santa Monica is a municipal corporation situate in the county of Los Angeles and organized as such under a freeholders' charter. At all times named herein there has been in full force and effect in said city an ordinance entitled "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations." By the provisions of said ordinance each person, firm, or corporation conducting, managing, or carrying on the business of running, driving, or operating any automobile, automobile truck, automobile tank wagon, or any other motor-propelled vehicle used for the transportation of baggage, express, freight, household goods, merchandise, or machinery, was required to pay semiannually a license tax computed upon the annual tonnage of freight, wares, and merchandise transported by the persons, firms, or corporations as above enumerated.

Said ordinance contains certain exemption and other provisions which do not affect the questions presented for decision. The penal clause prescribed for a violation of said ordinance a fine not exceeding $500 or imprisonment not exceeding six months, or both such fine and imprisonment.

The charter provision under which said ordinance is authorized provides that the municipality shall have the power "* * * to license and regulate the carrying on of any and all professions, trades, callings and occupations carried on within the limits of the said city, and to fix the amount of license tax thereon to be paid by all persons engaged in such professions, trades, callings or occupations, provide the manner of enforcing the payment of the same; provided no discrimination shall be made between persons engaged in the same business otherwise than by proportioning the tax upon any business to the amount of business done * * *."

Appellant, California Fireproof Storage Company, a corporation, with its principal place of business in the city of Los Angeles, alleges, in its bill for an order of permanent injunction, that it has no other place of residence than the city of Los Angeles, and that it is, and for many years last past has been, regularly engaged in the business of storing, moving, transferring, shipping, delivering, and transporting freight, household goods, and other goods, wares, and merchandise by motor vehicle and motor truck for hire, and that said business is carried on by plaintiff through employees whose sole duty it is, as an incident to said business, to receive any of the aforesaid articles of merchandise, and transport the same according to instructions given to them by said corporation, "and that in the course of said business, and as an in-

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

cident thereto, it has occasion to, and does pick up, from time to time, household goods, freight, wares and merchandise in the city of Santa Monica and deliver the said household goods, freight, etc., to points outside of the city of Santa Monica and in the city of Los Angeles and to other points outside said city of Santa Monica, and has occasion to and does receive goods within the city of Los Angeles and elsewhere outside of the city of Santa Monica for delivery, and does deliver the said household goods, freight, wares and merchandise to points and places within said city of Santa Monica; that plaintiff has no defined routes between any two points and no terminus or place of business within the city of Santa Monica."

For the sake of brevity the language of the complaint will not further be quoted verbatim, except where it is deemed necessary to do so in order to present the issues as framed by the pleadings, but its phraseology will, nevertheless, be closely followed.

Continuing, it is alleged that plaintiff has no depot, warehouse, or equipment situated or located within the limits of said city of Santa Monica "except such trucks as may be used from time to time in transmitting said household goods, etc., to and from the city of Santa Monica to points and places without the said city; that the said plaintiff has no solicitors or representatives or agents within said city of Santa Monica, and that the only business that the plaintiff does within the said city of Santa Monica is as above set forth, and only upon call or demand received at its place of business aforesaid in the city of Los Angeles, for each specific occasion that it receives or delivers household goods, etc., within the limits of the said city of Santa Monica, or from places outside said city to places within said city."

Appellant claims that said ordinance is void, and that it was beyond the power of said city or its commissioners to enact it, in that said ordinance is an attempt to impose a tax or license on persons, firms, and corporations doing business outside of the city of Santa Monica; that it is extraterritorial in its operation, application, and effect, and an attempt to take the private property of appellant for a public use without compensation; that said ordinance is invalid for the further reasons that it was enacted for taxation and revenue purposes in the guise of a police regulation; that it is oppressive, unreasonable, and arbitrarily discriminatory in its operation. It is further alleged that, notwithstanding the illegality of said license tax, the defendants, said city and certain of its officers, have demanded of plaintiff's truck drivers that the license tax, as prescribed by said ordinance, be paid forthwith, and threatened to arrest and imprison said truck drivers, agents, servants, and employees of plaintiff, if said license tax was not paid forthwith; that defendants have *repeatedly* stopped the employees of plaintiff while operating its motor vehicles or motor trucks upon the public streets of Santa Monica and demanded of plaintiff, its agents, and employees, that the license tax imposed by said ordinance be paid, and, upon refusal of payment of the same, have arrested said agents and employees of plaintiff; "that all of the aforesaid agents and employees of said plaintiff herein at the time of the said various demands have been in the performance of their duties for the plaintiff in calling for said household goods within the said city of Santa Monica for delivery to a place within the said city of Los Angeles and to other points outside the city of Santa Monica or delivery of said goods and other wares and merchandise of similar kind and character from the city of Los Angeles or other places outside said city to and within the city of Santa Monica."

It is alleged that by its threatened acts said city and its officers have caused great and irreparable damage to plaintiff by delaying plaintiff and its agents and employees in the delivery of freight, household goods, wares, and merchandise to its *customers and patrons in said city of Santa Monica, and to other customers* and patrons of plaintiff without said city, and the arrest and threatened arrest of plaintiff's employees aforesaid will continue to cause the plaintiff to suffer great and irreparable injury and loss in the *continuance of its business*, etc. It is finally alleged that the commissioners of said city have instructed its chief of police to demand of plaintiff, its servants, agents, and employees that said tax be paid, and, upon further refusal, to arrest and imprison any agents, servants, and employees of plaintiff operating any motor truck or motor vehicle within the said city of Santa Monica unless said license tax is paid as prescribed by said ordinance. It is admitted that appellant has not paid said tax, and does not propose to do so. By the prayer of the complaint it seeks to permanently and forever restrain and enjoin said city and its officers from enforcing said ordinance as against plaintiff and its employees. Plaintiff specifically prays that said city and its officers be restrained from arresting the agents and employees of plaintiff for refusal on their part to pay a license tax as demanded by said city by virtue of the provisions of said ordinance, and to enjoin said city and its officers from attempting to collect said tax.

The city of Santa Monica is a city of an estimated population of 40,000 inhabitants, situate on the shores of the Pacific Ocean. From the city hall of the city of Los Angeles to the shore line the distance is approximately 17 miles, and the intervening territory between those points is urban and heavily populated. So far as territorial appearances are concerned, the line that divides the two municipalities is unobservable to a person passing from one city into the other. The highways connecting the two cities are congested with vehicular travel practically at all times. Urban electric trains also aid in bringing the two cities into close business contact. Plaintiff's principal place of business was in the city of Los Angeles, and it maintained no office or designated place of business in said city of Santa Monica. That the occupation which appellant was pursuing and which it proposes to pursue in the city of Santa Monica does not involve "casual" or "occasional" acts, such as have been held not to constitute an occupation or business, is made clear by the allegations of the complaint, which are above set forth at considerable length.

Repeated allegations are made that respondents threaten to and have seriously interfered with appellant in the pursuit of *its business* in said city of Santa Monica. The filing of this action is conclusive proof that it is the purpose of plaintiff to continue to conduct *its business* therein and to further build up its business in said city. The point urged by appellant, that it has no fixed office or place of business in said city, is of little significance, in view of the general use made of the telephone, automobile, and mails as means of communication in the transaction of business. A large part of the business conducted between interurban and nearby cities is with the aid of the telephone, thereby eliminating the necessity and expense of maintaining a local office. The metropolitan newspapers carry the advertisements of business enterprises into all the smaller communities. Various methods of advertising assist in doing the work formerly done by paid solicitors. The business in which plaintiff is engaged is ambulatory in character, and may be built up extensively by the employment alone of the telephone. Each business visit into a community advertises the business of the firm or corporation thus entering, even though no personal solicitation for customers is made by the agents of said firm or corporation. If appellant's claim is sound, its employees, trucks, machinery, and all appliances necessary to perform the service of moving household effects and freight may be brought into the city, and upon its streets, which serve as a suitable and ample place for the transaction of its business, and will be used without cost ad libitum, while the local one-vehicle expressman, whose place of business consists of a parking space in front of a dry goods or grocery store, is required to pay a license tax. This would appear to be unfair discrimination against the local expressman.

[1-4] Appellant rests its claims of illegality of said ordinance upon the grounds that it attempts to impose a tax upon persons, firms, and corporations doing business outside of said city of Santa Monica; that its effect is extraterritorial and an attempt to take private property without compensation for a public use; that it was enacted for taxation and revenue purposes in the guise of a police regulation; that it is oppressive, unreasonable, and arbitrarily discriminatory. We are of the view that said ordinance is not invalid on any of said grounds. Two decisions of the appellate courts of this state are relied upon by appellant to sustain its case. The first is In re Smith, 33 Cal. App. 161, 164 P. 618. The petitioner in that proceeding was restrained of his liberty on a charge of operating an auto bus without first obtaining a license so to do over streets of the city of Tropico, in violation of an ordinance of that city which made it an offense to operate or carry on the business of operating any auto bus or motor vehicle over the streets of said city in carrying passengers for hire from one point to another, both of which points are outside the boundaries without first obtaining a license. The petitioner was engaged in the business of carrying passengers for hire between two particular points, to wit, the city of Bakersfield and the city of Los Angeles. The city of Tropico lies between said two points and the petitioner's auto bus passed over its public streets en route to its termini. Reviewing the facts, the court thus summarizes the situation: "Hence, it cannot be said that the carrying of passengers for hire, from Los Angeles to Bakersfield by means of a motor vehicle operated over the public highway, a part of which extends through Tropico, where no stops are made, nor any of the incidental acts of such transportation performed other than traveling along the streets, constitutes a business 'transacted and carried on in such city.'"

Petitioner did not in any way augment his business of carrying passengers or transact any business whatsoever in Tropico. Further comment is unnecessary other than to add that the petition, having violated no ordinance of said city by merely using its highways or streets in passing through, was discharged from custody. The right of said city to regulate the use of its streets and to license for the purpose of revenue and regulation all and every kind of business authorized by law is expressly conceded by the decision.

The other case upon which reliance is placed by appellant is The Emporium v. City of San Mateo, 177 Cal. 622, 171 P. 434. We are rather of the view that the case last cited, as well as the case cited therein (Bramman v. City of Alameda, 162 Cal. 648, 124 P. 243), strengthens respondents' case. The Emporium was a corporation engaged in the retail dry goods business in the city of San Francisco, having customers within said city of San Mateo and within several cities and towns in proximity to said city of San Francisco. For the purpose of the delivery of articles of merchandise purchased at its store in the city of San Francisco by its outside customers, it maintained in said city of San Mateo a system of local deliveries, consisting of horses and wagons in charge of its employees, whose daily duty it was to receive such articles of merchandise at the stations in said city to which they had been shipped by rail, there to load the same upon such delivery wagons and deliver the several articles of merchandise to their respective purchasers within and about said city of San Mateo. The ordinance of said city provided for the levying and collection of a license tax upon every person, firm, or corporation driving, operating, or maintaining upon any street in said city a delivery wagon or wagons, at a specified rate for each such wagon according to its tonnage capacity. The Emporium sought by the action to enjoin and restrain said city of San Mateo from attempting to collect said license tax. The Emporium made the same objection as appellant herein makes, to wit, that said ordinance must be confined in operation to business done in San Mateo, and that a business institution established and being conducted in the city of San Francisco was not subject to the terms of said ordinance. That question was decided adversely to The Emporium's contention. It was properly said in that case that the general rule is that the use of the streets of a city which is merely occasionally incidental to a business conducted elsewhere than within its boundaries is not a proper subject of taxation. But, on the other hand, it is said, that, "when a business institution though located as to its central place of conduction or of the sale of its goods or products in one city or town, conducts through delivery wagons or other vehicles a regular system of delivery to customers within another municipality, the latter, under proper authority, may impose a license tax upon the wagon or other appliances of the distributing business which is thus actually done within it and upon and along its streets"—citing cases. In the instant case appellant not only alleges that it conducts business in Santa Monica, with which the enforcement of the city ordinance will interfere, but alleges sufficient to show that its purpose is to make its future business in said city much more extensive, if it can tie the hands of the city officers against the enforcement of the city's ordinance.

From the very nature of the business in which appellant is engaged, if it is to enter said city ad libitum upon "call," as stated in the pleading, it will transact business therein precisely as it transacts its business in the city of Los Angeles. It does not matter at which end of the line the business is initiated, its situs is the municipacity of Santa Monica. The heavy auto trucks, moving machinery, and other appliances necessary to conduct said business are brought into said city, and its streets are made to sustain the burden of said business equally with the streets of the city of Los Angeles.

That appellant's use of the streets of said city will not be occasional or merely incidental to a business conducted elsewhere, as in the case of In re Smith, 33 Cal. App. 161, 164 P. 618, and other cited cases, is apparent from the pleading, which discloses the purpose of appellant to use the streets of said city of Santa Monica for business purposes as frequently and as extensively as its business expectations may justify.

The complaint failing to set forth facts sufficient to entitle appellant to injunctive relief, the demurrer thereto was properly sustained, and the judgment of dismissal entered thereafter upon the refusal of appellant to amend is affirmed.

It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

LESLIE v. BROWN BROS. INCORPORATION. (Civ. 3723.)★

District Court of Appeal, Third District, California. March 13, 1929.

Rehearing Denied April 12, 1929. Hearing Granted by Supreme Court May 9, 1929.

1. Damages ⚿189—Evidence held to show that provision in lease contract for liquidated damages on lessee's failure to complete improvements within time specified constituted penalty and was therefore invalid (Civ. Code, §§ 1670, 1671).

Where lease contract required plaintiff lessee to construct canals and ditches, to level and make land fit for agricultural purposes, and to complete improvement by certain date, evidence *held* to show that provision requiring lessee, as security for faithful completion of improvements within time specified, to deposit certain mortgages and notes secured thereby with defendant, on understanding that defendant should in case of plaintiff's default, retain security as liquidated damages, constituted a penalty and not compensation for damages actually sustained, and that it was neither impracticable nor extremely difficult to estimate cost of completing improvements in case of lessee's default, and it was therefore invalid, under Civ. Code, §§ 1670, 1671.

2. Landlord and tenant ⚿157(6)—Plaintiff, having substantially completed improvements required by lease contract, held entitled to compensation, and defendant could not retain security for performance.

Where evidence showed that plaintiff substantially performed its obligations to complete certain improvements required by lease contract, he was entitled to recover compensation as for complete performance, and defendant could not retain possession of notes and mortgages secur-

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★Hearing granted. 283 P. 936.

ing performance of contract; remedy being by counterclaim or by independent action for any damages sustained.

3. Landlord and tenant ⚷223(2)—Plaintiff's claim for conversion of notes securing performance of obligations under lease contract held not counterclaim to defendant's actions for rent (Code Civ. Proc. §§ 422, 437, 438, 439).

Plaintiff's claim for defendant's unlawful conversion of mortgage notes and mortgages pledged by plaintiff to secure faithful performance of lease contract requiring plaintiff to make certain improvements within time specified *held* not in any legal sense a counterclaim to any of defendant's prior actions for rent, under Code Civ. Proc. §§ 422, 437, 438, and was therefore not barred by section 439.

4. Pledges ⚷54—Lessee's failure to reply to letter reciting lessee had forfeited ownership of pledged securities held not a consent thereto.

Where plaintiff, who pledged mortgage notes and mortgages to secure faithful performance of his obligations to make improvements under lease contract, did not reply to nor in any manner manifest acceptance of terms stated in letter received from defendant's counsel, reciting that only interest plaintiff had in such securities was an option to reacquire them by completion of improvements on or before a certain date, and that, inasmuch as work was not completed within option period, option had expired, and that plaintiff forfeited his ownership therein absolutely, *held* that such silence, unaccompanied by any act, was not sufficient to indicate his consent to such letter.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Thomas O'Brien, for whom on his death was substituted James Leslie, administrator, against Brown Bros. Incorporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Oliver O. Clark and Charles R. Nelson, both of Los Angeles, for appellant.

V. N. Thompson and C. L. Brown, both of El Centro, for respondent.

McDANIEL, Justice pro tem. This is an appeal by the defendant from a judgment in favor of plaintiff. This suit was originally commenced by one Thomas O'Brien, now deceased. Upon his death, by order of court, the administrator of his estate, James Leslie, was substituted as plaintiff. It was brought, by amended complaint, to recover damages for the alleged conversion of certain promissory notes, secured by mortgages on real property in Imperial county, for the total sum of $11,983.25; it being alleged that on December 8, 1917, the defendant came into possession of said securities, and on December 31, 1921, wrongfully and unlawfully converted them to its own use.

The answer of defendant denies wrongful or unlawful conversion and pleads an affirmative defense based upon certain contracts; also, sets up three further and separate defenses on the ground that plaintiff, by failure to counterclaim upon its alleged unlawful conversion in three separate suits prosecuted by defendant against the said Thomas O'Brien, was barred from prosecuting this action by the provisions of section 439, Code of Civil Procedure. These matters hereinafter will be specifically noticed in greater detail.

The essential facts involved in this case may be outlined as follows:

On February 1, 1914, James E. Brown and Thomas O'Brien entered into a contract of lease whereby Brown leased to O'Brien certain lands in Imperial county, fully described in the pleadings herein, consisting of 320 acres. The term of the lease was from January 1, 1914, to December 31, 1917. O'Brien agreed to build, construct, and dig upon said land canals or head ditches; to level, border, seed the same to some useful crop not less than 40 acres within 60 days from date of the lease; in default of doing the work within time in such manner as to comply with the rules and regulations of the Department of the Interior for making final proof of desert land entries. O'Brien was to pay all damages occasioned to Brown for loss of land or for delay or inconvenience in obtaining a patent from the government to said land. O'Brien agreed to fill in all arroyos, or natural ditches, to the level of contiguous surrounding land, except a certain large arroyo near the center. Certain percentages of said improvements were definitely indicated for each year of the term of the lease. In case it was found impracticable to fill the large arroyo mentioned near the center to the proper level, OBrien agreed to terrace it and to border the terrace in the manner specifically stated. This lease was introduced in evidence as Defendant's Exhibit B. O'Brien did not complete the improvements as the agreement required, and on December 4, 1917, the defendant Brown Bros. Incorporation, which had acquired the interests of James E. Brown, the original lessor of said land, made another lease contract with O'Brien. This second lease is Defendant's Exhibit A. This lease recited the making of the first lease, which was about to expire, O'Brien's failure to complete the improvements, his desire to secure a lease for the year, beginning January 1, 1918, to and including December 31, 1918, his promise within said extended term to complete the improvements, expressing his willingness to furnish security for the making and completing said improvements within said last-mentioned term.

There was a provision also for a crop rental and one providing for the deposit with defendant of certain notes and mortgages par-

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ticularly described in Exhibit A attached to the agreement. This last-mentioned proviso contains the following, to wit: "And in the event said party shall (referring to O'Brien) fail to complete and pay for all of said improvements prior to the first day of August, 1918, then said first party is authorized to complete said improvements and to pay therefor and to collect upon said securities."

Time was made of the essence of this lease. There are other terms and provisions as to maintenance charges, nonremoval of improvements, which need not here be further noticed. The notes and mortgages described in Exhibit A are the securities, the conversion of which is the basis of the present action.

Defendant alleges in its answer that O'Brien's agreements as to the completion of the improvements on time were not completed under this lease on or about the 1st day of August, 1918, and, accordingly, on July 30, 1918, the parties made and executed in writing a third instrument of lease, which again recited all of the preliminary matters contained in the two former leases, the second of which was to expire a few months later; O'Brien's failure to complete the improvements in accordance with these two leases; his desire to obtain a further lease for the term of three years from October 1, 1918, to September 30, 1921, inclusive; and his wish to secure an extension for completing the improvements on or about December 31, 1918; his willingness to furnish security that the improvements would be completed on time. It contains with respect to the improvements and the time for their completion the following:

"Said party of the second part further agrees that he will, on or before the 31st day of December, 1918, complete all of the improvements on the said premises as specified in said lease contract of February 1st, 1914, to which reference is hereby made for further particulars, and as security for the faithful completion of said improvements within said time, and at his own expense, said party of the second part does hereby deposit with said first party certain mortgage notes and mortgages described in Exhibit 'A' attached hereto and made a part hereof, together with appropriate assignments thereof, to said first party, upon the understanding and agreement that it being exceedingly impracticable and difficult to estimate or ascertain the damages which would be sustained by said first party in the event said second party failed to complete said improvements as herein provided, that therefore, in the event said second party shall fail to complete said improvements as herein provided then said first party shall retain said mortgage notes and mortgages as liquidated damages for such breach and shall thereafter hold title thereto and be the owner thereof free from any claim or interest of said second party or any other person, it being expressly represented by said second party that he is the owner of the said notes and mortgages free and clear of any incumbrances whatsoever. * * *

"Time is of the essence of this contract and in the event said party of the second part shall fail to perform any of the terms, covenants and conditions, and acts of agreements by him to be performed, as herein specified, at the time or in the manner specified then said party of the first part may, at his option, elect to declare all of the rights of the said second party of the second part herein, at an end and said party of the second part agrees that he will upon receipt of notice of such election, surrender said premises to said party of the first part and pay all damages which said party of the first part may sustain, or may have sustained by reason of said default, including reasonable attorneys fees and it is agreed that notice, in writing, of such election deposited in the United States mail addressed to said party of the second part, at Brawley, Imperial County, California, shall upon the expiration of fifteen (15) days thereafter be conclusive notice of said election to said party of the second part.

"All of the terms, covenants and conditions herein contained shall run to, bind and inure to the benefit of the heirs, executors, administrators and assigns of the respective parties hereto."

On December 8, 1919, the last-mentioned contract was modified by the extension of the term to September 30, 1922, inclusive, with the election reserved to the lessor to terminate it as of December 31, 1921; said election, if made, was to be evidenced by written notice; O'Brien was required to pay certain additional rentals, was released from certain obligations to plant and cultivate alfalfa; and contained other provisions unnecessary to be set out.

It may be observed that in this agreement of December 8th no mention is made of any prior failure on O'Brien's part to make required improvements on time under the terms of the preceding agreements, nor is any mention made of any damages sustained by defendant, nor of any appropriation, conversion, or forfeiture of the said notes and mortgages theretofore assigned by O'Brien to defendant as security.

Defendant, in its answer, pleads that it came into the possession of said notes and securities on or about December 4, 1917, in accordance with the contract of that date, which contained a provision for liquidated damages hereinbefore set out.

The answer describes the land as rough desert land, traversed by deep gullies requiring large quantities of material to fill; alleges that the value, rentability, and salability of such land in Imperial Valley fluctuated greatly from time to time, and it therefore was extremely difficult to fix damages which defendant would sustain by reason of delay in the completion of said improvements. Defendant further alleges that on or about October 31, 1919, he gave said O'Brien the right to acquire the said notes and mortgages by completing the improvements on or about July 30, 1920, as claimed to be shown in a letter written to O'Brien by defendant's counsel on October 31, 1919; that O'Brien did not reply to the letter and did not, prior to August 1, 1920, complete or substantially make any of said improvements; and thereafter and prior to November 1, 1920, the defendant notified O'Brien that the said right and option had expired, that the improvements had not been completed, and that defendant was and at all times subsequent to December 31, 1918, had been absolute owner of said securities, and that O'Brien had no interest therein or right thereto. The answer then sets out in three separate counts, as further and separate defenses, that on November 8, 1929, in the superior court of Imperial county, and on January 14, 1921, in the same court, and on November 7, 1921, in the same court, it had commenced actions at law against O'Brien for the recovery of rent due under the lease contract of July 30, 1918; these actions being numbered 6444, 7137 and 7474. In addition to rent, action No. 7474 was also brought to recover payment for failure to improve the premises with a good stand of alfalfa, as provided in the said contract and extensions thereof. O'Brien in each case was duly served with summons, but failed to defend by answer, and judgment was given against him therein, and in the action at bar it is claimed that, by his failure to set up a counterclaim upon the cross-complaint for unlawful conversion sued for herein, he is barred from maintaining this action and is estopped from asserting any claim or right to any of the securities, or from recovering or asking to recover anything from the defendant.

The findings of fact and conclusions of law of the trial court were in favor of the plaintiff on all the issues presented by the pleadings. It was found, in addition to necessary preliminary matters, that on the 8th day of December, 1917, the notes and mortgages described in the pleadings and agreement were the property of Thomas O'Brien; that on that day they came into the possession of defendant their actual market value was found to be $7,500; that on December 31, 1921, O'Brien was the owner and entitled to the possession of said securities, but that on that date defendant without right converted them to its own use, and thereafter on March 22d disposed of them, converted them into cash and retained the proceeds to the total of $7,500 and interest at 7 per cent. from December 31, 1921. The court also found that defendant was in possession of the said securities in accordance with the lease contract of December 4, 1917, which was thereafter on July 30, 1918, modified, not at O'Brien's request, but by the mutual consent of the parties, and that the contract of July 30, 1918, not at the request of O'Brien, but by mutual consent, was further modified by written contract, dated December 8, 1918; that at all times mentioned in the action defendant was represented by attorneys and counsel, but O'Brien was not represented; found that prior to August 1, 1918, O'Brien had made substantial improvements under said contracts and extensions and modifications, but that all were not completed prior to August 1, 1918; that O'Brien, prior to January 1, 1918, had made substantial improvements, but had not completed all of them, as required by contract.

The court further found it is not true that at any time mentioned in the answer, because of the nature of the case, or otherwise, it was impracticable or extremely difficult to fix actual damages sustained by defendant by reason of O'Brien's failure to complete the improvements on time, as required in said contracts, but, on the contrary, found it to be true that at all times any and all actual damages, which would have been sustained by reason of said failure to complete the improvements, readily could have been ascertained and determined; found as to the kind and description of the land as of the time of the making of the original contract, and that soon thereafter O'Brien commenced and continued to make substantial improvements in leveling, grading, bordering, ditching, and cropping the land, thereby reclaiming all of said land from its original nonimproved state into well-improved productive agricultural land, so that agricultural crops could be and are successfully grown upon the whole area thereof; that O'Brien within the time specified in the extensions of the original contract graded the large gully and ravine so that the whole area thereof was made irrigable and suitable for farming and production of crops, and that land immediately adjacent to said gully was left well graded and suitable for farming and irrigation without depressed area; found that the rental value of the land depended upon its improvement and that the rental and sale value fluctuated considerably from time to time, but that damages, because of the failure of O'Brien to complete said improvements within the time limit provided in the said contracts, could readily have been ascertained and determined; found that the letter of October 31, 1919, set out in paragraph VIII of the answer, was not in final settlement and compromise of the controversy between O'Brien and the defendant concerning the making of the improvements and the ownership of the securities, and that defendant did not by said letter grant to O'Brien the right to acquire said securities from defendant, or any thereof, by completing the improvement in the contract of February 1, 1914, but that O'Brien did not answer said letter, nor accept, nor express acceptance or ratification of the terms thereof, nor assent to or comply with its terms.

The court further found that prior to August 1, 1920, O'Brien had made substantial improvements, but that the same were not completed; that prior to November 1, 1920, defendant notified O'Brien that the option to O'Brien had expired, and it claimed to be the absolute owner of the securities and that O'Brien had no further interest or claim therein, or right thereto.

The court found as to the other defenses based upon the three rental suits instituted against O'Brien by the defendant that the claim of plaintiff for damages, as set out herein, did not exist at the time of the commencement of said actions respectively; that the claim sued upon in this case did not arise out of the same transaction, which was the foundation of the several rental claims sued for by the defendant herein, plaintiff therein; that O'Brien's failure to set up his counterclaim for conversion as a counterclaim in each of said rental suits did not bar the maintenance of this action against defendant.

The court concluded that Brown Bros. Incorporation, on the 31st day of December, 1921, unlawfully and without right converted all of said promissory notes and mortgages to its own use and benefit and during the month of March, 1922, sold and disposed of all of the same and retained all of the proceeds from the sale thereof to its own use, and that the value of said personal property during all the said time and at the conversion thereof was the sum of $7,500; concluded plaintiff to be entitled to judgment for that amount, together with interest at the rate of 7 per cent. per annum from December 31, 1921; concluded that the provisions of the written contract between Thomas O'Brien and defendant, with the written extensions and modifications thereof, inasmuch as it or they related to or provided for the forfeiture of the securities, were at the time of the making thereof, and are void and in violation of sections 1670 and 1671 of the Civil Code of the state of California; that the said letter of the attorneys for the defendant to O'Brien, dated October 31, 1919, does not and did not constitute or form any part of the estate or any contract between said parties.

The remaining conclusions were in accordance with the findings of fact as to the said action numbered 6444, 7137, and 7474, namely, that the plaintiff's counterclaim in this suit was not passed upon or founded upon any of the contracts, upon which the cause of action in either of said numbered suits is predicated; that defendant is not lawfully entitled to set up or claim as offset or counterclaim the judgment or amount of the judgment in either of said actions; that plaintiff in this case could not lawfully have set up the asserted claim in this action as against the claim of said Brown Bros. Incorporation in either of said actions.

Appellant in a very elaborate and voluminous argument specifies twelve points, as to which he argues that the court erred. It will not be necessary to consider each of these twelve points seriatim, for all the essential issues may be reduced to four points:

(1) Was the provision for liquidated damages in the contract of July 30, 1918, and extensions thereof, void under the provisions of section 1670, Civil Code, or was it within the exception provided by section 1671, Civil Code?

(2) If the provision for liquidated damages was invalid, was the defendant authorized to retain possession of said securities under the terms of the prior lease, dated December 4, 1917, and at all times thereafter until the completion of the improvements by O'Brien?

(3) Did O'Brien ever substantially complete the said improvements as required?

(4) If the defendant at any time prior to the institution of its suits for rent under the contract of September 30, 1918, unlawfully converted the said securities, is O'Brien barred from maintaining this action, because of his failure to counterclaim?

[1] It is apparent from an examination of the liquidated damage provision that, notwithstanding the recital that it was exceedingly impracticable and difficult to ascertain the damages at the time of entering into said contract, the essential character of that provision is that of a penalty. The securities were agreed to be given for the performance of certain labor of a kind not difficult to estimate. Any one familiar with that class of work, especially practical engineers or contractors engaged in estimating and doing such work, readily could ascertain in advance the approximate cost, and, of course, that cost would be the measure of the approximate damage. There is nothing in the nature of the case or the work to be performed, notwithstanding the recital to the contrary, that would seem to make it impracticable or extremely difficult to fix the actual damage. At any rate, upon that issue, a question of fact was to be determined by the trial court upon the evidence. There was little, if any, evidence adduced upon the part of the defendant at the trial upon the question, but, on the part of the plaintiff, it was shown by the testimony of P. W. Knights, an engineer, that the cost of that kind of work could be determined. He stated that he had made estimates of leveling lands in their desert state, and in partially reclaimed states, for irrigation purposes and for raising agricultural crops of various kinds. His testimony was that it would not be difficult, though tedious, to do the work of reclamation upon this land, and that it would be entirely practicable to make such estimates and to ascertain the cost.

The letter of October 31st of defendant's counsel, which defendant claims in its answer and in the argument, to be a modification of the contract of July 30, 1918, as well as notice to O'Brien on its claim that Brown Bros. Incorporation was the owner of the securities, by reason of his default in making said improvements, demonstrates that the securities were appropriated as a penalty and not as compensation for any damage actually sustained. This letter does not state that any actual damage had been sustained, but merely that the securities "are now the property of Brown Brothers by reason of your default in making said improvements in the manner and within the time limited."

Furthermore in this particular, the testimony of Mr. J. E. Brown, secretary of defendant corporation, is as follows:

"By Mr. Brown (Attorney for Plaintiff): Q. Mr. Brown, you have already testified that these notes and mortgages were delivered to the defendant corporation on or about the 8th day of December, 1917. They were delivered to the defendant corporation by Thomas O'Brien, were they not? A. Yes sir.

"Q. Did the defendant corporation pay Thomas O'Brien anything for the notes and mortgages? A. No, not in cash. They were held as security.

"Q. They were not held as security on any other note? A. It was to secure the performance of a certain contract he had entered into with us for the improvement of 320 acres of land that we owned.

"Q. They were simply put up, as I understand it, as a penalty in the event he didn't complete the contract, is that right?

"Mr. Clark: Objected to as calling for the opinion or conclusion of the witness, and, therefore, incompetent, irrelevant and immaterial.

"The Court: Overruled.

"A. Yes sir.

"Mr. Clark: Did you understand the question that he asked you it was put up as a penalty for not improving the land? A. I don't think I understand that question, then.

"By Mr. Brown: Read the question to him again. (Question read by reporter.) A. They were put up as security.

"Q. Put up as security that he would complete the contract? A. Yes sir, that is it, in the time mentioned in the contract.

"Q. I see. In other words, you were not going to pay him anything for these notes and mortgages, but would keep them if he didn't comply with the contract within the time mentioned. A. That is the idea.

"Mr. Clark: May the answer be stricken out until I can object to it?

"The Court: Make your objection.

"Mr. Clark: Was it under the contract? A. Yes sir.

"Q. By Mr. Clark: Was that contract in writing? A. Yes sir.

"Mr. Clark: Then we object to the question on the ground it is incompetent, irrelevant and immaterial and not the best evidence. The contract speaks for itself.

"The Court: Will you read the question to which that objection is made? (Question read by reporter.) In other words, you were not going to pay him anything for these notes and mortgages, but would keep them if he didn't comply with the contract within the time mentioned.

"The Court: Objection overruled.

"Mr. Brown: That is all."

When the construction put upon the liquidated damage provision by the parties to the lease and the attorneys for the defendant corporation is examined, it is beyond doubt that that provision was a penalty exacted for the mere lapse of time in making the improvements and not for liquidated damages for any damage, actual or prospective, but, if intended as indicated by the recital in the provision that it was, in effect, intended to be for liquidated damages, the testimony of the two civil engineers, Mr. Rice and Mr. Knights, witnesses at the trial, demonstrate that it was at the time of the making of the contract neither impracticable nor extremely difficult to determine the cost of completing the improvements, which cost would be the only possible measure of damages to the defendant, if any, resulting.

Many authorities are cited by appellant upon the law as to liquidated damages and the case of Wright v. Rodgers, 198 Cal. 137, 243 P. 866, is relied upon to establish the point that, in the agreement under review, "the parties have clearly manifested their intention that the sum fixed therein as damages should be liquidated damages, and in the absence of any ambiguity or uncertainty in its terms this declared intention should control in so far as the intention of the parties is concerned." But that case was one for the breach of a contract for the exchange of real property, and it holds that under section 3387, Civil Code, in such an action, a provision for liquidated damages is presumed to be valid, citing Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. It clearly is distinguishable from this case.

The law of California respecting liquidated damages under section 1670, Civil Code, and section 1671, Civil Code, is well settled. Sherman v. Gray, 11 Cal. App. 348 to 353, 104 P. 1004; Dyer Bros. v. Central Iron Works, 182 Cal. 588, 189 P. 445; Green v. Frahm, 176 Cal. 259, 168 P. 114; Long Beach City School Dist. v. Dodge, 135 Cal. 401, 67 P. 499; Patent Brick Co. v. Moore, 75 Cal. 205, 16 P. 890. In the case of Nakagawa v. Okamoto, 164 Cal. 718, 130 P. 707, the rule is stated as follows: "In determining whether a provision in a contract is for liquidated damage or for a penalty, 'the fundamental rule * * * is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made.' "

The case of Sherman v. Gray, supra, in many respects on its facts similar to the case at bar, says: "It is clearly incumbent upon the party seeking to recover upon such agreement (liquidated damage clause) to show by averment and proof that his case is within the exception." It holds that whether such a clause is valid or not is a question of fact, and further holds, "from the testimony of these witnesses it appears that it was not an impracticable, but on the contrary a simple, matter to ascertain plaintiff's actual damages."

We hold, therefore, that the findings of the trial court that the clause in the contract of July 30, 1918, was invalid to be correct.

[2] The second and third questions may be considered together. James Leslie, the plaintiff, when called as a witness, testified quite fully as to the improvement work done and accomplished by O'Brien over a long period, extending to December 31, 1921. Without setting it forth in detail, it may be said it shows O'Brien had complied in a substantial manner with the requirements for improvements. The land was reclaimed; it was being successfully cultivated, irrigated, and farmed for various crops, such as rice, barley and alfalfa; it was graded, leveled, and in condition for farming operations.

"It is well settled that substantial performance of a contract by one party coupled with retention of the benefits thereof by the other will authorize an action by the former to recover the contract compensation; that in such case recovery may be had upon an averment of full performance though the proof falls short of showing it; and that the remedy of the latter is by counterclaim for his damages or by an independent action before he is sued." Omaha Water Co. v. Omaha, 156 F. 922, 85 C. C. A. 54.

The answer does not set up by averment any claim of actual damages. The defense seems to rest entirely upon the claimed validity of the liquidated damage provision. If defendant suffered any damage, he should have set it up. In attempting to justify the liquidated damage provision, the defendant points out that, as to the rental values and salability, there were two elements of damage which could not be estimated at the time the contract was made. Such elements seem to us to be somewhat remote and speculative. Section 3301, Civ. Code. All of the evidence shows that in no respect did the defendant sustain even the slightest damage, even though it be admitted that O'Brien defaulted in the performance on time stated in the several contracts. He was permitted, however, to remain undisturbed in his possession. Rents were collected or judgments for rent obtained against him. There was no evidence that any written notice of an election to terminate his tenancy at the expiration of the year 1921 was ever exercised, except that there was evidence of a new lease to a Mr. Butters in 1922. It may be conceded that defendant may have had a right, under the contract of December 4, 1917, to retain possession of said securities until it had received notice of the substantial completion of the improvements. Up to that time it might have taken advantage of the damage clause therein, but, as a matter of fact, it did not do so. We regard as immaterial, therefore, the findings of the court that defendant was not entitled to possession of the securities any time after July 30, 1918.

[3] The claim for unlawful conversion in this action was not, in any legal sense, a counterclaim to any of the three actions for rent, under sections 437, 438, and 422, Code of Civil Procedure, and is not barred by the provisions of section 439, Code of Civil procedure. This view is upheld by a long line of decisions in this state. Bandy v. Westover, 200 Cal. 222, 252 P. 593; Heilbron v. Kings River, etc., Co., 76 Cal. 11, 17 P. 933; Earl v. Times-Mirror Co., 185 Cal. 165, 196 P. 57; Glide v. Kayser, 142 Cal. 419, 421, 76 P. 50; Waugenheim v. Graham, 39 Cal. 169; 34 Cyc. 706–710, on the subject of counterclaim; Clark v. Kelley, 163 Cal. 207, 124 P. 846.

It is unnecessary to notice other arguments of counsel as to whether or not O'Brien was caused to believe by several letters written by defendant's counsel that his time for completing the improvements had been extended.

Under the authorities cited, we hold that the findings of the court as to the counterclaim are correct.

[4] There is an additional contention of counsel for appellant we deem worthy of notice, which is that by counsel's letter of October 31, 1919 (Defendant's Exhibit H), O'Brien confirmed his previous assignment of the deposited securities to appellant so as to pass title thereto, and that the only interest he had left was an option to acquire said securities by the completion of the improvements on or before July 1, 1920; and, inasmuch as the work was not completed within the option period, the option expired and appellant's ownership of the securities was forfeited absolutely.

O'Brien did not reply to nor in any manner manifest acceptance of the terms stated in said letter. His silence, unaccompanied by any act, was not sufficient to indicate that the question of the possession and ownership of said securities was a closed incident in appellant's favor. We quote from 13 Corpus Juris, 276: "An offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance." See, also, Niles v. Hancock, 140 Cal. 157–162, 73 P. 840; Williston on Contracts, p. 168, § 91, and page 172, § 91a, and sections 1580 and 1581, Civ. Code.

We hold, therefore, that this letter did not modify any contract, nor in any manner, or at all, any agreement with O'Brien affecting the possession or ownership of the securities.

To recapitulate, we determine that the findings of the court upon all material issues involved herein must be upheld, namely, that the liquidated damage clause was invalid under section 1670, Civil Code, and not within the exception of section 1671, Civil Code; that defendant unlawfully converted the said securities on the 31st day of December, 1921; that O'Brien on that date had substantially completed the improvements and was entitled to the return of his securities; that defendant failed to establish that it had suffered any damage by reason of O'Brien's failure to comply with the time provisions of the several contracts; that this action is not barred by reason of the alleged failure of O'Brien to file counterclaims against Brown Bros. Incorporation in the rental suits specified.

It appears from a general view of all the evidence in the case that the defendant received and retained the benefits of all improvements made by O'Brien in the years of his tenancy, and by its answer, without right seeks to retain the full value of the securities which were converted to its own use. The trial court's conclusions of law were correct.

The judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

SOUTHERN CALIFORNIA EDISON CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 6324.) ★

District Court of Appeal, Second District, Division 2, California. March 19, 1929.

Hearing Granted by Supreme Court May 16, 1929.

Master and servant ⚷405(6)—Evidence did not show refusal to give further medical treatment to employee and did not authorize compensation for services of second doctor (Workmen's Compensation Act, § 9, subd. (a).

In proceedings to recover compensation for medical services incurred by employee, evidence that employee was treated by employer's doctor, who told him to go back to work and that he was cured, that employee stated he was not able to do hard work but did not disclose symptoms, and doctor did not examine employee, but stated he would get along all right, and that thereafter employee went to another doctor, did not show neglect or refusal to furnish medical service, under Workmen's Compensation Act (St. 1919, p. 913) § 9, subd. (a), Deering Gen. Laws 1923, Act 4749, and did not justify award of compensation for services of second doctor.

Certiorari to review an order of the Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by James W. Williamson, employee, opposed by the Southern California Edison Company, employer. To review an award of the Industrial Accident Commission allowing compensation, the employer brings certiorari. Award annulled.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

WORKS, P. J. James W. Williamson, one of the respondents in this proceeding, suffered an injury arising out of and in the course of an employment under petitioner. He was sent to a Dr. Coffey for treatment by petitioner. After being attended by this physician for some time and after occurrences which will be set out in detail below, Williamson, without the knowledge of petitioner, went to a second physician, Dr. Rey, for further treatment. This latter physician rendered services to him, and he later petitioned respondent Industrial Accident Commission for an adjustment of compensation to cover the charges made in that behalf. An award was rendered in Williamson's favor, and petitioner instituted this proceeding for the purpose of procuring its annulment.

The only point we think it necessary to consider in determining the proceeding depends upon the testimony of Williamson before respondent Industrial Accident Commission. Some time after his injury, when his sufferings became acute, Williamson went to a hospital "used" by petitioner for its employees. It was there that Dr. Coffey saw and treated him, visiting him daily for a period of about fifteen days. A few days before the expiration of this period, at a time when he was suffering badly, he was examined by three physicians, Dr. Coffey, a Dr. Homer, and another whose name Williamson did not remember. On the 11th day of December, 1927, which was a Sunday, Dr. Coffey told him that he might leave the hospital the next day and go home, which he accordingly did. He said he saw Dr. Coffey once after that, and then the record shows:

"Q. Did you have any further medical treatment? A. Well, I went back, came back to Dr. Coffey and he told me to come back in a day or two and I came back to him.

"Q. What did he say? A. Well, I don't remember just what he said. He said, 'We will have to give it a little more time,' or

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★Hearing granted. 280 P. 679.

something; so I came back to him again that week about Friday, I think of that week.

"Q. That would be about two times after you had left the hospital? A. Yes, sir.

"Q. He just observed you, I suppose; he did not give you treatment? A. Yes, sir.

"Q. What did he say the last time he saw you? A. He said he thought I could go to work Monday; he said he thought I would be better off, rather urged me to go to work.

"Q. What did you think about it? A. I didn't, I told him, I didn't feel like that. * * *

"Q. After seeing Dr. Coffey the second time and he advised you to try work, then you did not try work at that time? A. I tried work Monday.

"Q. You tried Monday? A. That was the 19th, yes, sir."

Williamson then testified that he worked from that day, at light labor until January 3, when he and others were laid off because of a reduction of force. He said, however, that he felt very badly during the entire period. He testified, a little later:

"Q. Did you go back again after you quit there, after they had laid you off, did you go back again or talk with any of the doctors or any of the representatives of the employer? A. I went to Dr. Homer, I think; well, I went to him the 5th of January.

"Q. Did he examine you again? A. Well, he talked to me, that was all. He said, 'Well, I think you will get along all right; I am going to just report you as well.' I told him that I was not able to do any hard work at all.

"Q. What symptoms did you give to Dr. Homer there on January 5th, if you remember; what did you tell him? A. Well, I don't know as he asked for any symptoms.

"Q. And you didn't tell him any? A. I told him—I don't know as I told him anything. I just told him I was not able to do hard work.

"Q. What did you go to Dr. Homer for? A. Dr. Coffey.

"Q. I understood you went to Dr. Homer. A. That was an X-ray. It was Dr. Coffey.

"Q. What was your idea in going to Dr. Coffey? A. He was a company doctor.

"Q. Well, you say you did not tell him, give him any symptoms? Did you expect him to be a mind reader or what? A. I supposed if he wanted to know any further about my condition that he would ask about it. * * *

"Q. * * * After the 5th of January what did you do? * * * A. I went to Dr. Rey on the 8th; that is Monday."

A few pages further on Williamson testified as follows:

"Q. Who referred you to Dr. Rey? A. I went to Dr. Rey of my own accord.

"Q. Did you tell Dr. Coffey that you had gone to Dr. Rey? A. No, sir.

"Q. Did you tell him of the treatment that you were receiving by another doctor? A. I was not receiving any treatment until after Dr. Coffey discharged me.

"Q. But you went back to Dr. Coffey after you had been discharged by Dr. Coffey, didn't you? A. Not after I had been discharged.

"Q. When was it that you were discharged? A. He told me the 5th, the night of the 5th of January.

"Q. Isn't it a fact that he discharged you for return to work on December 19th? A. He told me to come back to him.

"Q. But isn't it a fact that he discharged you to go to work on December 19th? A. He told me I could go to work on December 19th, but he told me to come back to see him on the 19th."

Upon this testimony respondent commission found: "The employer refused and neglected to furnish further medical treatment reasonably required to cure and relieve from effects of said injury, and said employee is entitled to his reasonable medical expenses. * * *" The finding was made pursuant to the provisions of subdivision (a) of section 9 of the Workmen's Compensation Act, to the effect that compensation shall be furnished for "such medical, * * * treatment, * * * as may reasonably be required to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same. * * *" Stats. 1919, p. 913, Deering, Gen. Laws, Ed. 1923, Act 4749. It is contended that the finding is not supported by the evidence, and we think the contention must be upheld. Laying aside the question whether Dr. Coffey had authority to bind petitioner by a refusal or by neglect to furnish Williamson "further" medical service—a question which is argued at length in the briefs—we think there is nothing in the evidence which shows that the physician either refused or neglected to furnish it. When he told Williamson he was cured, the latter made no remonstrance, made no statement from which the doctor might have been induced to reconsider his opinion that a cure had been effected. He merely responded to the statement of the physician that he could do no hard work, a remark not inconsistent with the idea that a cure had resulted. We think the testimony of Williamson falls far short of showing that refusal or neglect contemplated by subdivision (a) of section 9 of the act.

Award annulled.

We concur: CRAIG, J.; THOMPSON, J.

97 Cal. App. 609

STOCKWELL v. McALVAY et al. (LEE, Intervener). (Civ. 6341.)

District Court of Appeal, Second District, Division 1, California. March 18, 1929.

1. Quieting title 🔑30(1)—Complaint in intervention, as action for damages for fraud, held not to show right to intervene (Code Civ. Proc. § 387).

Complaint in intervention, in action to quiet title, as an action to recover damages for fraud, based on exchange of property involving property in suit, *held* not to show a right to intervene, under Code Civ. Proc. § 387.

2. Equity 🔑66—Complaint in intervention as pleading in suit in equity held not to show right to intervene, in that intervener has placed it beyond her power to do equity.

Complaint in intervention, in action to quiet title, based on exchange of property involving property in suit, as a pleading in suit in equity, *held* not to show right to intervene, in that intervener has received and disposed of consideration she accepted in return of property conveyed by her, and hence has placed it beyond her power to do equity by returning or offering to return to alleged wrongdoer that which she received from him.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action to quiet title by B. C. Stockwell against B. D. McAlvay and another, in which defendant McAlvay filed a cross-complaint against the plaintiff, V. E. Stockwell, and others, and Lulu S. Lee filed a complaint in intervention. From a judgment dismissing the complaint in intervention, the intervener appeals. Affirmed.

E. J. Miller, of Los Angeles, for appellant.

Newby & Newby, of Los Angeles, for respondents.

CONREY, P. J. B. C. Stockwell is the wife of V. E. Stockwell. In this action B. C. Stockwell, as plaintiff, filed her complaint against defendant B. D. McAlvay, to quiet the title of the plaintiff in and to a certain parcel of land in the city of Los Angeles. She alleged that McAlvay claims some interest in said property by virtue of an execution levied thereon for the enforcement of a certain judgment against V. E. Stockwell; that the defendant Traeger, sheriff of Los Angeles county, having levied upon said real property under said execution, had advertised the property for sale, and, unless restrained by order of court, would sell said property as the property of V. E. Stockwell, judgment debtor. Plaintiff prayed that her title be quieted against defendants, and that the sheriff be enjoined from proceeding further with said execution sale.

The defendants McAlvay and Traeger by answer alleged that said real property was, at all the times mentioned in the complaint, as well as at the time of the answer, the property of said V. E. Stockwell, and further set up facts showing an existing judgment, an execution levy made against said real property, and that the judgment, execution, and levy constituted a valid lien upon said property of V. E. Stockwell. The said McAlvay, in addition to his answer, filed a cross-complaint against both the Stockwells and against R. P. Greenleaf and the Citizens' Trust & Savings Bank of Los Angeles, whereby cross-complainant sought to bring in said additional parties, and to establish the validity and priority of his said judgment lien. An answer to the cross-complaint was filed by the two Stockwells and Greenleaf on November 5, 1925. Certain amendments to these pleadings were later filed, which do not require further consideration.

On the 23d day of January, 1926, Lulu S. Lee, having first obtained an order permitting her so to do, filed a complaint in intervention in said action. To this complaint the defendants B. C. Stockwell and V. E. Stockwell demurred on various grounds, which demurrer was on February 23, 1926, sustained without leave to amend. Thereafter the court vacated that portion of its order denying leave to amend, and permitted the intervener to submit for its consideration an amended complaint in intervention. Thereupon "a proposed amended complaint in intervention having been submitted, and the court having considered the same, leave to file said amended complaint in intervention by Lulu S. Lee is denied, and it is now ordered that the demurrer to the complaint in intervention be sustained without leave to amend." This was followed by an order or judgment dismissing the complaint in intervention. From this order or judgment the intervener appeals.

The demurrer to the first complaint in intervention was properly sustained. Without deciding that the pleading failed to state any cause of action, it suffices to say that said complaint was full of uncertainties, some of which were covered by the demurrer. The judgment of dismissal properly followed, unless the court's rejection of the proposed amended complaint was in itself an abuse of discretion. To determine this question we have examined the proposed amended complaint in intervention.

Instead of a concise and clear statement of facts, the proposed complaint is a long and rambling story. It does allege, however, that in March, 1922, intervener was the owner of the real property described in plaintiff's complaint, and certain valuable household furniture, etc., contained therein; that V. E. Stockwell stated to intervener that Mrs. Greenleaf was the owner of certain property, both real and personal, which she would exchange for intervener's property; that Stockwell stated that he was the agent of Mrs. Greenleaf, but that he would also act as agent of intervener, and would charge her a commission of $200 for the service; that in fact Stockwell was the real owner of the so-called Greenleaf properties and was secretly acting for himself and not for Greenleaf; that Stockwell represented that the Greenleaf properties were of certain stated values, which in fact, as to some of the items, were worth substantially less than the amounts represented in the Stockwell statements; that at the time of the consummation of the transaction of exchange Stockwell refused to complete that transaction unless intervener would include, in the transfers by her, certain personal property not included in the original agreement of exchange, or else pay a stated amount for the privilege of retaining said personal belongings; that, by reason of intervener's embarrassed financial condition at the time, she yielded to said demands; that thereafter intervener was compelled to, and did, sell certain of the properties conveyed to her by Greenleaf, for stated sums much less than the values which had been fixed in the statements made to intervener by Stockwell.

It is further stated that, at the time of the conveyance of intervener's property to Greenleaf, the Stockwells went into actual possession of the same, but represented to intervener that they were merely occupying a room in the house at the request of Greenleaf; that, within 30 days before the filing of her first complaint, intervener "learned that the said V. E. Stockwell carried said residence property in the name of said R. P. Greenleaf for a time, and then had it transferred and carried it in the name of his wife, B. C. Stockwell, reference being made to the files and complaint of B. D. McAlvay for further particulars thereof." This last statement was not, it may be observed, a direct allegation of fact, nor was it even so much as an allegation made upon information and belief.

Intervener in the prayer of her proposed complaint demanded "that said real and personal property be declared to be held in trust for the benefit of the plaintiff and be reconveyed to her"; also that plaintiff recover the said commission of $200; and certain moneys paid by her as rent for her occupancy of said property during the pendency of the transaction of exchange; and certain stated moneys claimed, in the nature of damages; and rent claimed from the Stockwells for their occupancy of the property conveyed by intervener since the time of such conveyance; and other relief "as equity may require."

[1] As an action to recover damages for fraud, said complaint would not show a right to intervene. It would not come within the description of any interest which entitles one to intervene in an action between other parties. Code Civ. Proc. § 387.

[2] As a pleading in a suit in equity, the case stated is not in the nature of an action or suit to enforce a trust, except as facts showing a right to rescind may include some elements of an involuntary trust. The intervener has received and has disposed of the consideration she accepted in return for the property conveyed by her. According to her own statement, the property wrongly obtained from her remains in the possession and control of the Stockwells, and therefore, if the facts warranted such relief, a conveyance to intervener could be compelled. But before plaintiff can obtain relief in equity, she must be ready and willing to do equity by returning or offering to return to the alleged wrongdoer that which she received from him, and must not have placed it beyond her power so to do. Lupton v. Domestic Utilities Mfg. Co., 173 Cal. 415, 422, 160 P. 241.

In view of the conclusions above stated, it becomes unnecessary to discuss the other questions argued by counsel.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

97 Cal. App. 501

PEOPLE v. ROSA. (Cr. 1522.)

District Court of Appeal, First District, Division 2, California. March 13, 1929.

1. Criminal law 🔑696(3)—Refusal to strike out testimony of defendant's statement in conversation, that he belonged to I. W. W. and was proud of it, held error.

In arson prosecution, wherein witness in detailing conversation had with defendant shortly after fire stated that defendant admitted he belonged to I. W. W. and was proud of it, refusal to strike out such statement as not being connected with res gestæ was error.

2. Criminal law 🔑722(3)—District attorney's statement defendant's mother ignored him since I. W. W. got hold of him, based on incompetent evidence, held error.

Statement of district court attorney that defendant's mother, who brought him into the world, now has nothing to do with him since the I. W. W. got hold of him, based in part at least on evidence which trial court erroneously refused to strike out, *held* error.

3. Criminal law 🔑829(1)—Requested instructions should have been granted notwithstanding subject-matter of them was touched on by trial court in making extemporaneous remarks.

Though subject-matter of requested instructions was touched on by trial court in making extemporaneous remarks, requested instructions should have been granted, where remarks were of such nature that it cannot be said that subject-matter of requested instructions was covered by instructions which were given.

4. Criminal law 🔑757(7)—Instruction that jury "must" reject whole testimony of witness deliberately falsifying under oath if testimony was on material issue held error.

Instruction that if jury find that witness deliberately falsified under oath they could reject whole of his testimony if they saw fit, especially so, "and it must be so," if testimony was upon some material issue in case, *held* erroneous under Code Civ. Proc. § 2061, subd. 3, in the use of the word "must."

5. Criminal law 🔑758—Instruction that if jury believed defendant, detective whose testimony defendant contradicted was entirely out of place as officer, held to invade province of jury.

Instruction in criminal prosecution, stating names of persons, times, and places, that if jury believed defendant, then certain detective whose testimony defendant contradicted was entirely out of place as an officer, but if defendant's testimony was not true, jury could disbelieve the whole testimony of defendant as they saw fit, as one or the other was perjuring himself, *held* erroneous as invading province of jury.

6. Criminal law 🔑656(6)—Court's statement denouncing counsel's comments on testimony of named witness held improper, since jury might have understood court to be expressing its opinion on veracity of witness.

Statement by court denouncing epithets used by counsel in argument in commenting on testimony of witness called for prosecution, witness being named in court's statement, was improper as jury might have understood court to be expressing opinion on veracity of witness named.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Joseph C. Rosa was convicted of arson, and he appeals. Reversed.

Albert M. Armstrong, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant charging him with having committed the crime of arson. The defendant appeared and pleaded not guilty. The action was tried before the court sitting with a jury. The jury returned a verdict of guilty. The defendant made a motion for a new trial, the motion was denied, and judgment was pronounced on the verdict as rendered. The defendant has appealed and has brought up a typewritten record.

The evidence introduced at the trial showed without conflict that about half past 2 o'clock in the morning on March 18, 1928, St. Joseph's Catholic Church, located in the town of Mountain View, was destroyed by fire. The fire broke out on the outside of the church under or near the stairs. That fact and other facts introduced by the prosecution showed that the fire was incendiary. As to who set the fire rested on circumstantial evidence. The defendant attempted to prove an alibi, and, in doing so, to account for his movements from Thursday, March 15, 1928, to and including Sunday, March 18, 1928.

The defendant makes several points. We will not discuss all of them. We have examined each point and the record in connection with it. Those points which we do not discuss have not, in our judgment, any merit. We will proceed to discuss the points that seem to have merit.

[1, 2] 1. The chief of police was called as a witness by the prosecution and was asked if he held a conversation with the defendant shortly after the fire. When he stated that he did have, he was asked to state the conversation. The defendant interposed no objection. The witness proceeded: "I asked him, I said, 'Do you belong to the I. W. W.'? He said, 'Yes, I do, I am proud of it.' Mr. Armstrong: We ask that portion be stricken out as not connected with the res gestæ in this matter whatever organization he belongs to. The Court: The court will allow you to tell the conversation." As the portion of the conversation was "not connected with the res gestæ in this matter," the motion should have been granted. The importance of the ruling appears as we proceed. The witness J. A. Meek delineated a conversation he had with the defendant. In that conversation he asked the defendant where he was on Friday night, two days before the fire. Continuing, he stated that the defendant replied that he had listened out of his window to exhortations or speeches of a man connected with the I. W. W. In his argument to the jury the district attorney said: "This boy's mother, who brought him into the world, now has nothing to do with him since the I. W. W. got hold of him." The defendant objected and assigned the remark as a misstatement of the evidence and reversible error. The trial court ruled that the jury could determine whether the remark was supported by the testimony. The district attorney continued: "That is not the testimony; that is simply my conclusion." That conclusion was formed in part at least on the evidence which the trial court refused to strike out. If we are correct in what we have said regarding the soundness of the motion to strike, it follows that the ruling last discussed continued the error.

[3] 2. The defendant requested and the trial court refused to instruct the jury, "I charge you that when circumstantial evidence

is relied upon to establish guilt, it must be sufficient to exclude every other rational hypothesis than guilt of the defendant, *but not necessarily exclude every other hypothesis;* and that the circumstances relied upon to establish guilt must be consistent with that hypothesis and inconsistent with any other rational conclusion." The portion italicized might well have been omitted. The instruction was apparently taken from the text of the opinion in People v. Ward, 105 Cal. 335, 38 P. 945. The portion italicized made the requested instruction somewhat involved, but the instruction was not incorrect.

3. The defendant requested and the trial court refused to instruct the jury: "Circumstances relied upon to establish guilt must be consistent with that hypothesis and inconsistent with any other rational hypothesis." The respondent does not contend that the instruction, as worded, is not sound. As to that requested instruction, and as to the other one just discussed, the subject-matter was touched on by the trial court. (Rep. Tr. 371, 374.) The court was evidently making extemporaneous remarks. Those remarks were of such a nature that it cannot be said that the subject-matter of the requested instructions was covered by the instructions which were given. Therefore both requests should have been granted.

[4] 4. The defendant contends that the trial court erred in giving the following instruction: "As a general principle of law, a witness that tells an untruth in part of his testimony, you are justified in viewing all other testimony of that witness with suspicion, with caution; and if you find that a witness deliberately falsifies, under oath, then you can reject the whole of his testimony, if you see fit, especially so, and it must be so, if that testimony is upon some material issue in the case." The defendant contends that the use of the word "must" is not supported by the law. The contention is well founded. 16 C. J. 956; Code Civ. Proc. § 2061, subd. 3; People v. Soto, 59 Cal. 367. The error was emphasized by the incident which is attacked in the next point which we will discuss and which, in time and substance, was immediately connected therewith.

[5] 5. During the introduction of testimony the prosecution called W. J. Dreschmeier, a detective attached to the office of the district attorney. He testified to conversations he had with the defendant. When the defense was putting in its case it called to the stand the defendant. Among other things he rebutted the testimony given by the witness Dreschmeier as to what was said in the conversation. While instructing the jury the trial court recited these facts quite fully, stating the names of persons, times, and places. And then the court said: "If you believe this defendant * * * then Dreschmeier is entirely out of place as an officer; * * * but if you find that (defendant's testimony) is not true, you can disbelieve the whole testimony of the defendant if you see fit; * * * one or the other is perjuring himself. * * *." The defendant claims that the instruction last referred to was an invasion by the trial court of the province of the jury. We think it was. The result of the ruling, taken in connection with the ruling discussed in the preceding point, operated to deprive the defendant of the only defense he had—his testimony under oath.

[6] 6. In delivering its charge and reading instructions the court made a statement denouncing the epithets used by counsel in argument. The arguments were not written up. The statement by the court was made of and concerning comments on the witness Haley. That witness was called by the prosecution. The defense contends that by the mentioning of the name of the witness the jury must have understood the court to be expressing its opinion on the veracity of the witness named. The point is not without merit. People v. MacDonald, 167 Cal. 545, 140 P. 256.

For the reasons hereinabove stated, the order denying a new trial and the judgment of conviction are reversed.

We concur: KOFORD, P. J.; NOURSE, J.

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97 Cal. App. 434

LANGLEY et ux. v. ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited. (Civ. 3675.)★

District Court of Appeal, Third District, California. March 11, 1929.

Rehearing Denied April 10, 1929. Hearing Denied by Supreme Court May 9, 1929.

1. Names ⚷3—"Legal name" at common law consists of one Christian name and one surname, errors as to middle name or initial being immaterial.

A legal name under the common law consists of one Christian name and one surname, and the insertion, omission, or mistake in middle name or initial is immaterial.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Legal Name.]

2. Names ⚷3—Mistake in middle initial of defendant does not affect jurisdiction, where real defendant is served and brought into court.

A mistake in the use of the wrong middle initial of a defendant, or the omission of such initial, does not affect the jurisdiction of the court, where the defendant is actually served with process and brought into court.

3. Judgment ⚷244—Proof of judgment against W. H. Holland does not establish judg-

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★Rehearing denied. Hearing denied by Supreme Court.

ment against W. T. Holland without proof of identity and that latter had legal notice of action (St. 1919, p. 776).

In a suit against an automobile liability insurer under St. 1919, p. 776, proof of a judgment against W. H. Holland does not establish a valid judgment against the insured, W. T. Holland, unless it is satisfactorily established that W. H. Holland and W. T. Holland are one and the same person, and that the latter had the notice of said action required by law.

4. Process 🔑31—Evidence held insufficient to show actual or constructive notice to insured, where published summons described him by wrong middle initial (St. 1919, p. 776).

Evidence *held* insufficient in action against automobile liability insurer under St. 1919, p. 776, to show that insured had actual or constructive notice of pendency of an action brought against him in which summons was published and mailed in which he was designated by wrong middle initial.

5. Property 🔑9—Things which a person possesses are presumed to belong to him (Code Civ. Proc. § 1963, subd. 11).

Under Code Civ. Proc. § 1963, subd. 11, it is a presumption of law that things which a person possesses belong to him.

6. Insurance 🔑591½—Action against automobile liability insurer, brought after time for appeal from judgment against insured, held not premature, delay for full year being unnecessary (St. 1919, p. 776; Code Civ. Proc. § 473).

Under St. 1919, p. 776, providing that in case judgment is secured against insured automobile owner by injured person action may be brought against insurance company, such a judgment is not premature where time for appeal from judgment against insured had expired, and no motion to set aside judgment was made, and no appeal taken therefrom; it being unnecessary to defer action full year, within which defendant could apply to set aside judgment, under Code Civ. Proc. § 473.

7. Insurance 🔑591½—In suit against automobile liability insurer for amount of judgment against insured, it is unnecessary to prove latter's insolvency (St. 1919, p. 776).

In action under St. 1919, p. 776, to recover against automobile liability insurer amount of judgment against insured, it is unnecessary to prove insolvency of insured.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by J. B. Langley and wife against the Zurich General Accident & Liability Insurance Company, Limited, a corporation. Judgment for plaintiffs, and defendant appeals. Reversed.

Hearing denied by Supreme Court; PRESTON, J., voting for a hearing.

J. Hampton Hoge and L. H. Honey, both of San Francisco (Enid Childs, of Berkeley, of counsel), for appellant.

Edward Bickmore, of Merced, for respondents.

JAMISON, Justice pro tem. This case was tried by the court without a jury. At the close of plaintiffs' evidence defendant moved for a nonsuit, and, when said motion was denied, declined to offer any evidence. Judgment was thereupon entered in favor of the plaintiffs, and the defendant has appealed.

The facts which are not disputed are, in substance, that on May 17, 1924, one W. T. Holland was the owner of a Willys-Knight roadster automobile, and on that date appellant insured said W. T. Holland for a period of one year from that date in an amount not exceeding $5,000 against damages arising from death or bodily injuries accidentally suffered as a result of the ownership and use of said automobile. The policy evidencing the said insurance stated that the assured, W. T. Holland, resided at 455 Eighteenth street, Merced, Cal., and that his business was that of a painting contractor.

On May 19, 1924, respondent Lottie M. Langley was a guest of a man whom she designated as a Mr. Holland, who was a painting contractor, whose place of business was 455 Eighteenth street, Merced, Cal. As such guest she was riding, with another guest, a Mrs. Rowe, in a Willys-Knight roadster automobile, which was being driven and operated by the said Mr. Holland; that by reason of the negligent manner in which the said Mr. Holland drove and operated the said automobile, it collided with another vehicle and overturned, whereby the said Lottie M. Langley was severely injured. Thereafter she and her husband, J. B. Langley, began an action against the Mr. Holland, who was driving the said automobile at the time she was injured as aforesaid, for damages resulting to her from said injuries.

This action was prosecuted against the said Mr. Holland under the name of W. H. Holland. Not being able to secure personal service upon the said Mr. Holland, whom the Langleys had sued as W. H. Holland, as aforesaid, upon the affidavit of J. B. Langley showing such inability, the court ordered service upon the said W. H. Holland by publication of the summons. Service on said W. H. Holland by publication having been completed, default was duly entered against him, and a judgment was thereupon rendered against the said W. H. Holland.

Respondents commenced the present action against appellant on November 17, 1925, to recover the amount of said judgment, to wit, the sum of $2,500 and costs, setting forth in their complaint the fact of appellant's insurance of W. T. Holland as aforesaid and the rendition of said judgment against W. H. Holland, stating therein that the W. H. Holland, named in said judgment, was and is the same person named as W. T. Holland in the insurance policy issued by appellant to W. T. Holland as the owner of the Willys-

Knight roadster automobile; that by said judgment the loss suffered by the said W. T. Holland growing out of the injuries sustained by respondent, Lottie M. Langley, by reason of said accident has been ascertained and made certain; and that therefore appellant has become indebted to respondents in the amount for which said judgment was rendered, to wit, the sum of $2,550.80. Respondents also allege in their complaint that no part of said judgment has been paid and that the said W. T. Holland is insolvent.

It is admitted that the provisions of the policy and the provisions of the act of the Legislature (Stats. 1919, c. 367, p. 776) require that a judgment be had against the assured, making the loss certain, before an action can be maintained against the indemnity company.

Appellant contends that the judgment in the case under consideration should be reversed for the reason that no judgment had, prior to the institution of this action, been rendered by any court against W. T. Holland ascertaining and determining his loss growing out of the aforesaid accident; that the said judgment against W. H. Holland is not a valid judgment against W. T. Holland for the reason that the service of the summons was by publication, no appearance by the defendant was ever had or entered, and there is nothing in the summons so published indicating that the action was against W. T. Holland, or any one other than W. H. Holland.

[1, 2] By the common law, since the Norman Conquest, a legal name has consisted of one Christian name and of one surname. 29 Cyc. 264. And, under the well-settled rule that the law recognizes only one Christian name, it has been repeatedly held that the insertion, omission of, or mistake in the middle name, or initial in a criminal or civil proceeding is therefore immaterial. 29 Cyc. 265. But, as was said by the Supreme Court of Minnesota, in the case of D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 N. W. 357, 47 L. R. A. (N. S.) 236, this rule, like most rules of judicial procedure, is not without exceptions. Calling attention to the case of State v. Higgins, 60 Minn. 1, 61 N. W. 816, 27 L. R. A. 74, 51 Am. St. Rep. 490, where the court said: "It seems to us that it appears on its face that the middle letter or initial is material when only the initial of the first name is given. * * * The name was written 'M. F. Higgins' in the body of the contract and in the signature. No one would understand 'M. J. Higgins' to mean the same person."

And in the case of First National Bank v. Hacoda Mercantile Co., 169 Ala. 476, 53 So. 802, 32 L. R. A. (N. S.) 243, Ann. Cas. 1912B, 599, the court said: "We doubt if the common-law doctrine of one Christian name and one surname ever really applied (though it has been held to have done so) where the Christian name was signed by initials only. The better rule undoubtedly is that, where the Christian name is signed by the initials only, the initials taken all together in their regular order should be considered as the Christian name for the purposes of signature." In the case of Carney v. Bigham, 51 Wash. 452, 99 P. 21, 19 L. R. A. (N. S.) 905, the court said: "At common law, it is true, a legal name consisted of one given name and one surname or family name, and mistakes in a middle initial or a middle name were not regarded as of consequence. But since the use of initials instead of a given name before a surname has become a common practice the necessity that these initials be all given and correctly given * * * has become of importance in every case and in many absolutely essential to a correct designation of the person intended."

In the case of Riley v. Litchfield, 168 Iowa, 187, 150 N. W. 81, Ann. Cas. 1917B, 172, the Supreme Court of that state, in passing upon this question, said: "Where the given name is written, then the middle name or letter may be disregarded in identifying the individual and where only a letter or letters precede the surname such letter or letters, in the absence of any showing to the contrary, are to be treated as the given or proper name." In the case of Gibson v. Foster, 24 Colo. App. 434, 135 P. 121, the name appearing in the summons, which was served by publication, was A. L. Deleplane, the true name being A. S. Deleplane, the court, in passing thereon, said: "The variance in the name of this defendant is too great to permit jurisdiction of the person, * * * in the absence of any appearance. * * * Courts are cautious in permitting jurisdictions of the person where service is made by publication."

No case has been called to our attention where this question has been considered and determined by the courts of this state. Respondents, in their brief, cite a number of criminal cases, but none of them touches upon the question under consideration here. The only case that touches this question that this court has been able to find among the decisions of the courts of this state is the case of Allison v. Thomas, 72 Cal. 562, 14 P. 309, 1 Am. St. Rep. 89. That action was brought to quiet title to and interest in certain mining claims which were originally owned by John C. McDonald. The defendants claimed title to the property by virtue of a judgment by default obtained by them in a justice's court against John McDonell. A copy of the complaint and summons was regularly served upon McDonald by the sheriff, but in his return he omitted to show that a copy of the complaint was served. The court there said that the omission of the initial letter of the middle name was of no consequence and did not affect the validity of those proceedings, but appeared to base this ruling on the fact that while the justice's record must show jurisdiction, there was in fact jurisdiction by personal service, though the return of the officer did not show it.

There can be no question that an omission of, or the use of the wrong initial, does not affect the jurisdiction of the court, where the right party is actually served with process and brought into court.

[3] The judgment in the case of J. B. Langley and Lottie M. Langley v. W. H. Holland is not void on its face. It is a valid judgment against W. H. Holland, but, of course, would not be a judgment against W. T. Holland unless it was satisfactorily established that the W. H. Holland named in said judgment and the W. T. Holland named in the instant case are one and the same person and that the said W. T. Holland had the notice of said action required by law.

In the case of Langley v. Holland, one of the plaintiffs, J. B. Langley, made the affidavit upon which the order for publication of summons in that action was based. In that affidavit he alleged that Holland was concealing himself in order to avoid service of process, that his last known place of residence was Los Angeles, Cal., general delivery. Upon the filing of said affidavit the court made an order for publication of summons and directed that a copy of the said summons and complaint be forthwith deposited in the United States post office at Stanislaus county, postage prepaid, addressed to said Holland at Los Angeles, Cal., general delivery, and that in obedience to said order said Langley did place a copy of the complaint and summons in a sealed envelope, postage prepaid, addressed to said W. H. Holland, painter, at Los Angeles, Cal., and deposited the same in the United States post office at Modesto, Stanislaus county, Cal., and that the same was never returned to him, as uncalled for mail. A short time after the findings and judgment in the case of Langley v. Holland were filed and the judgment docketed, James Ross, sheriff of San Bernardino county, served a copy of said findings and judgment upon the W. H. Holland named therein and in his certificate of service stated that he made legal service of said findings and judgment on W. H. Holland, whose true name is W. T. Holland, he being the defendant named in said findings and judgment, by personally delivering to him a copy of said findings and judgment.

On May 19, 1925, at least a month before the date of the trial of Langley v. Holland, Edward Bickmore, the attorney representing the Langleys in that case, wrote to appellant notifying it of the pendency of said action, inclosing a copy of the complaint and summons, and suggesting that appellant appear and defend the action, calling the attention of appellant to the date of the policy and that it covered public service liability for a Willys-Knight roadster automobile; that appellant received this letter is evidenced by the fact that its attorney, J. Hampton Hoge, replied to Bickmore's letter on May 25, 1925, stating therein that appellant declined to appear in the action.

It may be that, on a retrial of this case, respondent will be able to produce evidence that in fact W. T. Holland received the complaint and summons which was mailed to W. H. Holland, painter, at Los Angeles, Cal., general delivery, as aforesaid. The production of this evidence would be in line with the cases of Peabody v. Phelps, 9 Cal. 213; Chaplin v. Superior Court, 81 Cal. App. 367, 253 P. 954, and De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165. In the case of Peabody v. Phelps, supra, Field, J., used the following language: "Mere cognizance of the existence of the action is not notice in the legal sense. To be available, the notice must apprise the party whose rights are to be affected, of what is required of him, and the consequences which may follow if he neglect to defend the action."

[4] We are of the opinion that substantial evidence is wanting of the fact that W. T. Holland had actual or constructive notice of the pendency of the action brought against him by J. B. Langley and Lottie M. Langley.

[5] Appellant claims that there is no evidence identifying the car driven by the man designated as Mr. Holland as being the car which appellant insured for W. T. Holland. No doubt this alleged error can be cured upon a retrial of the case, though, as a matter of fact, the inferences that a court or jury could legally draw from the testimony produced by respondents are that the Willys-Knight roadster in the possession of Mr. Holland at the time of the accident was owned by him. It is a presumption of law "that things which a person possesses belong to him" (subdivision 11, § 1963, Code Civ. Proc.), and that the Mr. Holland who was in possession of the said Willys-Knight roadster automobile, being a painting contractor with his place of business at 455 Eighteenth street, Merced, Cal., was the W. T. Holland, painting contractor, whose office was at said address and whose Willys-Knight roadster was insured by appellant.

[6, 7] Appellant also contends that the judgment of the Langleys v. Holland had not become final when the present action was brought for the reason that the full year within which the defendant could apply to set the same aside the judgment, under the provisions of section 473 of the Code of Civil Procedure, had not expired before the commencement of the present action. We do not see any merit in this contention. The act of the Legislature (Stats. 1919, c. 367, p. 776) provides that in case judgment is se-

cured against the insured in an action brought by the injured party, then an action may be brought against the insurance company. The judgment in the case of Langley v. Holland was rendered July 23, 1925. No motion to set aside said judgment was made nor appeal taken therefrom. After the time for appeal had expired, the present action was commenced and judgment in this action was rendered on March 21, 1927. As a basis for bringing the action against the appellant, the judgment in the case of the Langleys v. Holland was a final judgment when respondents commenced the present action.

Appellant claims that respondents failed to prove the insolvency of W. T. Holland. There was no error in this. Proof of insolvency is unnecessary. Marple v. Auto Ins. Co., 82 Cal. App. 137, 255 P. 260; Pigg v. International Indemnity Co. (Cal. App.) 261 P. 486.

Appellant calls attention to some other alleged errors; but under the conclusions we have reached we do not consider it necessary to consider them. The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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97 Cal. App. 676

FANNING et ux. v. MERCHANTS' NAT. TRUST & SAVINGS BANK.
(Civ. 6703.)

District Court of Appeal, First District, Division 1, California. March 19, 1929.

1. Appeal and error 🔑994(3)—Court is exclusive judge of witnesses' credibility, which may be overcome both by character of testimony and motives (Code Civ. Proc. § 1847).

Jury or court sitting as such is exclusive judge of credibility of witnesses, and presumption of truthfulness of witnesses may be overcome both by character of their testimony and their motives, under Code Civ. Proc. § 1847.

2. Evidence 🔑563(1)—In determining meaning of escrow agreement, trial court was not bound by testimony of escrow officer discharged and under indictment that consideration for purchase was in escrow agent's possession.

In action against escrow agent to recover amount due vendor of property under escrow agreement, trial court was not bound by opinion of escrow officer as to meaning of escrow agreement, and was justified in rejecting officer's statement that consideration for conveyance was in possession of escrow agent to be paid on maturity of trust deed notes, in view of evidence that escrow officer had been discharged by escrow agent and was under indictment on charges growing out of escrow transactions, and further testimony by purchaser of property contradicting vendor's claim.

3. Evidence 🔑471(29)—Vendor's testimony as to his understanding of legal effect of escrow agreement sued on held properly excluded.

In action by vendor of interest in realty against escrow agent to recover amount due vendor under escrow agreement and to recover damages for breach of escrow agreement and to reform agreement, testimony by vendor as to his understanding of legal effect of escrow agreement when he signed same was properly excluded.

4. Judges 🔑25(2)—Findings and judgment, in case submitted November 29, filed January 8, held within jurisdiction of judge assigned for term ending December 31.

Where judge of municipal court was assigned to sit as judge of superior court for term beginning November 8, 1926, and ending December 31, 1926, and to act until all matters submitted prior to December 31 were disposed of, and cause was submitted for decision on date of trial which was November 29, 1926, findings of fact, conclusions of law, and judgment filed January 8, 1927, were authorized and within jurisdiction of judge.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by G. J. Fanning and wife against the Merchants' National Trust & Savings Bank, sued under its former name of Hellman Commercial Trust & Savings Bank, a corporation. Judgment for defendant, and plaintiffs appeal. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Rohe & Freston and Harold P. Curtis, all of Los Angeles, for respondent.

PER CURIAM. Plaintiffs brought this action to recover from defendant bank the sum of $6,500. The claim was alleged in separate counts—one for money had and received, the second for damages due to the alleged violation of an escrow agreement, and in addition equitable relief was sought, namely, reformation of the escrow agreement. The trial court found for the defendant, and, from the judgment, the plaintiffs have appealed.

On September 25, 1925, plaintiff G. J. Fanning and one Harry C. Otto entered into an escrow agreement with the defendant, which was as follows:

"Escrow Instructions. No. 680.

"Escrow Clerk, Florence K. Patton.

"Los Angeles, Cal., Sept. 25, 1925.

"Hellman Commercial Trust and Savings Bank:

"I will hand you $1,000.00 and Trust deed note for $6,500.00 which you are instructed to use, provided within 30 days you can exhibit guarantee or continuation of Title Guarantee and Trust Company's and/or Title Insurance and Trust Company's guarantee of title on the real property in the city of Los Angeles, California, decribed as follows: North 50 feet of the south 100 feet of lot 17—18—19 of the Marlborough Tract, showing title vested in Henry C. Otto and Mabel Otto, his wife, as joint tenants, free of incumbrances except taxes for the fiscal year 1925–26.

"Conditions, restrictions, reservations and rights of way of record.

"Street bonds amounting to approximately $279.33;

"A mortgage or trust deed to be placed by the buyer in an amount not to exceed $25,000.00;

"A trust deed for $6,500.00 to be executed by the vestees in favor of G. J. Fanning and Estella Fanning, his wife, as joint tenants, due on or before six months after date with interest at 8% per annum to be paid at maturity.

"You are to secure assignment in blank of above trust deed note and hold in escrow together with $6,500.00, which I will hand you, which is to be held until the maturity of the note or until I instruct you to pay off the trust deed.

"I will also hand you $750.00 to be paid to C. E. Barker.

"I agree to deliver to you any instruments which this escrow requires shall be executed by me.

"It is understood that the guarantee made under above instructions shall be subject to all the conditions contained in the usual form of guarantee, which does not include an examination of the record of any city except Los Angeles.

"When this transaction has been completed you will instruct the county recorder to mail to my address all documents recorded for me.

"I agree to pay $5.00 and expense of mortgage and trust deed for showing title in me in addition to the fees for recording deed.

"In the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at the earliest possible date thereafter, unless I shall have made written demand upon you for the return of the money and instruments deposited by me.

"[Signature] Harry C. Otto."

"Los Angeles, Cal., Sept. 25, 1925.

"Hellman Commercial Trust and Savings Bank:

"The conditions as above are hereby approved and I will hand you an assignment of contract executed by G. J. Fanning and Estella Fanning to Harry C. Otto and Mabel Otto, his wife, as joint tenants, covering property above described, which you are authorized to deliver upon payment to you for my account the sum of $1,000.00 and a trust deed note for $6,500.00 from which you will deduct your escrow charges and my proper recording fees, also charges for certificate of title with a liability of $7,500.00 called for above.

"Revenue on deed over amount supplied by Hellman Commercial Trust and Savings Bank. Instruct Hellman Commercial Trust and Savings Bank to make deed to the above described property to Harry C. Otto and Mabel Otto, his wife, as joint tenants.

"I agree to deliver to you any instruments necessary to complete this escrow.

"[Signature] G. J. Fanning."

The agreed price for the transfer to Otto of plaintiff's interest in the property was $7,500, and plaintiffs contend that under the terms of the escrow agreement the defendant, before delivering to Otto the assignment executed by them, was to receive for their use the sum of $1,000, a note for the balance of the purchase price due on or before six months after date secured by a deed of trust of the property, both executed by Otto and his wife, and also the amount represented by the note, namely, $6,500. The first amount with the note and deed of trust was received by the defendant, which thereupon delivered the assignment to Otto. The plaintiffs claim that the defendant also received the $6,500, and that the finding to the contrary is unsupported; and, further, that, if this sum was not so received, the defendant by delivering the assignment to Otto violated the escrow agreement to their damage in that amount.

The evidence shows and the court found that the escrow agreement was dictated by E. F. Otto, the brother and agent of the buyer, to a stenographer in the employ of defendant, and was, after being signed by the buyer and G. J. Fanning, delivered to the defendant. Both the agent and Fanning agree in their testimony that the latter and his wife were to execute an assignment of the note in blank for the purpose of enabling the buyer or his agent to sell the same and pay the plaintiffs the balance of the purchase price of the property. This assignment appears to have been executed and placed with the escrow papers, but, so far as shown, neither the note nor the assignment thereof was delivered to the Ottos. Subsequently the defendant caused the trust deed to be recorded. Presumably this was done for the benefit of the plaintiffs, but what disposition was made of the note the record does not disclose. However, no complaint in this regard appears to have been made by the plaintiffs either in their pleadings or at the trial. Plaintiffs claim that the paragraph of the assignment appearing over the buyer's signature, which reads, "You are to secure assignment in blank of the above trust deed note and hold in escrow together with $6,500.00 which I will hand you, which is to be held until maturity of the note or until I instruct you to pay the trust deed," shows that the defendant was to receive the above amount before delivering the assignment of the contract to the buyer. On the other hand, that portion of the agreement signed by Fanning directs the delivery of the latter assignment upon the payment of $1,000 and the receipt by the defendant of the note for the balance of the purchase price with a trust deed securing the same. In that connection E. F. Otto, the agent, in reply to a question by the plaintiffs as to whether he understood that the balance of the purchase price should be deposited with the note and deed of trust, replied: "No sir, there would have been no reason for putting that trust deed in if I was paying cash." This appears to have been the view of the trial court. The record, however, discloses evidence which, if given the weight to which plaintiffs contend it was entitled, tended to show that the escrow officer then employed by the bank had the same understanding of the arrangement as the plaintiffs. This officer, according to the testimony of G. J. Fanning, on several occasions expressed to him the opinion that the escrow agreement provided for the payment to the bank of the balance of the purchase price; and it appears that on November 12, 1925, at his request she signed and delivered to him the following letter, which was written on the letterhead of the bank: "To G. J. Fanning: This is to certify that we have in this escrow sixty-five hundred ($6,500.00) dollars, to be paid upon maturity of trust deed notes or before if we are instructed by the owner of the property, as per escrow instructions.—Florence K. Patton, Escrow Officer." The writer of this letter, who had been discharged by the defendant, and, according to the record before us, was under indictment upon a charge growing out of escrow transactions with which one of the Ottos had been connected, testified at the trial as a witness for the plaintiff. According to her testimony, the sum mentioned in the letter was represented by checks aggregating that amount which had been deposited by or for the buyer Otto, and were placed by her among the escrow papers, where they remained for several months, that none of the checks were presented for payment or paid, and that no entry was made by her of this part of the transaction, although it was her duty to do so, nor prior to the spring of 1926, when an investigation of conditions in her department was made, did she disclose to any officer of the bank the fact that the checks had been received. The witness, basing her refusal upon the fact that she was under indictment, declined to answer certain material questions asked on cross-examination with respect to this transaction.

[1, 2] Plaintiffs contend that the evidence, together with the testimony of G. J. Fanning that by a mutual mistake of the parties to the escrow agreement the same did not provide that the deposit of $6,500 should be a condition precedent to the delivery of the assignment to the buyer is unimpeached, and for that reason could not be disregarded by the trial court, citing Stewart v. Silva, 192 Cal. 405, 221 P. 191, and Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377. While, as held in those cases, unimpeached testimony cannot be arbitrarily disregarded, nevertheless a jury or a court sitting as such is the exclusive judge of the credibility of witnesses; and the presumption of the truthfulness of such witnesses may be overcome both by the character of their testimony and their motives. Code Civ. Proc. § 1847. Here the trial court was not bound by the opinion of the escrow officer as to the meaning of the escrow agreement; and, in view of the circumstances shown, was justified in rejecting the statement of fact contained in her letter above quoted. Moreover, the testimony of the witness Otto, quoted above, contradicted the claim of the plaintiff last named that the payment of the balance of the purchase price was understood or intended by the parties to be a condition precedent to the delivery of the assignment or that any part of this sum should be collected by the defendant.

[3] It is also contended that the trial court erroneously excluded the testimony of the plaintiff last named as to his understanding of the legal effect of the escrow agreement when he signed the same, but we find no error in this ruling.

[4] The further claim is made that the authority of the judge before whom the case was tried terminated before the filing of his decision and that the judgment is consequently void. The trial was had on November 29, 1926, before Hon. Elias V. Rosenkranz, a judge of the municipal court of the city of Los Angeles, who, on November 6, 1926, was assigned by the judicial council of the state of California to sit as a judge of the superior court of that county "for the term beginning November 8, 1926, and ending December 31, 1926, and thereafter to act as such until all matters submitted to you prior to said December 31 are disposed of by you." The cause was submitted for decision on the date tried, and the findings of fact, conclusions of law, and judgment were filed on January 8, 1927. These acts were expressly authorized by the above assignment, and there is no merit in the contention that jurisdiction was lacking.

After a review of the evidence, we are convinced that the conclusions of the trial court were fully supported, and the judgment is accordingly affirmed.

97 Cal. App. 600

HESSE v. COMMERCIAL CREDIT CO.★
(Civ. 6486.)

District Court of Appeal, First District, Division 2, California. March 16, 1929.

Rehearing Denied April 15, 1929. Hearing Denied by Supreme Court May 13, 1929.

1. Sales 🔑481—Evidence held to sustain judgment for conditional buyer.

In action for money had and received, evidence that plaintiff paid to defendant's agent two overdue installments on conditional automobile sales contract, at which time agent agreed to extend time for payment of final installments, knowledge of which agreement was transmitted to defendant, and that defendant repudiated agreement of agent, claimed forfeiture of sales contract, and took possession of automobile, *held* to sustain judgment for plaintiff.

2. Pleading 🔑85(1)—Denial of motion to amend answer, made more than year after original answer was filed, held not shown to have abuse of discretion.

Trial court cannot be said to have abused its discretion in refusing to permit defendant to amend its answer, on motion made more than year after original answer was filed and at time when cause was called for trial; it not appearing that motion was supported by affidavit or other showing.

3. Judgment 🔑253(1)—Reasonable value of use of automobile was not deductible from judgment, where not put in issue nor proved.

In action for money had and received arising out of defendant's breach of agreement to extend time of payments by plaintiff under conditional automobile sales contract, and taking possession of automobile, reasonable value of use of car during period it was in plaintiff's possession was not deductible from amount of judgment for plaintiff, where such question was not put in issue and no proof of reasonable value of use was made.

4. Principal and agent 🔑137(1)—Defendant retaining benefits of agent's agreement with full knowledge thereof, and knowing that plaintiff acted and relied on it, held estopped from questioning agent's authority to enter into agreement.

Where defendant accepted plaintiff's check in payment of installments under conditional automobile sales contract with full knowledge of agent's agreement to extend time of final payments under contract, and retained benefits of agreement and knew that plaintiff had acted and relied on it, defendant is estopped from questioning agent's authority to enter into agreement.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action for money had and received by H. B. Hesse against the Commercial Credit Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles W. Haswell, of San Francisco, for appellant.

Joseph A. Brown, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued on a common count for money had and received. He had judgment for $411.81, and defendant has appealed upon typewritten transcripts.

[1] The evidence is that the money was paid to the defendant, or to its assignor, on account of a conditional sales contract covering the purchase of an automobile. On July 17, 1926, the plaintiff paid to the defendant's agent $53.20, which represented two overdue installments on the contract. At that time the agent agreed with plaintiff that he could make the two final payments on the contract ($26.59 each) in 30 and 90 days, respectively, though one of these payments was then due. Knowledge of this agreement was transmitted to defendant by an indorsement on the back of plaintiff's check of $53.20, which read as follows: "Balance of account on contract as held by Commercial Credit Co. of $53.20 to be paid Aug. 20 and Oct. 20, 1926." Under this indorsement the defendant added: "Not a payment in full. Pay to the Dexter Horton National Bank of Seattle or order, Commercial Credit Co." It then cashed the check and retained the proceeds. Within a week thereafter, and with but $53.20 remaining payable under the contract, the defendant repudiated the agreement of its agent, claimed a forfeiture of the sales contract, and took possession of the car.

On this appeal the appellant attacks the judgment as not sustained by the evidence. The trial court's findings were fully supported by the evidence, portions of which we have heretofore cited. All the elements necessary for a judgment for money had and received were established by uncontradicted proof.

[2] Criticism is made of the refusal of the trial court to permit the defendant to amend its answer. The motion to amend was made more than a year after the original answer was filed, and at a time when the cause was called for trial. No record has been made for the presentation of the point on this appeal. It does not appear that it was supported by affidavit or other showing. If the trial court deemed the delay unreasonable, we cannot say that it abused its discretion in refusing leave to amend.

[3] It is argued that the court should have deducted from the amount of the judgment the reasonable value of the use of the car during the period that it was in plaintiff's possession. This was not put in issue and no proof of the reasonable value of such use was made.

[4] Appellant insists that the respondent failed to prove the authority of the agent to extend the payments. But appellant accept-

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★Rehearing denied. Hearing denied by Supreme Court.

ed the check with full knowledge of the agent's agreement; it retained the benefits of the agreement and knew that respondent acted and relied upon it. Appellant is therefore estopped from questioning the agent's authority. It is also claimed that this agreement was void as a modification by parol of a written contract, and as without consideration because the moneys were already made payable under the original contract. Both points have been determined adversely to appellant in Johnson v. Kaeser, 196 Cal. 686, 698, 239 P. 324.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

97 Cal. App. 576

In re McCRUM'S ESTATE.★

TURCK et al. v. McCRUM et al.

(Civ. 6643.)

District Court of Appeal, First District, Division 2, California. March 15, 1929.

Rehearing Denied April 12, 1929. Hearing Denied by Supreme Court May 13, 1929.

Wills ⟹501—Grandnephews and grandniece of husband held members of his "family" entitled to participate in estate devised by widow to members of husband's family; "heirs" (Civ. Code, §§ 1334, 1386, subd. 8).

Under will of widow, providing that "I wish my husband's family to share and share alike the remainder of my property," *held* that, in view of Civ. Code, §§ 1327 and 1334, the grandnephews and grandniece of husband were members of husband's family entitled to participate in the estate share and share alike with nephews and nieces, under Civ. Code, § 1386, subd. 8, and not subdivisions 2 and 5; the word "family," as used in Civ. Code, § 1334, being equivalent to "heirs," and the "heirs" of a person being those whom law appoints to succeed to his estate in case he dies without disposing of it by will.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Family; Heirs.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Helen McCrum, also known as Helen M. McCrum, deceased. Petition by John J. McCrum and others for a partial distribution, to which Marius Hugh Turck and others filed objections. From an order directing partial distribution, the objectors appeal. Reversed.

Philip S. Ehrlich and John O'Donnell, both of San Francisco, for appellants.

George K. Ford and I. F. Chapman, both of San Francisco, for respondents.

NOURSE, J. This is an appeal from a decree of partial distribution. The appellants had filed objections to the petition for partial distribution, asking that it be denied until their claim of heirship had been determined. The objections were overruled, and the probate court made findings to the effect that the appellants were not heirs entitled to succeed to any portion of the estate.

The appeal is presented upon typewritten transcripts.

Helen McCrum died testate in the city and county of San Francisco on March 27, 1926. Her husband, Hugh McCrum, died intestate on June 27, 1902; there was no issue of the marriage, and at the time of the respective deaths of both Hugh McCrum and Helen McCrum they left no issue, parents, brothers, or sisters. The will of Helen McCrum was olographic, and was executed on January 15, 1926. This will, after making numerous charitable bequests and bequests to friends and blood relatives of the testatrix, contained the following clause, which is the subject of the controversy here: "I wish my husband's family to share and share alike the remainder of my property in accordance of promise I made my husband, Hugh McCrum." At the date of the execution of the will and at the date of the death of the testatrix, the relatives of Hugh McCrum consisted of six nephews and nieces, who are the respondents herein, and two grandnephews and one grandniece of said Hugh McCrum, who are the children of deceased sisters of Hugh McCrum, and who are the appellants herein.

The question which is presented here is whether the expression in the will "my husband's family" includes the two grandnephews and the grandniece. The trial court decided that the members of the family of Hugh McCrum should be determined in accordance with the provisions of subdivision 5 of section 1386, Civil Code, that is to say, that the members of his family were the next of kin in equal degree. It is the contention of appellants that this question is to be determined by reference to subdivision 8 of section 1386, Civil Code, so that it would include not only the nephews and nieces in equal degree, but the descendants of any deceased brother or sister by right of representation. The contention of the appellants is based upon the ground that the entire estate of the testatrix, the residue of which she devised to her husband's family, was the common property of herself and of her predeceased spouse during his lifetime; that her husband predeceased her by 24 years, and that at the date of her will she had in contemplation as her husband's family the heirs mentioned in subdivision 8 of the section, because she must have known that all the property which she sought to devise to these heirs was such common property.

★Rehearing denied. Hearing denied by Supreme Court.

Section 1334, Civil Code, provides that "A testamentary disposition to 'heirs,' 'relations,' * * * or 'family,' * * * without other words of qualification * * * vests the property in those who would be entitled to succeed *to the property of such person*, according to the provisions of the title on succession in this Code." (Emphasis ours.) In the title on succession, all that is material here is found in section 1386, which purports to cover the contingencies for the determination of heirship in the case of intestacy. The first subdivisions of this section all relate to the succession to the property of a decedent leaving a surviving husband or wife and issue, leaving no surviving husband or wife, but leaving issue, leaving a surviving husband or wife, but no issue, leaving neither surviving husband or wife or issue, but a father or mother, leaving none of these, but leaving brothers or sisters or the descendants of deceased brothers or sisters, and leaving none of those mentioned, but leaving other kindred. Subdivision 8 alone deals with the right of succession in a case where the deceased is a *widow* or *widower* and leaves no issue. The first paragraph of the subdivision deals with the succession where the property was the common property of the decedent and of his, or her, deceased spouse while such spouse was living. The second paragraph deals with the succession where the property left by the decedent was the separate property of the deceased spouse while living. The portions of this subdivision dealing with the community property, which are material here, provide that, when the father and mother of the deceased spouse are both dead, one-half of such community property shall go "in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation." The same method of devolution is provided in the case where the property was the separate property of the deceased spouse while living. On the other hand, subdivision 5 of this section, which relates to the separate property of the decedent alone, where there is neither issue, husband, wife, father, mother, brother, or sister, gives the estate "to the next of kin in equal degree."

Section 1327, Civil Code, provides that "technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention." The word "family," as used in section 1334, Civil Code, is equivalent to "heirs." Estate of Watts, 179 Cal. 20, 23, 175 P. 415. "The 'heirs' of a person * * * are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will." Hochstein v. Berghauser, 123 Cal. 681, 687, 56 P. 547.

Accepting the rule followed in all the authorities that, when the words "heirs," "relations," "family," etc., are used in a will as words of donation, we must turn to the title on succession to determine who were included in the term by the testator, we must read the will as though it read "my husband's family (or heirs) as shall be determined to be under the provisions of section 1386, Civil Code, relating to the specific classes of property which are herein devised."

Thus, if we were to determine the family of the deceased husband at the time the will was executed, in relation to the succession to his separate property, we must follow the provisions of subdivision 2 of section 1386, and the family would have consisted of the surviving wife, the children, and grandchildren of the deceased brothers and sisters of the husband, because there survived him no issue, father, mother, brother, or sister. If we were to determine the family of the deceased husband at the time of the death of the wife, in relation to the separate property of the husband which had come into possession of the wife, then we would follow the provisions of the last paragraph of subdivision 8 of that section, and hold the family to be the "descendants of any deceased brother or sister." If, on the other hand, the only property to which heirship is claimed was the common property of the decedent and of her deceased spouse while such spouse was living and we were called upon to determine the "family" or "heirs" of the deceased husband in relation to such property, we must follow the provisions of the first paragraph of subdivision 8 of that section and hold the family to be the descendants of the deceased brothers and sisters.

From this it must be apparent that the heirs, relations, or family of a person are to be determined in the light of all the circumstances covering the status of the decedent and the character of the property succeeded to as outlined in the various subdivisions of section 1386. Thus, where the decedent was unmarried, or where he was the first spouse to decease, and the property was the separate property of the decedent, the heirs, family, and relations are determined by the first 7 subdivisions of the section. But, where the deceased was a widow or widower, and the property was the common property of the decedent and his or her deceased spouse while such spouse was living, the heirs are to be determined by the first paragraph of subdivision 8, whereas, if the property was the separate property of the deceased spouse while living, the heirs would be determined by the second paragraph of that subdivision in so far as succession to that property is concerned.

It might be said that subdivision 8 deals with the subject of succession to the property of a widow or widower only, as those who inherit under it "take as heirs of the * * * widow or widower, not as heirs of the predeceased spouse" (Estate of Watts, 179 Cal. 20, 23, 175 P. 415, 416), and thus that the section merely defines the heirs of the widow or widower and not of the predeceased spouse. But the section has not been so interpreted. In the Estate of Page, 181 Cal. 537, 185 P. 383, the decedent, a widow, gave one-fourth of her estate to her husband's "lawful heirs" and the balance to "my lawful heirs." A portion of the property left by the testatrix had been the common property of herself and her deceased spouse, and a portion had been the separate property of the deceased spouse. The Supreme Court said: "The right to succeed to the property of a widow, derived from her deceased spouse, is regulated by section 1386, subdivision 8, of the Civil Code. * * * It will be observed, then, that different heirs of the deceased inherit the different classes of property. Her separate property owned by her during the marriage or acquired by her subsequent to the marriage would be distributed in accordance with section 1386, subdivision 3. The common property of the testatrix and her deceased husband would be divided between the relatives of herself and the *relatives* of her deceased husband. The separate property of the deceased husband would go to his *relatives* alone." (Emphasis ours.) The court then held that the devise of one-fourth of the estate went to the lawful heirs of the widow to be determined by subdivision 8 of section 1386. That is to say, that the heirs of the husband were, under the provisions of that subdivision, also heirs of the widow and entitled as such to participate in the distribution of the three-fourths portion of the estate.

Appellants find further support for their position in the language of the Supreme Court in the Estate of Watts, supra, commenting upon the earlier opinion of Estate of Marshall, 176 Cal. 784, 169 P. 672. In the Marshall opinion the will of the testatrix gave the residue of her estate to her "*own* family who I think are all in Mexico." The court held that the use of the word "own," coupled with the reference to their residence in Mexico, indicated an intent to limit the gift to the blood relatives of the testatrix. In the Watts opinion (179 Cal. 20, 175 P. 415) the Supreme Court said: "The entire argument proceeded, however, on the assumption that, in the absence of these 'words of qualification,' the term 'family' (which, under Civil Code, section 1334, is equivalent to 'heirs'), would have covered the persons designated by subdivision 8 of section 1386." In the Estate of Ross, 187 Cal. 454, 463, 202 P. 641, the Supreme Court applied the same doctrine, holding that in "certain contingencies" the descendants of a deceased brother or sister were entitled to succeed under subdivision 8, section 1386, that is, where the property was the community property of the decedent and his or her deceased spouse. In the Estate of Brady, 171 Cal. 1, 151 P. 275, the Supreme Court stated that the apparent object of subdivision 8 of this section was to provide for the inheritance equally by the "respective families" of the two spouses.

Though in the technical sense urged by respondents the heirs succeeding on the husband's side under subdivision 8 would be heirs of the wife rather than heirs of the predeceased husband, it would seem clear that, when Mrs. McCrum devised this portion of her estate to her husband's "family," she used the term "family" as including those who on her husband's side would succeed to that portion of the estate in case of intestacy, because, under the peculiar circumstances present here, the predeceased husband would have been without family, or heirs, at the time of the execution of the will if this strict interpretation were to be applied. As the effect of this clause of the will was merely to give all that portion of the estate to the heirs on her husband's side to the exclusion of those on her side, and her husband being a "predeceased spouse," as that term is used in subdivision 8 of the section, she must be presumed to have had in mind the law under which the relatives of a predeceased spouse succeed to the estate left by the other spouse as outlined in that subdivision, and to have used the term in that sense.

Any other interpretation would be wholly unreasonable. Manifestly the determination cannot be controlled by subdivision 5 of the section, because the husband left a wife surviving him. To apply subdivision 2 and thus include in the term "family" the surviving wife and her heirs would seem to be directly contrary to the intention of the testatrix, because, if she had desired to have the property go in that manner, she would have used the expression "my family" and thus include all those mentioned in subdivision 8.

The grandnephews and the grandniece, being members of the husband's family within this interpretation, they were entitled to participate in the portion of the estate devised to the family by right of representation in the absence of a declaration in the will fixing a different proportion of participation. Here the will provided that the members of the family should participate "share and share alike." Assuming, therefore, that the appellants have satisfactorily proved their relationship (a question which is not before us on this appeal), they would be entitled to participate share and share alike with the respondents as members of the family of Hugh McCrum. For the reasons given the order appealed from should be reversed, with directions to the trial court to hear and determine the question of heirship of appellants in accordance with the views herein expressed, and, if it be found that they are, as claimed, the descendants of deceased sisters of Hugh McCrum, deceased, it should then be determined that they are members of the family of Hugh McCrum within the terms of the will, and entitled to their proportionate share of the property devised.

The order appealed from is reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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97 Cal. App. 516

WINSLOW v. BULL et al. (Civ. 3604.)

District Court of Appeal, Third District, California. March 13, 1929.

1. Highways 🔑93—Attempted lay-off of general maintenance engineer by transfer of engineer with lower classification constituted in effect an unauthorized dismissal (Civil Service Act, §§ 5, 13, as amended, and § 14).

Attempt of state highway commissioner to lay off general maintenance engineer by the transfer of an engineer with a lower classification, as made in accordance with Civil Service Act (St. 1913, p. 1035), § 5, as amended by St. 1919, p. 1339, and by St. 1923, p. 659, thereby violating section 13, as amended by St. 1919, p. 1346, authorizing transfer to similar position in same class or grade, constituted in effect an unauthorized dismissal without compliance with section 14, authorizing removal for any causes therein enumerated after trial on written charges.

2. Highways 🔑93—Acquiescence of civil service commission in action of highway commission in transferring maintenance engineer without required classification did not constitute "reclassification" of position (Civil Service Act, § 5, as amended).

Acquiescence of civil service commission in action of highway commission in attempted lay-off of general maintenance engineer by transfer of engineer with lower classification did not constitute a reclassification of such positions, since, until changed in manner provided by Civil Service Act (St. 1913, p. 1035), § 5, as amended by St. 1919, p. 1339, and by St. 1923, p. 659, the classification made by civil service commission is as binding on commission as on others.

3. States 🔑53—Unsubstantial and colorable changes in classification of civil service positions do not warrant ousting of employee and appointment of another (Civil Service Act, § 5, as amended).

Unsubstantial and merely colorable changes in classification of positions as made by civil service commission in accordance with Civil Service Act (St. 1913, p. 1035), § 5 as amended by St. 1919, p. 1339, and by St. 1923, p. 659, are not sufficient foundation to warrant the ousting of one employee and appointment of another person to perform substantially the same duties.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus by G. R. Winslow against Ralph Bull and others. Judgment for defendants, and petitioner appeals. Reversed.

Inman & West and Theodore W. Chester, all of Sacramento, for petitioner.

Harry A. Encell, of San Francisco, for respondents.

FINCH, P. J. The appellant applied to the trial court for a writ of mandate to compel his reinstatement as general maintenance engineer of the state highway commission and the payment of his salary as such engineer. Judgment was entered in favor of the respondents, and this appeal is from the judgment.

At the time this proceeding was commenced, and for several years prior thereto, R. M. Morton was state highway engineer, and, as such, the executive officer of the state highway commission. By a stipulation filed herein during the pendency of this appeal, but which was not filed in the trial court, it appears:

"That the existing classification of engineering service was adopted by the civil service commission on February 21, 1921, and included, among others, two grades of highway engineering positions, namely, highway engineer, grade 6, with a salary range of $360 to $420 a month, and associate highway engineer, grade 5, with a salary range of $285 to $350 a month; further that under the terms of this classification the position of general maintenance engineer with the California Highway Commission was classified in the subclass of highway engineer, grade 6, and the position of division maintenance engineer was classified in the subclass of associate highway engineer, grade 5."

At all times since July 1, 1919, the appellant has been classified as highway engineer, grade 6. His employment commenced in January, 1912, and from August 18, 1924, to the time of the attempted termination of his employment, he was general maintenance engineer of the state highway commission at a monthly salary of $400.

"The duties of maintenance engineer are state-wide. So far as maintenance is concerned he has to do with all the roads of the state that are under the jurisdiction of the State Highway Commission. This involves the allotting of funds to the various divisions, ten in number; the passing upon recommendations of the division engineers for maintenance work; advising the division engineers as to the methods to the end that there should be uniformity in maintenance work throughout the state; the passing upon the methods of expenditures by the division engineers pertaining to maintenance; and in general the doing of all things necessary or proper in carrying out maintenance work over the entire state."

In the latter part of June, 1926, Morton found fault with petitioner's work, and suggested that he tender his resignation. Petitioner refused to resign, and July 3, 1926, Morton wrote him as follows: "Inasmuch as, after a trial extending over nearly two years, your conduct of the maintenance department has not developed the possibilities and the efficiency which I believe it reasonably should have, I hereby request your resignation as maintenance engineer. The form of resignation is enclosed herewith."

The petitioner still refused to resign, and on the 24th of the same month Morton wrote him: "You are hereby advised that effective July 31, 1926, your connection with this department as maintenance engineer is terminated in accordance with rule 16, section 1, rules and regulations of the Civil Service Commission."

On the same day Morton wrote the civil service commission as follows: "You are hereby notified that layoff has been made, effective July 31st, of G. R. Winslow, maintenance engineer. * * * A reduction in force, as well as a direct saving, will be effected by the layoff. * * * We expect to transfer Mr. Thos. H. Dennis, division maintenance engineer of division III, Sacramento, to the headquarters maintenance department as acting maintenance engineer. Mr. Dennis holds civil service standing as civil engineer, grade V. His duties as division maintenance engineer will be performed by present employés of the division. We are recommending an increase in salary for Mr. Dennis on account of increased responsibility as acting maintenance engineer from his present salary of $300 per month to $350 per month, effective August 1st, 1926."

On the 28th of the same month Morton wrote the division maintenance engineers as follows: "You are hereby advised that on the first of August, Thomas H. Dennis will assume charge of the headquarters maintenance department as acting maintenance engineer. Mr. Dennis will act in the position formerly held by G. R. Winslow, laid off."

Morton testified: "In the summer of 1926 it was found that we could effect a reduction in the number of employees and effect economy in our salary outgo by making a consolidation which involved the laying off of Mr. Winslow. I finally decided to lay off Mr. Winslow and assigned his duties to Mr. T. H. Dennis, who formerly was maintenance engineer of division 3 in Sacramento. The work in division 3 was distributed between the division engineers, the assistant in the division and Mr. Dennis; this resulted in the saving of $350 per month. * * * I did not discharge Winslow. I laid him off. * * * When I asked for his resignation on July 3, 1926, it was because he had not developed the possibility and the efficiency of the department. * * * Mr. Dennis had occupied the position which he held for two or three years prior to July, 1926. He had charge of the maintenance work for about 900 miles in division 3. * * * It did not become lessened. The work that Mr. Dennis was performing during that time was necessary work, and the money that was being paid for it was not wasted. The department from which he came continued to function and other men in that department absorbed his duties. * * * The work that was being performed by Mr. Winslow on July 24, 1926, and prior to that time was necessary work and that work continued to be necessary. The work that was being performed by Mr. Winslow in that department is now being performed by Mr. Dennis. * * * We are paying Mr. Dennis under grade 5. That is the grade which he occupied in division 3. The state is divided into ten districts. Each district has a division engineer. Each division engineer has an assistant, who is charged with the maintenance of highways within his district. He is called the division maintenance engineer. Mr. T. H. Dennis filled this position in division 3. His work consists of directing the superintendents, foremen and laborers engaged in the repair and upkeep of the highways. He instructs them as to materials, equipment and methods to be used; in fact exercises general supervision as to details. Most of this work is in the field."

The civil service commission approved the recommended increase in the salary of Dennis as acting maintenance engineer. Section 1 of rule 16 of the civil service commission, referred to in Morton's letter of July 24, 1926, provides: "Whenever any permanent civil service position is abolished or made unnecessary, or whenever the number of positions of a certain character is reduced through lack of work or lack of funds, the employee or employees legally holding such positions shall be deemed to be laid off without pay. * * * Such employees shall be laid off by the appointing power according to their relative efficiency and the least efficient shall be laid off first."

[1, 2] From the foregoing statement it appears that the appellant held the position of general maintenance engineer, "classified in the subclass of highway engineer, grade 6"; that Dennis held the position of division maintenance engineer, "classified in the subclass of associate highway engineer, grade 5"; that these positions are not in the same class; that appellant's position was not "abolished or made unnecessary," nor was the number of positions of that character reduced through lack of work or lack of funds, there being but the one such position, and the work thereof being performed by appellant's successor after the attempted discharge. From the statement in the stipulation referred to, that "the existing classification of the engineering service was adopted by the civil service commission on February 21, 1921," it appears that there was no reclassification of the "highway engineering positions." The acquiescence of the civil service commission in the action of the highway commission did not constitute a reclassification of such positions.

Until changed in the manner provided by law, the classification made by the civil service commission is as binding on that commission as on others. 46 C. J. 991. Any other interpretation of the Civil Service Act would defeat its purpose and fix the tenure of civil service employees at the will of the civil service commission and the employing officer or agency, rather than "during good behavior," as the act provides. At the time of the transactions in question, section 5 of the act provided: "The commission shall * * * classify positions to be held under state authority in accordance with the provisions of this act and in accordance with the duties attached to such positions. The commission shall grade all positions within each class with respect to salaries. * * * Such classes and grades may from time to time be amended, added to, consolidated or abolished by the commission, but persons holding positions under the original classification or grade shall not be affected thereby." Stats. 1923, p. 659.

Section 13 provides: "The commission may authorize the transfer of any person legally holding a position to a similar position in the same class or grade. * * * No promotion, transfer or reinstatement shall be made from a position in one class to a position in another class." Stats. 1919, p. 1346.

Section 14 provides that "the tenure of every one holding a position under the provisions of this act shall be during good behavior" (St. 1913, p. 1035), but that any such person may be removed for any of the causes therein enumerated, after a trial upon written charges. It is not contended that the appellant was removed in the manner provided in that section, but, without a trial, he was "laid off without pay," and another engineer in a position of a lower class and grade was, contrary to the express provisions of section 13 of the act, transferred to the position of general maintenance engineer to do substantially the same necessary work that appellant had been doing.

Morton testified: "Q. Was there any difference in the character of work that was performed by Mr. Winslow and that performed by the staff of engineers under the direction of Mr. Dennis? A. Yes. Q. Just explain what that difference consists of. A. Mr. Dennis' connection with the maintenance work has always been what you might call somewhat closer, somewhat more practical than Mr. Winslow. In other words, with the placing of Mr. Dennis in the position of maintenance engineer in charge of all the maintenance of the state, the duties of the department became thus in closer sympathy, actually expansive—the various allotments, the development of the department, of the functioning of the maintenance department became possible on account of his familiarity with those particular men. The duties expanded also in taking advantage of the various men in the road service which we had under maintenance, and the preparation of a program for expeditious protection of the gravel surface for the oil work, which required an exclusive and proper detailed knowledge of the character of each one of those roads."

[3] Respondent contends that this evidence shows that the character of the duties performed by Dennis after his transfer were different from those performed by Winslow. Such evidence relates, however, to the quality of the work and the relative efficiency of the two men rather than to any difference in the character of the work. It is true that Morton further testified that "the work in division 3 was distributed between the division engineers, the assistant in the division and Mr. Dennis," implying that Dennis, after assuming the duties of acting general maintenance engineer, continued to do some of the work of his former position. Morton later testified that the department from which Dennis "came continued to function and other men in that department absorbed his duties." In Morton's letter to the civil service commission, announcing the transfer of Dennis, he stated: "His duties as division maintenance engineer will be performed by present employees of the division." If there were any changes in the character of the duties of general maintenance engineer, they appear to have been unsubstantial and colorable rather than real. Even in the absence of the stipulation referred to, there is nothing in the record to show that the civil service commission was informed of any changes in the character of the duties of the positions in question or that it approved thereof or in any manner reclassified or regraded such positions or the duties thereof. Unsubstantial and merely colorable changes in the classification of positions are not a sufficient foundation to warrant the ousting of one employee and the appointment of another person to perform substantially the same duties. 5 R. C. L. 614; Craighan v. O'Brien, 199 Cal. 652, 660, 250 P. 653; Barry v. Jackson, 30 Cal. App. 165, 169, 157 P. 828; McArdle v. City of Chicago, 216 Ill. App. 343. In the case last cited, some of the features of which are similar to those of this case, it is said: "One of the chief purposes of the Civil Service Act is to protect honorable and efficient employees from arbitrary ouster. The method of dismissal is as important as that of selection and appointment."

Section 14 of the act provides a simple and expeditious procedure for the removal of an employee for any of the causes therein enumerated, upon written charges, and after a public trial before the civil service commission or the "appointing power." It clearly appears that the "layoff" of the appellant, which was in effect a dismissal, was not authorized by the law or the rules and regulations of the civil service commission. No civil service employee's position would be secure if he could be supplanted at the will of the appointing power by the transfer of an employee from a position or class of a lower grade.

It may be added, in justice to the trial judge, that the stipulation referred to and quoted herein covers material facts which it does not appear from the record were shown at the trial.

The judgment is reversed.

I concur: PLUMMER, J.

97 Cal. App. 529

In re WILSON'S ESTATE.

SPROUSE v. SHINDLER et al.

(Civ. 6339.)

District Court of Appeal, Second District, Division 1, California. March 13, 1929.

1. Executors and administrators ⚷238—Court properly set aside original order allowing executor's individual claim and required direct proof thereof in connection with settlement of executor's account.

Where executor filed his first annual account and petition for partial distribution and listed in the account his individual claim against the estate, court did not err in setting aside original order allowing the claim and in requiring direct proof thereof.

2. Executors and administrators ⚷252—Evidence supported order rejecting individual claim of executor against decedent's estate on open book account.

Evidence *held* sufficient to support order rejecting individual claim of executor against decedent's estate on an open book account between himself and decedent.

3. Account, action on ⚷18—Necessary element of book account is that plaintiff show against whom charges were made.

Necessary element of a book account is that plaintiff shall show against whom charges were made.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

J. N. Sprouse, as executor of the estate of Mary Wilson, deceased, filed his first annual account and petition for partial distribution, and in the account he listed his individual claim against the estate, which was contested by Helen Shindler and others. From an order rejecting the claim and from an order denying a motion to strike out the bill of costs, the executor appeals. Affirmed.

Frank G. Falloon, of Los Angeles, for appellant.

McPherrin & Ottofy, of Los Angeles, for respondents.

CONREY, P. J. J. N. Sprouse, executor of the last will and testament of Mary Wilson, deceased, presented to the judge in the probate proceeding his individual claim based upon an alleged open book account between himself and decedent, and purporting to show a balance of $5,310.89 owing to the claimant. The judge approved the claim. This ex parte order was later set aside by an ex parte order; thereafter, and upon notice, the second order was set aside. Thereafter the executor filed his first annual account and petition for partial distribution. In this account he listed the alleged claim as a liability of the estate. Certain persons interested in the estate contested this item of the account. When the account came on for hearing, the judge, on his own motion, set aside the original order allowing the Sprouse claim, and required the claimant to produce evidence in support of the alleged book account. The only witness produced on that subject was the claimant's wife, Olive J. Sprouse. A looseleaf book was produced and identified as a book wherein certain of the pages contained many other items which were not charges against Mary Wilson. The items claimed to be for expenses paid on behalf of Mary Wilson were identified by certain check marks which said witness declared that she and her husband had made at or about the time when the bills were paid. She testified that the name "Mary Wilson," found at the top of the first of the pages offered in evidence, was written there when the account was opened; that is, that she thought so.

The points relied upon by appellant are not very definitely stated, but the following propositions will cover the merits of the case:

[1] The court did not err in setting aside the original order allowing the claim, and in requiring direct proof thereof in connection with the settlement of the executor's account. In re Sullenberger, 72 Cal. 549, 552, 14 P. 513.

[2, 3] The evidence was sufficient to support the order rejecting the claim. This is so because the court refused to receive in evidence the alleged account book, and also because the book itself, together with the testimony of Mrs. Sprouse, left the genuineness of the book and its character as a book of account against Mary Wilson so much in doubt that the court was justified in its refusal to accept the book as evidence. A necessary element of a book account is that the book shall show against whom the charges were made. Wright v. Loaiza, 177 Cal. 605, 171 P. 311. We are unable to agree with appellant that the testimony of Mrs. Sprouse contained uncontradicted evidence sufficient as a matter of law to establish the validity of the book as a book of account. It may well be that the internal evidence contained in the pages themselves, together with the uncertainty of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the witness as to some matters, and the manner in which she testified, justified the court in refusing to believe that the name "Mary Wilson" appeared in the book as originally written. Davis v. Judson, 159 Cal. 121, 128, 113 P. 147.

The appeal from the order denying the motion to strike out the bill of costs appears to be without merit. Section 1720 of the Code of Civil Procedure provides for the payment of costs by parties to proceedings in probate "as justice may require."

Finally, it should further be noted that the appeal as set forth in the notice of appeal purports to be by Sprouse "as executor of the estate of Mary Wilson, deceased." It is difficult to see how the executor of an estate, in his capacity as representative of such estate, can be injured by an order rejecting a claim against the estate.

The orders from which these appeals were taken are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.

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97 Cal. App. 534

BABER v. PAPPAS. (Civ. 5369.)

Disrtict Court of Appeal, Second District, Division 1, California. March 13, 1929.

Brokers ⚷85(3)—**Evidence of purchaser's financial worth held admissible, in broker's action for commission, to show ability to consummate sale.**

In action for broker's commission, evidence of purchaser's financial worth *held* admissible to show that he was able, as well as ready and willing, to consummate sale by making cash deposit within time required, though he did not have required amount in cash.

Appeal from Superior Court, Los Angeles County; Ordean S. Smith, Judge.

Action by J. A. Baber against Louis Pappas. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

John H. Miller, of San Francisco, for appellant.

E. J. Fostinis and Bernard L. Herlihy, both of Los Angeles, for respondent.

YORK, J. This is an action brought by plaintiff and appellant against defendant and respondent to recover $1,250 real estate commission, growing out of an agency contract entered into on or about November 22, 1923.

The only issue raised by the pleadings was that raised by the allegations of the complaint that "the said plaintiff sold the said premises," the property in question, to "Roy Porter, a purchaser ready, able and willing to purchase and pay for said property," and the denial in the answer that the said Roy Porter, to whom the property was sold, "was a purchaser ready and able and willing or ready or able or willing to purchase and pay for, or purchase or pay for said property."

The finding of the trial court was as follows: "The court further finds that the said Roy Porter was a person who was ready and willing to proceed with the said purchase, but the evidence fails to show that he was a person who was able to pay for the said property in accordance with the terms of said agreement of sale."

The appellant contends that the judgment of the trial court is erroneous and should be reversed for the following reasons:

1. That the finding of the court that the evidence failed to show that the purchaser was able to pay for the property is contrary to the evidence.

2. The court erred in sustaining the defendant's objections to questions tending to prove the financial worth of the purchaser.

Upon direct examination, the purchaser testified that he was able to deposit $9,800, the amount required to be deposited, and that he was ready to do so within the 60-day period contemplated by the escrow.

It is true that he was asked by the attorney for appellant, interrupting the cross-examination by counsel for respondent: "You may state whether or not you had securities or property out of which you could have readily realized enough to make up the $9800. A man don't have to have cash in bank." This was objected to by counsel for respondent as follows:

"If your honor please, I object to that on the ground that the decisions of the state of California are to the effect that no matter whether a man has a possibility of getting the money, unless he has it at the time, he is not ready, willing and able to buy.

"The Court: You may ask him to state the fact if he had that $9800 at that time.

"Q. By Mr. Miller: State whether or not within the 60 days—that is, before January 22, 1924—you had in money $9800? A. I did not.

"The Court: Now pardon me. In justice to the witness and counsel also, I didn't mean to impose that condition.

"Mr. Miller. I didn't understand your honor.

"Mr. Jenal: He has answered he did not.

"The Court: You may ask him the simple question, and he may state as a fact, did you have $9800 within that 60 days? A. Not in cash.

"Q. By Mr. Miller: Well, what did you have it in?

"Mr. Jenal: Now, your Honor, I object to that as incompetent, irrelevant and immaterial.

"The Court: Sustained."

The court gave as his reason for such ruling that the purchaser may have had all kinds of resources upon which he could have secured money later, but if he did not have the cash within the 60 days, he could not put up the cash within the 60 days.

We are of the opinion that these rulings by the trial court were erroneous and that the judgment should be reversed.

The question of ability of the purchaser to buy the property on the terms fixed arose in the case of Pellaton v. Brunski, 69 Cal. App. 301, 231 P. 583, under facts similar to those in the instant case, in which it was held: "The principle is well established that in order to entitle a broker to recover a commission under a contract of this character, where, as here, no sale has been actually consummated, it is incumbent on him to prove that he found a purchaser not only ready and willing but also able to buy the property on the terms fixed. * * * the word 'able' means financially able. 9 Cor. Jur. 599. This rule, however, does not mean that such purchaser must have all the money in his immediate possession or to his credit at a bank, but only that he must be able to command the necessary funds to close the deal within the time required. It is sufficient if the purchaser has arranged so that these funds will be available for payment when the time comes to close the transaction, although part of it be obtained on the purchased property itself."

In view of this, we believe it was clearly the right of the appellant to attempt to prove the financial worth of the purchaser, in order to show that such purchaser was ready, willing, and able to consummate the transaction, if such was the fact.

Judgment reversed, and new trial ordered.

We concur: HOUSER, Acting P. J.; CRAIL, Justice pro tem.

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97 Cal. App. 605

HARGROVE v. WILSON. (Civ. 6201.)

District Court of Appeal, Second District, Division 1, California. March 18, 1929.

1. **Appeal and error ⚷1010(1)—Findings of trial court, supported by substantial evidence, are conclusive on reviewing court.**

Trial court's findings, supported by substantial evidence, are conclusive on reviewing court.

2. **Appeal and error ⚷1048(6)—Denying examination of prospective purchaser to show inability to take care of payments on property purchased held not prejudicial, in broker's action for commissions, where inquiry was not pursued further.**

In broker's action for commissions, refusal to permit examination of prospective purchaser, as to whether he was going to get a loan on property purchased to take care of payments, *held* not prejudicial, where defendant made no effort to ascertain actual financial ability of proposed purchasers to meet payments on property as they would have become due.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by A. E. Hargrove, doing business under the name and style of the Hargrove Realty Company, against F. C. Wilson. Judgment for plaintiff, and defendant appeals. Affirmed.

Leonard Evans, of Anaheim, and Parker, Moote & Longcroft, of Los Angeles, for appellant.

Thomas L. McFadden and George F. Holden, both of Anaheim, for respondent.

HOUSER, Acting P. J. By an instrument in writing it was agreed between plaintiff, who was a licensed real estate broker, and defendant, who was the owner of an orange grove, that in the event of sale or exchange of said property by plaintiff, defendant would pay to plaintiff a commission of 5 per cent. "of list price." The terms of sale were left open. Later, by oral arrangement between the parties, the terms were also definitely agreed upon. By the findings of the trial court it appears that plaintiff produced purchasers who were ready, willing, and able to purchase the orange grove on the terms and at the price for which defendant agreed to sell it. Defendant then refused to make the sale. An action brought by plaintiff against defendant for the stipulated commission resulted in a judgment for plaintiff, from which defendant appeals.

[1] On examination of the record it is clear that each of the findings made by the trial court was amply supported by substantial evidence. It follows that appellant's specification of error in that regard cannot be sustained.

[2] In the course of plaintiff's case in chief one of the proposed purchasers of the property testified that at the date of the proposed purchase of the property, he and his associate in the matter had at least $20,000 on hand and "were fully able" to purchase the property in question. In that connection appellant urges prejudicial error in that, on cross-examination of such witness, the trial court refused to permit him to answer a question as to whether he was "going to get a loan upon this property, * * * to take care of these payments." In effect, the contention of appellant is that he had a right to test the ability of the proposed purchasers of the property to make the various payments on the purchase price as they would have fallen due had the sale been consummated. Although in the abstract the position assumed by appellant may be sound, it does not necessarily follow that he was prejudiced

by the action of the court in sustaining the objection to the question. It appears that, aside from the one question to which reference has been had, no effort on the part of defendant was made to ascertain the actual financial ability of the proposed purchasers to meet the payments on the property as they would have become due. It is manifest that if they "were fully able to do it," for example, either because of being possessed of sufficient cash in hand, or credit with a bank or banks, or were the owners of other property on which sufficient loans might be secured, the question whether they expected to get a loan upon the particular property involved in the transaction would not be determinative of their financial ability to conform with the requirements of the contract of sale. If defendant had pursued the inquiry and had been denied the right to ascertain *anything* with reference to the financial ability of the proposed purchasers of the property, he might have had just cause for complaint. But in the circumstances as presented by the record, it is clear that the effect on defendant of the action of the trial court was negligible.

The judgment is affirmed.

We concur: YORK, J.; CRAIL, Justice pro tem.

97 Cal. App. 654

SEPERMAN v. LYON FIRE PROOF STORAGE CO. (Civ. 3725.)★

District Court of Appeal, Third District, California. March 19, 1929.

Rehearing Denied April 18, 1929. Hearing Denied by Supreme Court May 16, 1929.

1. Automobiles ⚿245(8)—Truck driver's negligence in killing five year old child held for jury under evidence.

Negligence of driver of truck killing five year old child in street *held* question for jury under conflicting evidence.

2. Automobiles ⚿162(8)—Presence of small children playing in street or near curbing should be warning to motorists, requiring exercise of care for their safety.

Presence of small children playing in street or near curbing should be warning to drivers of passing automobiles, requiring exercise of care for their safety.

3. Trial ⚿173—Denial of motion for nonsuit does not prevent subsequent direction of verdict for defendant.

Denial of motion for nonsuit does not prevent trial court from subsequently directing verdict in favor of defendant, if condition of record warrants it.

4. Trial ⚿178—On motion for directed verdict, evidence of adverse party, with all fair inferences and deductions, must be taken as true.

In considering motion for directed verdict, evidence of adverse party must be deemed to have been true, together with all fair and rational inferences and deductions which may reasonably be drawn therefrom.

5. Trial ⚿142—Verdict should not be directed unless evidence is so conclusive that reasonable minds may not differ as to result.

A verdict should not be directed by the court, unless evidence is so conclusive that reasonable minds may not differ as to result which must necessarily follow.

6. Trial ⚿139(1)—Directing verdict on questions of fact, where there is any substantial evidence to contrary, is invasion of province of jury.

Directing verdict of jury on question of fact, where there is any substantial evidence to the contrary, is clear invasion of province of jury.

7. Negligence ⚿85(2)—Contributory negligence will not ordinarily be imputed to child of tender years.

Contributory negligence will not ordinarily be imputed to child of tender years, for in determining reasonableness of conduct of child, its age, maturity, and capacity must be taken into consideration.

8. Death ⚿24—Parent and child ⚿7(9)—Doctrine of imputed negligence on part of parents applies, where parent sues in own right for injuries to or death of minor child.

Parents are chargeable with ordinary care in protection of their minor children, and where parent sues in his own right for injuries to or death of minor child, doctrine of imputed negligence on part of parent will apply.

9. Death ⚿103(3)—Imputed negligence of parent, in permitting five year old child killed by truck to play on or adjacent to street, held for jury.

Whether parent, suing in his own right for death of five year old child killed by truck, was guilty of imputed negligence in permitting child to play on or adjacent to street, *held* question for jury under the evidence.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Joseph Seperman against the Lyon Fire Proof Storage Company. Judgment for defendant, and plaintiff appeals. Reversed.

Chauncey Gardner, of Los Angeles, for appellant.

J. S. Garnett and Joe Crider, Jr., both of Los Angeles, for respondent.

THOMPSON, J. [1, 2] This is an appeal from a judgment in favor of the defendant in an action for damages for the death of a child caused by an automobile accident. The case was tried before a jury. When the evidence of both parties was completed, on motion of the defendant the jury was discharged and a judgment by the court was rendered for the defendant. The evidence of the negligence of the driver of the truck was

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★Rehearing denied. Hearing denied by Supreme Court.

conflicting and should have been submitted to the jury.

September 3, 1925, at 5:15 p. m., the defendant's truck was being driven southerly along Echo Park avenue in Los Angeles. This avenue was paved, with a single street car track along its center. There were concrete walks and a boulevard on either side of the avenue. Between Cerro Gordo and Donaldson streets, where the accident occurred, it was slightly downgrade in the direction in which the truck was traveling. The course of the truck was about 7 feet from the westerly curbing. Loaded with furniture, the truck was making its last trip for the day. It was broad daylight and, except for a street car which passed northerly a few moments before the accident occurred, there was no traffic in the vicinity. The street was open, straight, and unobstructed for blocks. By the side of the driver of the truck sat his helper and associate.

Mrs. Nidorff, who chanced to be at a grocery store which was located midway on the westerly side of the block in which the accident occurred, testified: "The truck passed by with an awful speed * * * going 25 or 30 miles per hour. * * * I saw the truck pass by with an awful racket." In the vicinity of a tree and telephone pole which were located on the boulevard on the westerly side of Echo Park avenue, 15 feet northerly from its intersection with Donaldson street, the plaintiff's five year old child was playing with a companion. Mr. Wallace testified: "They were playing on the curb. * * * I saw Gordon start and run out into the street. * * * I saw the children playing in the street. * * * I saw a street car coming. * * * He (the child) was running toward the car and waving his hands." Mrs. Chernos, who was riding on the street car, said: "I saw two or three children playing on the curb, * * * jumping up and down. * * * They were absorbed in playing a game of some kind." Whether the children were playing in the street or on the boulevard near the curbing, there was nothing to obstruct a clear view of them for some distance up the street. The presence of small children playing in a street or near the curbing should be a warning to drivers of passing automobiles requiring the exercise of care for their safety. The driver of the defendant's truck testified that he was traveling not more than 15 miles an hour; that he was looking straight ahead and did not see the children. He said: "I got within a few feet north of Donaldson avenue; I spotted a little form dart out from the curb. Where the little thing came from I don't know. As I spotted him, I shoved down the footbrake and pulled up the lever with all my power. The little form came from off the curb on the west side of the street, running with its little body in a northeasterly direction * * * watching the electric car. * * * I done all that one could do, and it was impossible, impossible." The child was struck by the automobile at a point about 15 or 20 feet northerly from the corner of Donaldson and Echo Park streets, and died from the injuries sustained. At the place of the accident, skid marks were found on the pavement which were 35 feet in length. Ten feet below the lower terminus of these skid marks were blood stains on the pavement caused from the child's injuries.

The testimony of Mrs. Nidorff and the presence of skid marks 35 feet in length, caused by the dragging of the wheels of the truck, furnished substantial evidence from which the jury would have been warranted in finding the driver of the truck guilty of negligence for driving at an excessive rate of speed. It was therefore error to withdraw this issue from the jury.

[3-6] In this case a motion for nonsuit was denied. This, however, does not prevent the court from subsequently directing a verdict in favor of the defendant if the condition of the record warrants it. 24 Cal. Jur. 916, § 163; Sellers v. Solway Land Co., 31 Cal. App. 259, 160 P. 175. The procedure in the present case of first denying the defendant's motion for a directed verdict and then discharging the jury and rendering judgment for the defendant was unusual, but it may be assumed to have been equivalent to a directed verdict. See Estate of Sharon, 179 Cal. 447, 459, 177 P. 283. In considering a motion for a directed verdict, the evidence of the adverse party must be deemed to have been true together with all fair and rational inferences and deductions which may reasonably be drawn therefrom. A verdict should not be directed by the court unless the evidence is so conclusive that reasonable minds may not differ as to the result which must necessarily follow. Directing the verdict of a jury on questions of fact, where there is any substantial evidence to the contrary, is a clear invasion of the province of the jury. Butler-Veitch v. Barnard, 77 Cal. App. 709, 247 P. 597.

[7-9] In this case the defendant pleaded, and there was an effort to prove, that the accident was the result of the imputed negligence of the parents of the deceased child in carelessly permitting it to play upon the street. There was also a conflict in the evidence as to this issue. Contributory negligence will not ordinarily be imputed to a child of tender years. Gonzales v. Davis, 197 Cal. 256, 240 P. 16. In determining the reasonableness of the conduct of a child, its age, maturity, and capacity must be taken into consideration. Hoy v. Tornich, 199 Cal. 545, 554, 250 P. 565. Parents are chargeable with ordinary care in the protection of their minor children, and where a parent sues in his own right for injuries to or the death of his minor child, the doctrine of imputed negligence on the part of the parent will apply. Zarzana v. Neve Drug Co., 180 Cal. 32, 35, 179 P. 203 (15 A. L. R. 401). The question as to whether a parent is guilty of imputed negligence in permitting a five year old child to play on or adjacent to a street under circumstances such as are shown in the present case is essentially a question for the jury. Zarzana v. Neve Drug Co., supra; Fox v. Oakland Cons. St. Ry., 118 Cal. 55, 50 P. 25, 62 Am. St. Rep. 216; Daly v. Hinz, 113 Cal. 366, 45 P. 693; Karr v. Parks, 40 Cal. 188.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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97 Cal. App. 505

Ex parte GILBERT. (Cr. 1531.)★

District Court of Appeal, First District, Division 1, California. March 13, 1929.

Rehearing Denied March 28, 1929. Hearing Denied by Supreme Court April 11, 1929.

Criminal law ⚷1211—Defendant, convicted of attempted burglary and of prior conviction, will receive sentence on conviction of attempted burglary alone (Pen. Code, §§ 461, 664, 667, 671).

Where defendant was convicted of attempted burglary and of prior conviction of burglary, sentence will be imposed on conviction of attempted burglary alone under Pen. Code, §§ 461, 664, 671, since no valid sentence may be imposed to include both attempted burglary and prior conviction, which, under sections 667 and 671, would be sentence for one-half of natural life.

Application by Harry Gilbert for habeas corpus prayed to be directed to the warden of Folsom state prison to secure the release of petitioner on the ground that the judgment of sentence is void. Petitioner remanded to superior court for Alameda county, with directions.

Willard W. Shea, Public Defender, of Oakland, for petitioner.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

KNIGHT, J. Petitioner is imprisoned in the state prison at Folsom by virtue of a commitment issued out of the superior court of the state of California in and for the county of Alameda, and seeks to be released on habeas corpus upon the ground that the judgment of sentence is void.

The uncontroverted facts are that on November 24, 1926, petitioner was charged in said court with having attempted to commit the crime of burglary and with having suffered a prior conviction of burglary in the second degree. He entered a plea of not guilty to the former, and admitted the latter, and upon trial was found guilty of an attempt to commit burglary in the first degree. The judgment of sentence was that he "be confined in the state prison of the State of California at Folsom as prescribed by law."

An attempt to commit burglary in the first degree is punishable by imprisonment in the state prison for a term not exceeding one-half of the longest term of imprisonment which may be imposed upon conviction for the offense so attempted. Pen. Code, § 664. The minimum punishment prescribed for a conviction of burglary in the first degree is five years' imprisonment in the state prison (Pen. Code, § 461), and the maximum punishment is imprisonment during the natural life of the offender or any number of years not less than that prescribed (Pen. Code, § 671). Where, however, as here, a person has once been convicted of an offense punishable by imprisonment in the state prison, and he has served a term therefor in any penal institution, and subsequently he commits an offense punishable by imprisonment in a state prison, the penalty prescribed therefor is imprisonment in the state prison for the maximum period for which he might have been sentenced, if such subsequent offense had been his first offense. Pen. Code, § 667. Therefore, if the provisions of the foregoing Code sections are to be followed, the only sentence which could be imposed upon petitioner is that he be imprisoned in the state prison for the maximum term of one-half of his natural life; and it is conceded on the part of the state that such a sentence would be void, because "what the actual life of a particular person would be, and what would be the half of it, cannot be known." People v. Burns, 138 Cal. 159, 70 P. 1087, 60 L. R. A. 270; People v. Sama, 189 Cal. 153, 207 P. 893; People v. Gardner, 98 Cal. 127, 32 P. 880.

It is apparent, however, that the invalid sentence above mentioned is called for by said Code sections merely because of the inclusion in the judgment of the prior conviction, and that, in the absence of the latter the situation would be identical in principle with the one presented in People v. Sama, supra, and would permit a valid sentence to be imposed for the crime of attempted burglary. In that case the defendant was convicted of an attempted robbery, the maximum penalty for which was the same as prescribed upon conviction of an attempted burglary in the first degree, namely, imprisonment in the state prison for one-half of the life of the offender; and it was held that, inasmuch as section 1168 of the Penal Code contained no provision for the pronouncement of an indeterminate sentence in a case of that kind, the sections of the Penal Code relating to the sentencing of persons, which were applicable before the adoption of section 1168, remained in

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★Rehearing denied. Hearing denied by Supreme Court.

full force and effect; and therefore, under the authority of People v. Gardner, supra, and People v. Burns, supra, the cause was remanded to the trial court, with instructions to impose a sentence of "imprisonment in the state prison for such a term of years, as, in its opinion, would be a just and fair punishment."

As pointed out, in the present case no valid sentence may be imposed to include both the attempted burglary and the prior conviction, but a valid sentence may be imposed upon the conviction of the attempted burglary alone (People v. Sama, supra); therefore, since the matter of a prior conviction constitutes a distinct, severable element of the charge in an information, and under certain circumstances may be disregarded (People v. Chadwick, 4 Cal. App. 63, 87 P. 384, 389) we are of the opinion that, under the general rule to the effect that "where there are several counts in the indictment, some of which are good and others bad, sentence may be imposed upon the good count or counts" (16 Cor. Jur. 1279), it must be treated here as a nullity, and judgment of sentence be imposed upon the conviction of attempted burglary alone.

Therefore, in conformity with the procedure followed in People v. Sama, supra, and the other cases therein cited, and for the reasons hereinabove stated, it is ordered that petitioner be remanded to the superior court of the state of California in and for the county of Alameda, for the pronouncement of sentence upon the single conviction of an attempt to commit burglary in the first degree, and that, as a punishment therefor, he be sentenced to imprisonment in the state prison for such a definite term of years as in the trial court's opinion would be a just and fair punishment for the commission of such crime.

We concur: TYLER, P. J.; CASHIN, J.

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97 Cal. App. 674

SMITH v. WALL. (Civ. 6469.)

District Court of Appeal, Second District, Division 1, California. March 19, 1929.

Appeal and error ⚷622—Appeal will not be dismissed for failure to file transcript in time, where notice of entry of judgment was not given (Rules of Supreme Court and District Courts of Appeal, rule 1, § 1; rule 5, § 1; Code Civ. Proc. § 953d, added by St. 1927, p. 86.

Appeal will not be dismissed on ground that transcript of record was not filed within time under Rules of Supreme Court and District Courts of Appeal, rule 1, § 1, and rule 5, § 1, where no notice of entry of judgment was ever given in writing and such notice was not waived under Code Civ. Proc. § 953d, added by St. 1927, p. 86.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by Cassie E. Smith, Administratrix of the Estate of Frank T. Smith, deceased, against Henry V. Wall. From the judgment, defendant appeals. On motion to dismiss. Motion denied.

Newby & Newby and Dee Holder, all of Los Angeles, for appellant.

Fulton & Fulton and John M. Fulton, all of Los Angeles, for respondent.

HOUSER, J. This is a motion to dismiss an appeal from a judgment rendered by the superior court, on the ground that the transcript of the record was not filed within the time prescribed "by law."

By section 1 of rule 1 of the Rules of the Supreme Court and the District Courts of Appeal, it is provided that, in a civil action, within 40 days after an appeal is perfected the appellant must "serve and file the printed transcript of the record. * * * If "not filed within the time prescribed, the appeal may be dismissed. * * *" Section 1, rule V.

From the affidavit presented in support of the motion herein, it appears that, for a period aggregating considerably more than 40 days after appellant served and filed his notice of appeal and immediately next preceding the filing of the notice of motion to dismiss herein, the appellant failed to comply with the rule to which reference has been had. In reply thereto, respondent to this proceeding in effect admits the truth of the statements as shown by the affidavit of the moving party; but in defense presents the additional fact that no notice of the entry of judgment was ever given to him in writing, nor was such "written notice * * * waived in writing or by oral stipulation made in open court and entered in the minutes, * * *" as provided by section 953d of the Code of Civil Procedure, added by St. 1927, p. 86. With the exception that, at the time of presentation of the motion herein, by oral statement of the attorney representing the moving party, to the effect that, after the judgment had been entered, a stipulation was entered into between the parties "as to the settling of the bill of exceptions"—the facts with reference to the failure of the moving party to comply with the requirements set forth in said section 953d of the Code of Civil Procedure are not attempted to be controverted in any way.

In the case of Griffin v. Kent (Cal. Sup.) 274 P. 56, on practically identical facts as are here presented, a motion to dismiss an appeal was denied. To the same effect is

Attkisson v. Reynolds (Cal. App.) 270 P. 686. It follows that in the instant matter similar action should be taken by this court. Accordingly, it is ordered that the motion to dismiss the appeal be and it is denied.

We concur: CONREY, P. J.; YORK, J.

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97 Cal. App. 508

ALPHA HARDWARE & SUPPLY CO. v. RUBY MINES CO. et al. (Civ. 3673.)★

District Court of Appeal, Third District, California. March 13, 1929.

Rehearing Denied April 12, 1929. Hearing Denied by Supreme Court May 9, 1929.

1. Corporations 🔑547(4)—Corporation's judgment creditor held entitled to set aside as fraudulent deed of trust executed by insolvent corporation to director without consideration for purpose of defrauding plaintiff (Civ. Code, §§ 3439, 3442).

Corporation's judgment creditor, on proof that corporation was never indebted to directors, but that directors, for purpose of hindering, delaying, and defrauding creditors, caused to be executed on behalf of corporation note and trust deed in favor of one of their number, and that corporation was at the time insolvent, *held* entitled to set aside trust deed as fraudulent under Civ. Code, §§ 3439, 3442.

2. Corporations 🔑548(5)—Action by corporation's judgment creditor to set aside trust deed as fraudulent held maintainable in county other than that where land was located (Civ. Code, §§ 3439, 3442).

Action in nature of creditor's bill, brought against corporation and directors to set aside note and deed of trust claimed to have been executed by corporation to one of directors for purpose of defrauding plaintiff as corporation's judgment creditor, under Civ. Code, §§ 3439, 3442, *held* maintainable in county other than that in which land was situated.

3. Pleading 🔑403(2)—Incorporation by reference in amended complaint of paragraphs from original complaint held not to require reversal, where allegations were denied and case was tried as if allegations had been set out.

Amended complaint, merely alleging that the paragraphs of cause of action of original complaint were referred to and made part of amended complaint, without setting out paragraphs of original complaint in full, while defective, *held* not to require reversal, where answer to amended complaint denied practically all allegations so incorporated, and case was tried as though paragraphs contained in count of original complaint were set out in detail in amended complaint.

4. Pleading 🔑403(2)—Pleading, defective on account of insufficient statement, may be cured by controverting pleading which clearly places in issue material facts not previously stated.

Where pleading is defective on account of insufficient statement of material facts, defect may be cured by filing controverting pleading which clearly places in issue material facts which were previously omitted on account of the insufficient statement.

5. Corporations 🔑548(9)—Finding that trust deed, given by corporation to director, was fraudulent as to judgment creditor held justified (Civ. Code, § 3439).

Evidence that director to whom corporation gave note and trust deed had merely advanced money to one holding option on claims taken over by corporation, and that trust deed was executed to prevent creditors from pressing their claims by attachment or otherwise, justified finding of trial court that execution of note and trust deed was fraudulent as to corporation's judgment creditor, under Civ. Code, § 3439.

6. Corporations 🔑538—Evidence justified finding of insolvency in judgment creditor's suit to set aside trust deed from corporation as fraudulent (Civ. Code, § 3442).

Evidence that corporation was unable to pay its debts as they became due, and executed note and trust deed to prevent creditors from enforcing collection of their debts by attachment, justified finding of trial court, in action by judgment creditor of corporation to set aside trust deed, that corporation at time of execution thereof was insolvent, under Civ. Code, § 3442.

7. Fraudulent conveyances 🔑62—Debtor, unable to pay debts as they become due, is "insolvent," as regards creditor's right to set aside conveyance (Civ. Code, § 3442).

Debtor is "insolvent" within Civ. Code, § 3442, making voluntary transfer or incumbrance while insolvent fraudulent as to existing creditors, when he is unable to pay his debts from his own means as they become due.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Insolvency; Insolvent.]

8. Fraudulent conveyances 🔑57(1)—Creditor may set aside conveyance from debtor without proof of insolvency, where intent to defraud creditors is shown (Civ. Code, § 3439).

If intent of debtor to hinder and defraud creditors is shown, in creditor's suit to set aside conveyance from debtor as fraudulent, it is not necessary, under Civ. Code, § 3439, to show that debtor was insolvent at the time.

9. New trial 🔑102(2)—Refusal of new trial held proper, where newly discovered evidence was cumulative and inability to produce it at trial was not shown.

Denial of motion for new trial on ground of newly discovered evidence *held* proper, where facts stated in affidavits were merely cumulative, and no showing was made that evidence could not have been produced at trial.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by the Alpha Hardware & Supply Company against the Ruby Mines Company, C. E. Gilman, and others to cancel and annul a deed of trust. Judgment for plaintiff, and

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★Rehearing denied. Hearing denied by Supreme Court.

defendants, except first named defendant, appeal. Modified and affirmed.

Hearing denied by Supreme Court; LANGDON, J., not voting.

Sherman & Peters, of San Francisco, for appellants.

W. E. Wright, of Nevada City, Lynne Kelly, of Grass Valley, and Henry B. Neville, of Downieville, for respondent.

JAMISON, Justice pro tem. This is an appeal by defendants Gilman, Pike, Kerr, Hamilton, Hutchinson, Millar, De Vaux, Mitchell, Breed, and Thornton from a judgment canceling and annulling a deed of trust executed by defendant Ruby Mines Company to appellants Breed and Thornton as trustees for the benefit of appellant Hutchinson, and declaring that the liens of the judgments theretofore rendered against said company and in favor of respondent and its assignors are superior to the claims of appellants under said deed of trust and debarring and restraining appellants from asserting any claim whatsoever, arising from said deed of trust, to the mining claims in controversy, or any part thereof adverse to the defendant Ruby Mines Company, or adverse to the judgment liens of respondent and its said assignors.

The facts of this case are very fully set forth in the opinion rendered by Presiding Justice Finch in the Matter of the Application of C. E. Gilman & L. E. Kerr, Petitioners, v. Superior Court (Cal. App.) 260 P. 922. We therefore deem it unnecessary to restate them here.

Appellants urge on this appeal that their demurrer to the amended complaint should have been sustained upon the grounds that the said complaint did not state a cause of action, and upon the further ground that the action involved title, right of possession to, and enforcement of liens upon, real estate situated in Sierra county, while the action was brought in Nevada county. The complaint consisted of six counts, five of which were for the enforcement of stockholders' liability against certain of the defendants, and those five counts are not involved in this appeal.

[1] The sixth count alleges that the Ruby Mines Company is indebted to respondent in the sum of $4,838.19 on account of said judgments of respondent and its assignors; that the said company owns certain mining property in Sierra county, and that appellants Gilman, Pike, Kerr, Hamilton and defendant Vahrenkamp are and were the directors of said company; that said company was never at any time indebted to any of the defendants, but that the said directors, for the purpose of hindering, delaying, and defrauding respondent and respondent's assignors and creating an unlawful preference or gift to Hutchinson, at a meeting of said directors, fraudulently and in violation of their trusts and duties as such directors, and without any valuable consideration therefor being paid to said company, caused to be executed, on behalf of said company, the note and deed of trust in favor of Hutchinson involved in this action; that said company is, and was at the time said note and deed of trust was executed as aforesaid, insolvent.

Section 3439 of the Civil Code provides that every transfer of property, or charge thereon, made with intent to delay or defraud any creditor of his demand, is void against creditors of the debtor; and section 3442 of said Code provides that a voluntary transfer or incumbrance of property by a party while insolvent or in contemplation of insolvency is fraudulent and void as to existing creditors.

We are of the opinion that the sixth count of the complaint states a cause of action.

[2] As to appellants' objection that this action should have been brought in Sierra county, we are of the opinion that the real purpose and object of the action, as set forth in the sixth count of the complaint, was to set aside and cancel the note and deed of trust, which, as is alleged in said count, was executed for the purpose of defrauding respondent and its assignors, who were creditors of the said Ruby Mines Company. The provision of the Constitution requiring actions for the enforcement of liens upon real estate to be commenced in the county where the real estate is situated does not apply to an action in the nature of a creditor's bill, brought to set aside a conveyance made by an execution debtor on the ground of fraud. Beach v. Hodgdon, 66 Cal. 187, 5 P. 77; Woodbury v. Nevada Southern Ry. Co., 120 Cal. 463, 52 P. 730.

[3] Appellants contend that the amended complaint upon which this action was tried was insufficient to constitute a cause of action, or in reality was not a complaint at all, because of the manner in which it was drawn, in this, that in the amended complaint, instead of the pleader setting out the six paragraphs in full contained in said count six, as same appeared in the original complaint, he merely set forth the following: "That paragraphs I to VI, both paragraphs inclusive, in the sixth cause of action, set forth in the original complaint, are hereby referred to and made a part hereof as fully for all purposes as if set forth at length herein." While we are far from approving this abbreviated method of pleading, yet, in view of the fact that appellants answered said amended complaint, and in detail denied practically every allegation contained in the said sixth count thereof, and the case was tried just as though each of the said paragraphs contained in the sixth count of the original complaint was set out in detail in the amended complaint, we do not feel that this alleged error would require a reversal of this case. The rule that a defective complaint may be aided by averments contained in the answer is thus set forth in volume 21, California Jurisprudence, 278: "Although the complaint is fatally defective, the necessary issue having been tendered by the answer and tried, a judgment will not be reversed merely for the purpose of allowing an issue to be tendered by the plaintiff upon

matter that has already been practically put in issue at the instance of the defendant and been determined."

[4] When a pleading is defective on account of an insufficient statement of material facts, rather than on account of a statement of insufficient facts, the defect in such pleading may be cured by the filing of a controverting pleading which clearly and unequivocally places in issue the material facts which have not before been put in issue on account of the insufficient statement of the former pleading. Moody v. Pacific Surety Co., 41 Cal. App. 287, 182 P. 802.

[5] Appellants next contend that certain findings of the trial court to the effect that the execution of the note and deed of trust to appellant Hutchinson was done for the purpose of defrauding respondent, a creditor of said company, and to hinder and delay him in the collection of his debt, are not supported by the evidence. It appears that one E. L. Case was the owner of mining claims situated in Sierra county, and that he had given defendant Vahrenkamp an option to purchase them; that for the purchase, operation, and development of said mining claims Vahrenkamp needed financial assistance; that appellants Kerr, Millar, and Gilman advanced to him, at various times, sums aggregating $40,000; that thereupon Vahrenkamp executed a writing to them wherein he agreed, as a consideration for said loans, to give to them an option for five years for a 50 per cent. interest in said claims; that, Vahrenkamp having exercised his option, and, with the money advanced him by Kerr, Millar, and Gilman, having purchased the mining claims from Case, it was agreed that a corporation known as the Ruby Mines Company should be formed to take over the said mining claims. The corporation was formed pursuant to this agreement, and the mining claims were conveyed to it by Vahrenkamp. As a consideration for the conveyance of the mining claims to the company, 999,000 of the 1,000,000 shares of its capital stock were issued to Vahrenkamp, and thereupon Vahrenkamp had 500,000 shares of this stock, so issued to him, reissued to Kerr as trustee for the benefit of Kerr, Millar, and Gilman.

Vahrenkamp testified that, a short time prior to the execution of the note and deed of trust to Henderson, some of the creditors of the company were insisting upon the payment of their claims. Vahrenkamp was the president and general manager of the company, and a director thereof, and he consulted with the other directors regarding the financial condition of the company; it having no funds with which to pay its creditors. During this time labor was being done on the claims, and merchandise was being furnished the company, all of which would have to be paid for. It was finally decided that, to prevent the creditors from pressing their claims, by attachment or otherwise, a meeting of the board of directors should be called, and the note and deed of trust should be executed to Hutchinson, although the company was not indebted to Hutchinson in any amount, and this program was carried out.

The evidence adduced by respondent clearly shows that at no time was the company the debtor of any of the appellants. Kerr, Gilman, and Millar loaned the $40,000 to Vahrenkamp and not to the company. Admitting that they did not purchase the 50 per cent. interest of Vahrenkamp outright, but only took an option for that interest, still, upon their decision not to take up the option their recourse for the return of the money they loaned Vahrenkamp would have been against him and not against the company. In the case of Guernsey v. Douglas, 171 Cal. 329, 153 P. 227, the court said: "It is also claimed that there is no support in the evidence for the finding regarding the fraudulent intent of Douglas in making the conveyance. We cannot sustain this claim. The evidence of the defendant, as a whole, indicated that the only consideration really given for the conveyance was the sum of $10 paid to him at the time by his wife, and that this was not paid as a price for the property, but for the reason that they deemed it necessary to make such payment in order to make the deed 'legal,' as he termed it, and that the deed was not made as a spontaneous transaction or voluntary gift, but, because he feared that his creditors were about to attach the property. From all this the fraudulent intent was deducible."

So in the case under consideration, from the evidence produced by respondent, we think the trial court had the right to deduce therefrom the fraudulent intent.

[6-8] Appellants claim that the finding that the Ruby Mines Company was insolvent when the deed of trust was executed is not supported by the evidence. The evidence on the part of respondent was that, while the value of the property owned by the company exceeded the amount named in the note and deed of trust, at and prior to the date of the execution of the said note and deed of trust, the company was unable to pay its debts as they became due; that, as a matter of fact, the note and deed of trust were executed to prevent the creditors of the company, whose debts were due and unpaid, from enforcing the collection thereof by attachment. A debtor is insolvent when he is unable to pay his debts from his own means as they become due. Southwick v. Moore, 61 Cal. App. 585, 215 P. 704; First National Bank of Los Angeles v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64. The court found that this deed of trust was made with the intent of hindering, delaying, and defrauding the creditors of the company, including respondent and its assignors, in the collection of the debts owing to said creditors from said company, and this finding is supported by the evidence of Vahrenkamp, who testified that the deed of trust was made to prevent the creditors of the company from enforcing the

collection of their debts by attachment. If the intent is made out, it is not necessary to show that the debtor was insolvent at the time. Title Ins. & Trust Co. v. California Dev. Co., 171 Cal. 173, 152 P. 542. In the case of Evans v. Sparks, 170 Cal. 532, 150 P. 372, the court said: "It is true that fraud may be shown and may invalidate a deed even when the grantor does not entirely strip himself of assets, where there is other compelling proof of a fraudulent intent." 2 Bigelow on Fraud, p. 393; Johns v. Baender, 40 Cal. App. 790, 182 P. 55. In this last-named case the court said: "If a conveyance be made with the intent to defraud creditors it is void, notwithstanding that the debtor has other property ample in amount to satisfy his creditors."

[9] Appellants moved the court to grant them a new trial in this case; one of the grounds thereof being newly discovered evidence. With said motion affidavits of appellants Pike and Hamilton were submitted, in which were set forth certain testimony that they would give upon a retrial of the case. Examination of the affidavits discloses that the facts therein stated are merely cumulative, and no showing is made that this evidence could not have been produced at the trial of this case. The court properly denied the motion.

As we view the pleadings, this action as set forth in the sixth count of the amended complaint is, in effect, a creditor's bill, the object and purpose of which are to set aside and annul the alleged fraudulent note and deed of trust. It is in no respect an ordinary action to quiet title to real estate. However, the judgment is somewhat broader than is warranted by the pleadings and the evidence. We think it should be, and it is hereby, modified by adding at the end of paragraph 4 of said judgment the following words: "Arising out of, under or by virtue of said deed of trust"; also by adding to paragraph 5 of said judgment on the fifth line of said last-named paragraph after the word "thereof" the following words: "Arising out of, under or by virtue of said deed of trust."

And, as so modified, the judgment is affirmed, the respective parties to pay their own costs on this appeal.

We concur: FINCH, P. J.; PLUMMER, J.

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97 Cal. App. 558

BLUMENTHAL v. BLUMENTHAL.
(Civ. 6690.)

District Court of Appeal, First District, Division 1, California. March 14, 1929.

1. Marriage 🔑4—Eligibility of person to contract marriage must be determined from conditions existing at date of marriage.

Eligibility of a person to contract marriage must be determined from the conditions existing on the date of the solemnization of the marriage, and not from that which may happen afterwards.

2. Divorce 🔑320—Interlocutory decrees of divorce do not operate retrospectively so as to remove legal barrier existing at time of later marriage (Civ. Code, § 61).

Interlocutory decrees of divorce do not operate retrospectively so as to remove legal barrier existing at time parties entered into marital state, before expiration of one year from entry of interlocutory decree, as required by Civ. Code, § 61.

3. Divorce 🔑172—As between strangers and between parties and strangers, decree of divorce does not establish previous validity of marriage.

As between strangers, or between parties and strangers, a decree of divorce does not establish previous validity of the marriage, since the res adjudicata is a condition of subsequent singleness of the parties and not the valid prior existence of marital relations between them.

4. Divorce 🔑320—One marrying divorced woman before expiration of one year from interlocutory decree was not estopped from establishing that wife's previous marriage was void (Civ. Code, § 61).

One marrying divorced woman before expiration of one year from entry of interlocutory decree in violation of Civ. Code, § 61, was not estopped from establishing fact that wife's previous marriage was in fact void.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Mae Blumenthal against Alexander Blumenthal, wherein defendant filed a cross-complaint. From the decree, defendant appeals. Reversed.

A. S. Newburgh and William M. Malone, both of San Francisco, for appellant.

Heidelberg & Murasky and Joseph Edward Connolly, all of San Francisco, for respondent.

PER CURIAM. This is an appeal by the defendant, Alexander Blumenthal, from a decree annulling his marriage to plaintiff upon the ground that at the time it was solemnized plaintiff was the lawful wife of one Guidice. The decree provided also for a property settlement and for the custody and maintenance of a minor child, the issue of the Blumenthal marriage. Defendant contends, as one of the several grounds urged for reversal, that plaintiff's marriage to Guidice was void ab initio, and that consequently her marriage to him was valid.

The state of the record is as follows: Originally the action was one for divorce instituted by Mrs. Blumenthal upon the ground of extreme cruelty. Answering, defendant denied the charges of cruelty and added a cross-complaint setting forth four separate causes of action, two for annulment of the marriage and two for divorce. In his first cause of action for annulment it was, in substance, alleged that at the time he married plaintiff she was the lawful wife of Guidice. Plaintiff, in a verified answer to the cross-complaint, denied "that at the time said plaintiff married said defendant herein she was the wife of Edward I. Guidice or any other person," or that at said time she "was lawfully married to said Edward I. Guidice or to any other person or at all." Subsequently, and on the day of the trial, however, she filed an amended answer to the cross-complaint, which was also verified, expressly admitting "that at the time said plaintiff married said defendant she was the wife of Edward I. Guidice," and that at said time she "was lawfully married to said Edward I. Guidice." At the trial, she offered no proof to sustain the allegations of her complaint for divorce, but introduced evidence to establish the charge set forth in the first cause of action of defendant's cross-complaint, namely, that her marriage to defendant was bigamous. Before she had rested her case, defendant moved the court to dismiss the two causes of action for annulment in his cross-complaint, but the court denied his motion. After plaintiff had rested her case, defendant, in apparent contradiction of the allegations set forth in his first cause of action for annulment, sought to establish the validity of his marriage to Mrs. Blumenthal by showing that her marriage to Guidice was bigamous and consequently void ab initio; and he claimed, therefore, that her subsequent marriage to him was legal. However, as indicated, the trial court found that at the time of the Blumenthal marriage plaintiff was the wife of Guidice, who was then living; and upon that ground the marriage between plaintiff and defendant was annulled.

The evidence bearing upon the question of the marital status of Mrs. Blumenthal at the time of her marriage to defendant consisted chiefly of the decrees rendered in the previous divorce proceedings. The facts established thereby are not disputed and summarized are as follows: Guidice, immediately preceding his marriage to plaintiff, was the husband of one Maude Alice Guidice, who, on January 9, 1905, obtained an interlocutory decree of divorce from him in Los Angeles county, Approximately ten months thereafter, and on November 1, 1905, Guidice married plaintiff in the city of Napa. In 1910, he commenced divorce proceedings against plaintiff in Alameda county, and on April 5th of that year obtained an interlocutory decree. Fifteen days after the entry of such decree, to wit, on April 20, 1910, plaintiff married Blumenthal in Salt Lake City, Utah.

Section 61 of the Civil Code provides: "A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless: 1. The former marriage has been annulled or dissolved. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce. * * *" Manifestly, therefore, under the provisions of the foregoing Code section, Guidice's marriage to plaintiff was "illegal and void from the beginning," because the uncontradicted evidence shows that at the time he married her he was still the lawful husband of Maude Alice. That being so, plaintiff never was the lawful wife of Guidice, and, if she was not, her marriage to Blumenthal cannot be annulled upon the ground that she was.

[1, 2] Plaintiff calls attention to the fact that about two months after Guidice married plaintiff his marriage to Maude Alice was dissolved by the entry of a final decree; also that approximately eleven months following plaintiff's marriage to Blumenthal her marriage to Guidice was dissolved by the entry of a final decree. But the eligibility of a person to contract marriage must be determined from the conditions existing on the date of the solemnization of the marriage and not from that which may happen afterwards. Therefore neither of those decrees operated retrospectively so as to remove the legal barrier which existed at the time the parties entered into the marital state.

Plaintiff seeks to sustain the judgment of annulment upon the theory that, regardless of the actual facts relating to plaintiff's previous marital status, the interlocutory decree rendered in the divorce action between Guidice and plaintiff, and the final decree which was entered more than eleven months subsequent to the time she married Blumenthal, are conclusive against the whole world as to the validity of plaintiff's marriage to Guidice, and that consequently defendant is estopped from asserting or proving to the contrary.

[3] If the present controversy were one existing between the original parties to the divorce proceeding prosecuted by Guidice against plaintiff, or between parties claiming under them, and it be assumed that as to the question of finality an interlocutory decree of divorce shall be treated on an equality with a final decree, there would be much force in plaintiff's position, for it seems to be the general rule, with respect to final decrees of divorce at least, that, as between the parties and privies, a decree granting a divorce is conclusive of the existence of the marriage dissolved thereby. 9 Ruling Case Law, 459, 460. Such was the situation existing in the Estate of Lee, 200 Cal. 310, 253 P. 145, upon which plaintiff mainly relies. Here, however, the action is not between the original parties

to the Guidice-plaintiff divorce proceeding, nor their privies, but is between one of the parties thereto and a stranger to it, and under such circumstances a different rule prevails. It is stated in Freeman on Judgments (5th Ed.) vol. 2, p. 1913, as follows: "While the decree in a divorce suit as a decree in rem binds the whole world as to the status of the parties, to the extent that their status is the res adjudicata, with that limitation it is subject to the usual rule that estoppels must be mutual and is therefore not conclusive for or against any third person in reference to the facts which it necessarily affirms or denies. * * * As between strangers or between parties and strangers, a decree of divorce does not establish the previous validity of the marriage, since the res involved and adjudicated is the condition of subsequent singleness of the parties and not the valid prior existence of marital relations between them"—citing Oborn v. State, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966; Williams v. Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253. The rule is given substantially the same in Ruling Case Law, vol. 9, pp. 460, 461, as follows: "As to third persons the decree of divorce is conclusive as to the subsequent status of the parties, viz., that from the time of the divorce they are single as to each other (citing Belknap v. Stewart, 38 Neb. 304, 56 N. W. 881, 41 Am. St. Rep. 729; Oborn v. State, supra), but the divorce does not settle the status of their prior relations so as to render them valid or invalid as against the whole world regardless of whether they were so or not"—citing Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180; Williams v. Williams, supra; Oborn v. State, supra. Further on the text reads: "The judgment or decree in divorce or annulment proceedings, aside from establishing as against all the world that from the time of the divorce or annulment the parties are single as regards each other, cannot be invoked by a third person in a subsequent action against one of the spouses as establishing facts which may have been or were adjudicated in the divorce proceedings. Thus, as between the party securing the divorce and a third person, the divorce is not conclusive that a marriage actually existed at the time of the divorce between the parties to the action in which the divorce was granted. Citing Hunter v. Hunter, supra, and Williams v. Williams, supra. * * * So also, where a woman married a man who had a wife living, and then married another man, after which she secured a divorce from the man she first married, she was held not estopped by reason of such divorce from showing that the first marriage was void and that she was a lawful wife under her second marriage so as to be entitled to dower in her second husband's estate"—citing Williams v. Williams, supra. In the Hunter Case the facts show that Mrs. Hunter, after having been previously married and deserted by her husband, married Hunter, and that twenty years or more thereafter she sued for and obtained a divorce from her first husband, named Milam, who had disappeared. Thereupon an action was commenced by Hunter to annul his marriage to Mrs. Hunter, and it was held that neither the complaint Mrs. Hunter filed in her divorce action against Milam, nor the decree of divorce she had obtained therein was conclusive against her as to the existence of a valid marriage with Milam. As to the legal effect of such decree, the court said, in quoting from Burlen v. Shannon, 3 Gray (Mass.) 387, "It did not establish but recognized and presupposed the relation of husband and wife as previously existing," and then added, "It was conclusive against all the world that the plaintiff in that suit was no longer the wife of Joseph Milam and it was an adjudication of nothing else."

The case of Oborn v. State, supra, was to the same effect; it being there held that the divorce action, and the result thereof dissolving any marital relation between the parties, did not, as to the public generally, establish the relation of husband and wife as claimed by the parties in said action; that, so far as the action was in rem, the res was the condition of subsequent singleness as to each other, and not the prior existence of a valid marital relationship. In passing upon the point, the court in the latter case used this language: "* * * The mere treatment of the parties as man and wife in the divorce action, and judicial dissolution of their purported relations, did not make the void marriage valid. It merely established the status of the parties toward each other as judicially separated and absolved from all obligations of a marital nature existing between them." In other words, as said in the Williams Case, there is no more inconsistency in speaking of two persons being divorced from the bonds of matrimony when in law no such bonds ever existed between them, than there is in speaking of such persons being married, when in law there could be no such marriage. The facts of the latter case relating to the marital status of the parties closely resemble those of the present one. There Mrs. Williams married a man named Jones, who at that time had a wife. Subsequently she married Williams, after which she obtained a divorce from Jones. In her divorce complaint against Jones she alleged that they were lawfully married. The decree found the allegations of the complaint to be true, and she was granted a divorce. Later Williams died and Mrs. Williams brought suit to establish and recover her dower interest in the Williams estate. It was held that, notwithstanding the adjudication in the Jones divorce decree that she was the wife of Jones, she was not estopped thereby from establishing that such marriage was in fact void, and that therefore her marriage to Williams was valid.

[4] From the foregoing we conclude that Blumenthal, being a stranger to the divorce action between Guidice and plaintiff, was not estopped by either of the decrees rendered therein from establishing the fact that plaintiff's marriage to Guidice was in fact void; and, having so established such fact by uncontradicted evidence, it follows that plaintiff's marriage to Blumenthal was not bigamous, and that therefore the decree annulling the same upon that ground is not supported by the evidence, and consequently is erroneous. The conclusion we have reached on the foregoing issues makes it unnecessary to consider or determine the other points presented.

Judgment reversed.

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97 Cal. App. 583

McNEAL v. MERCER. (Civ. 5128.)

District Court of Appeal, Second District, Division 2, California. March 15, 1929.

1. Appeal and error ⚷1033(3)—Error in admitting, without foundation, letter tending to sustain defendant's theory in action for legal services, held favorable.

In action against druggist, to recover for legal services, with defense that drug company had volunteered to lend to defendant services of their attorneys to assist defendant in a difficulty with the prohibition department, error in admitting, without foundation, letter written by defendant to drug company, tending to sustain defendant's theory that drug company employed attorney, *held* not prejudicial to defendant, since favorable to defendant, and could not affect attorney's recovery for services, and reasonableness of amount charged was unquestioned.

2. Appeal and error ⚷1033(1)—Party benefited by error cannot complain of it.

Party benefited by error cannot complain of it.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by J. A. McNeal against Edward H. Mercer. Judgment for plaintiff, and defendant appeals. Affirmed.

Scott McReynolds, of Los Angeles, for appellant.

Clarke & Bowker, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. This is an action for legal services rendered by John G. Mott and Albert M. Cross, plaintiff's assignors, to the defendant, Edward H. Mercer. The action was tried before a jury, and a judgment rendered against the defendant for the sum of $500 and costs. The defendant appeals.

The defendant is a druggist in Oxnard, Cal., and in the spring of 1922 became involved with the federal authorities on account of some alleged irregularities in the sale of whisky, and was required to appear before the federal prohibition agent in Los Angeles to show cause why his permit to sell liquor on prescription should not be revoked. He employed Drapeau, Orr & Gardner, Esquires, a firm of attorneys in Ventura, Cal., to help him. The defendant had been buying goods from Brunswig Drug Company, wholesalers, in Los Angeles, and upon one occasion the defendant and his attorney visited the Brunswig Drug Company, and Walter M. Brunswig, of the wholesale firm, made an appointment for the defendant to meet Mr. Mott, attorney for the drug company, whom he thought could be of great assistance in the case. Mr. Mott was consulted, and thereafter co-operated with defendant's Ventura attorneys in the case. Nothing was said regarding a retainer or compensation at the time, and no bill was presented to the defendant by Mott & Cross until December, 1923. The entire matter had been closed in August, 1922, approximately 1½ years before a bill was rendered. A few weeks before the suit was brought the defendant ceased to buy goods from Brunswig Drug Company, and they brought an action against him for breach of contract in so doing.

There were two issues actually contested on the trial, viz.: The value of the services actually rendered by Mott & Cross, and the question as to whether or not the services were rendered at the instance and request of the defendant, or whether the Brunswig Drug Company had volunteered to lend to the defendant the services of their attorneys, Mott & Cross, to assist defendant, their customer, in this difficulty.

In the above we have adopted appellant's statement of fact as our own, without change. The only point upon which a reversal is asked is that a certain letter was admitted over the objection that it was not the best evidence. Without doubt its admission without any foundation was erroneous. The question for us to decide is whether or not the verdict must be reversed because of the error. We think not. The exhibit objected to reads as follows:

"Oxnard Drug Co.

"Oxnard, California, June 29, 1922.

"Mr. W. M. Brunswig c/o Brunswig Co.,
Los Angeles.

"Dear Sir: Am enclosing a copy of a summons from Mr. Rutter prohibition director and same is self explanatory, with the exception that he charges that we have sold liquor without a prescription, which is not a fact as was proven after the reading of the information filed by O'Leary and which we had a hearing on last Friday in the office of the United States attorney. Wish you would get in touch with Mr. Mott at your convenience and see if we can't keep this thing from coming up at all. I know that he is doing all he can, but would like to have you see him in regard to this matter.

"He will explain to you the details of the case as they now stand and I am at a loss to see how they can make a case out of the information that they have.

"Hope you will give this your kind attention and thanking you, I am,

"Yours very truly,

"[Signed] E. H. Mercer."

Mr. Mott testified that he first met Mr. Mercer the latter part of April or first part of May, 1922, after having received a telephone message from Mr. Walter Brunswig, an officer of the Brunswig Drug Company, asking for an appointment, that they (the drug company) had a customer which he desired to introduce, and "he wanted me to take up some matters for him." After that Mr. Brunswig came to the office with Mr. Mercer and his local attorneys. The legal troubles of Mr. Mercer were gone over, and Mr. Mott afterward performed the services sued for. Mr. Brunswig testified in part as follows:

"Q. Did you go to Mr. Mott's office that day with Mr. Mercer or meet him there? A. I did, yes.

"Q. Did you, at Mr. Mott's office, on that day, or at any other time, direct or advise Mr. Mott to go ahead and assist Mr. Mercer at the expense of the Brunswig Drug Company or at your expense? A. I did not. I introduced Mr. Mercer to Mr. Mott with the request that he do for him what he could. * * *

"Q. Did you state to him that he had made a mistake in hiring Drapeau and Gardner? A. I made the statement that it would be a good thing, in addition to Mr. Drapeau and Mr. Gardner, to hire some local attorney who was familiar with the ways of the prohibition unit in Los Angeles—some reputable attorney in Los Angeles in addition to his two local attorneys.

"Q. I will ask you, Mr. Brunswig, if you phoned to Mr. Mott for an appointment for these gentlemen? A. I did.

"Q. For Mr. Mercer? A. At his request."

Before the meeting at Mr. Mott's office, according to Mr. Mercer's testimony, Mr. Brunswig called Mr. Mercer over the telephone at Oxnard, stating that he understood Mercer was in some trouble with the federal government and to come down the next morning, that he wanted to see him. The next morning Mr. Mercer with his local attorneys went to Los Angeles and saw Mr. Brunswig and a Mr. King, also an officer of the drug company. A conversation, of which the following is a part, took place between Mr. Mercer and Mr King:

"Q. Then what occurred? A. (of defendant) He proceeded to inquire why I didn't take this matter up with him, and wanted me to lay my cards on the table; so I told him I didn't see where it was necessary for me to do that, that I had employed Mr. Drapeau and Mr. Gardner as my attorneys and he made the statement that he could—or that I shouldn't have done that, that they had competent attorneys here to see to the courts and they could let me use their attorneys; and then he went on with regular questions in regard to what happened and what took place, and in about half an hour Mr. Brunswig—Drapeau and Gardner came over there and Walter Brunswig suggested that he call up Mr. Mott, his attorney, whom I did not know at that time, and said he had made an appointment with him for five o'clock that afternoon, that he was not in that morning; so at five o'clock on that same day we met in Mott's office—Drapeau, Gardner, Walter Brunswig and Mr. Mott."

[1, 2] Mr. Mercer testified to the meeting at Mott's office about the same as above quoted, and states that he did not request Mr. Mott to represent him. Mr. Brunswig went to Ventura and testified as a witness for the plaintiff.

The case is absolutely devoid of any testimony to the effect that the conversation by and between Mr. Mercer and the officers of the drug company was ever communicated to Mr. Mott. Certainly Mr. Mott could not be bound by any arrangement of the drug company to have Mr. Mercer represented by Mott at their expense. There is no testimony tending to prove that Mr. Mott knew anything about the letter introduced, and it is difficult to see how it could affect Mr. Mott's recovery for services performed, even if it be admitted as genuine. It will be noticed that the letter was written about a month after the services began. Defendant defends principally upon the ground that he did not employ Mr. Mott, but that the drug company did. If the letter had any effect upon the jury, it seems to us it must have been along the line contended for by the defendant, for here (accepting the letter as genuine) we find the defendant, long after the employment began, not writing directly to his attorney when a new phase of the trouble arose, but writing to the drug company to see Mr. Mott about this, too. We cannot agree with defendant when he argues in his brief that this letter tends to prove the direct employment of Mott by Mercer. We think, if it is evidence affecting the employment at all, it tends to sustain defendant's theory that the drug company employed Mott. It is elementary that a party benefited by error cannot complain of it.

The firm which assigned to the plaintiff performed the services. There is no question raised here as to the reasonableness of the amount charged and found by the jury to be due. The statute had not run against the charge. There is no evidence in the case to the effect that it is a custom of wholesalers to furnish free counsel to their customers, and it does not seem that the testimony would warrant the conclusion that any one on behalf of the drug company ever intimated to Mr. Mott that the company would pay for the services performed for and on behalf of Mercer. If the drug company had been made a party, all of these conversations outside the hearing of Mr. Mott and uncommunicated to him and the letter complained of would have been very material evidence to the effect that the drug company had become obligated to Mr. Mercer either to pay Mr. Mott or to make good to Mr. Mercer any fee he was obligated to pay Mott. But no such question is presented in this case.

When mentioning Mr. Mott by name herein, we include his firm and assignee where such inclusion would be appropriate.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

97 Cal. App. 426

BROWN et al. v. DE CARLO. (Civ. 6463.)★

District Court of Appeal, First District, Division 2, California. March 8, 1929.

Rehearing Denied April 5, 1929. Hearing Denied by Supreme Court May 6, 1929.

1. Brokers ⚷44—Written authorization to brokers held revocable, where there was no time limit or consideration.

Written authorization to brokers to list and sell property in return for commission, with understanding that contract should not be exclusive for 30 days, *held* revocable, since there was no time limit or consideration.

2. Brokers ⚷44—Brokers held not entitled to commissions by virtue of receipt containing purchaser's name signed without written authority, where principal repudiated transaction before legal ratification by purchaser (Civ. Code, § 2309).

Brokers with whom principal listed property for sale *held* not entitled to commission by virtue of receipt acknowledging payment of deposit and containing name of purchaser signed by agent without written authorization from purchaser, where principal repudiated entire transaction before any legal ratification by purchaser claimed to result from assignment of his interest in writing, since purported agreement of sale, though indorsed by principal, was invalid on account of agent's want of authority in writing to sign purchaser's name, as required by Civ. Code, § 2309.

3. Brokers ⚷44—If principal's approval of sale after revocation of brokers' authority constituted renewed offer, such offer was withdrawn by principal's repudiation.

If principal's written approval of sale made by brokers after revocation of brokers' authority constituted renewed offer to sell, offer was withdrawn when principal repudiated entire transaction.

4. Brokers ⚷44—Brokers, notified of termination of agency, acquired no right to commissions by tender made by purchaser's assignee, where there was no valid contract for sale.

Tender to principal by assignee of purchaser was of no avail to give brokers right to commissions, where, at the time of the tender, there was no contract for sale in existence and no agency, on account of principal's repudiation and notification of brokers of termination of their agency before legal contract had been entered into and before purchaser's written assignment of his interest.

5. Brokers ⚷58—Principal's indorsement of contract held not to preclude him from attacking validity thereof as against brokers on ground purchaser's name was signed without written authority (Civ. Code, § 2309).

In brokers' action for commissions, principal *held* not precluded from questioning genuineness of contract for sale on ground that no authority was given agent in writing to sign purchaser's name, as required by Civ. Code, § 2309, by reason of the fact that principal indorsed his approval on document.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

On rehearing. Judgment affirmed, and former opinion superseded.

For former opinion, see 274 P. 374.

R. H. Countryman, of San Francisco, for appellants.

C. Leonard Rosenberg, of Oakland, for respondent.

KOFORD, P. J. Plaintiffs sought by this action to obtain a judgment of $450 as real estate broker's commission. Judgment was in favor of defendant. The respondent pleaded in his answer among other affirmative defenses that the sale alleged to have been made by appellant was a "wash sale," but the trial court omitted making separate findings upon these affirmative allegations. It found that respondent had not signified his approval of the said alleged sale in writing as alleged in the complaint; that the appellants did not consummate a sale of the property; did not perform the contract by which the property was listed with them; did not produce a purchaser; and did not obtain a valid and binding contract from their alleged purchaser. Appellants argue several points of law in their briefs, but their attack upon the judgment is in reality a claim that the evidence is insufficient to support the court's findings.

[1] Our examination of the evidence convinces us that the court's findings are sufficiently supported by the evidence. Respondent in writing authorized appellants to list and sell certain property, and agreed to pay a commission should appellants "succeed in selling it." The authorization concluded with the following: "I understand that this is not an exclusive contract for thirty days." It was dated September 6, 1926. The authorization was not of the kind that could not be revoked. It had neither time limit nor consideration. After the lapse of about two weeks or more, the respondent notified appellants that at 6 o'clock p. m. of September 25,

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★Rehearing denied. Hearing denied by Supreme Court.

the authorization to sell upon the terms therein detailed would expire. Thereafter, and at 8 o'clock p. m. on the said 25th day of September, the appellants came to the respondent, and told him that they had succeeded in selling the property. Respondent accepted their statement, and indorsed his approval upon a document presented to him by appellants, and which purported to be an agreement of purchase signed by the alleged purchaser. This document consisted of a receipt signed by appellants acknowledging the receipt of $50 from J. C. James as a deposit and part payment upon the purchase of respondent's property which he had listed with appellants. Below this receipt was the indorsement: "I hereby agree to purchase the above described property * * * on the terms * * * specified. * * * In the event of my failure to comply with the terms of this contract the agent may retain the said deposit and all my rights hereunder shall terminate." To this document the name of the alleged purchaser, J. C. James, had been written by N. C. Hart. The said Hart had no written authorization to sign James' name to the document, although James testified at the trial that he had authorized Hart to put up the deposit for him, and told him over the telephone to go ahead and buy it. Hart was a real estate salesman in another office. James appears from the testimony to have been a client of Hart's real estate office. Three days thereafter respondent, in pursuance of a previous verbal promise, agreed in writing to pay 10 per cent. commission instead of 5 per cent. Finally respondent repudiated the entire transaction. A week or more after this James assigned whatever interest he had to a man named Ulrich, and a tender of a prepared deed from respondent to said Ulrich was made, but respondent refused to consummate a sale to said Ulrich.

[2-4] The foregoing evidence is sufficient to warrant the conclusion that the appellants had not performed the broker's contract within the time given them. The name of James signed by Hart upon the purported agreement of sale did not make a valid and enforceable agreement or offer by James to buy the property because Hart was not authorized in writing to sign James' name. Civ. Code, § 2309. Because it was not a valid agreement or offer of James to buy the property, respondents' written approval of the said purported sale did not make a contract of sale and purchase. Respondents' said act was nothing more than a waiver of the fact that the purported agreement to buy was procured two hours late. If it should be considered as a renewed offer on the part of respondent to sell, then this renewed offer was withdrawn when, as stated above, respondent repudiated the entire transaction. If it should be conceded that, when James assigned his interest to Ulrich, he thereby legally ratified the signing of his name by Hart, such ratification came too late, because that was a week after respondent had repudiated the entire transaction and thereby withdrew his renewed offer, if indeed, it can be considered that any such renewed offer was made. Of course, it follows that Ulrich's ultimate tender was of no avail. There was at that time no contract in existence by which he had any right to buy the property, and there was no agency then outstanding by which appellants could earn a commission by producing a purchaser at that late date. The time had expired when appellants were notified by respondent that their agency had ceased. That was before the assignment to Ulrich was made by James, and, of course, before Ulrich made his tender.

[5] It is also claimed that respondent is precluded from questioning the genuineness of the alleged purchaser and of the claimed contract of sale by reason of the fact that he indorsed his approval upon the document to which the name of James was thus signed. It is stated that, after the seller enters into a valid contract of sale with the purchaser procured by the real estate broker, the latter's commission is not thereafter dependent upon the performance of said contract by the purchaser. The trial court, however, expessly found untrue the allegation that respondent ratified and approved the alleged sale. This finding is well supported by the evidence, which, as we have pointed out, shows that no contract of sale and purchase was ever entered into between seller and buyer, and no valid offer was obtained from James.

It is ordered that the judgment appealed from be, and the same is hereby, affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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97 Cal. App. 499

LAWSON v. ANDERSON. (Civ. 6710.)

District Court of Appeal, First District, Division 1, California. March 12, 1929.

1. Frauds, statute of ⇨18(4)—Oral promise by buyer of interest in business to pay seller's indebtedness for money borrowed and put into business held not within statute of frauds (Civ. Code, §§ 1624, subd. 2, 2794).

Where partner borrowed money secured by mortgage on home and put it into business and subsequently sold his interest in business, part of consideration being that buyer should assume such indebtedness, agreement, though oral, was not within Statute of Frauds (Civ. Code, § 1624, subd. 2), as promise to pay debt of another, since promise was made to debtor and was made on consideration beneficial to promisor within section 2794.

2. Appeal and error ⚿1011(1)—Under conflicting evidence, trial court's decision is conclusive where there is evidence to support it.

Where evidence is in substantial conflict and there is evidence to support trial court's action, reviewing court will not reweigh it.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Norman A. Lawson against W. A. H. Anderson. Judgment for plaintiff, and defendant appeals. Affirmed.

Hooper & Miller, of Los Angeles, for appellant.

Peyton H. Moore and Charles W. Hackler, both of Los Angeles, for respondent.

DOOLING, Justice pro tem. [1] Appeal by defendant from a money judgment in favor of plaintiff. The parties had been engaged as partners in the retail drug business. While so engaged, respondent, Lawson, borrowed $2,000 secured by a mortgage on his home, which he put into the business. On November 24, 1924, the partnership was dissolved, and respondent sold and transferred his interest in the business to appellant. Respondent claimed, and the court found, that as a part of the consideration for the sale of the business to him appellant agreed with respondent that appellant would assume and pay this $2,000 indebtedness. The agreement of the parties was oral, and appellant's first contention is that the agreement to pay this indebtedness is a promise "to answer for the debt, default or miscarriage of another" and hence within the Statute of Frauds (Civ. Code, § 1624, subd. 2). Appellant's contention must fail for two reasons: First, the promise was made to the debtor and not to the creditor and a promise to the debtor to pay his debt is not within the statute. 27 C. J. p. 140, § 27; Sierra Paper Co. v. Mesmer, 45 Cal. App. 667, 188 P. 605. Second, section 2794 of the Civil Code provides that:

"A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: * * *

"3. Where the promise, being for an antecedent obligation of another, is made * * * upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person."

The promise of appellant was made to respondent upon a consideration beneficial to appellant moving from respondent; i. e., the transfer by respondent to appellant of his interest in their partnership business, and falls clearly within the above provision of section 2794. Meyer v. Parsons, 129 Cal. 653, 62 P. 216; Stover v. Stevens, 21 Cal. App. 261, 131 P. 332.

[2] Appellant further contends that the evidence does not support the finding that this particular promise was made, and that under the evidence he was entitled to a credit for $1,000 put into the business by his father. On both questions the evidence was in substantial conflict, and, there being evidence to support the trial court's action, on familiar principles this court will not reweigh it.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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97 Cal. App. 597

METCALF et al. v. HILL. (Civ. 3657.)

District Court of Appeal, Third District, California. March 16, 1929.

1. Appeal and error ⚿931(1)—Appellate court will assume that oral agreement did not exist in accordance with finding on conflicting evidence.

Where trial court, on conflicting evidence relative to existence of alleged oral agreement, resolved the issue against defendant, alleging agreement, appellate court will assume that oral agreement did not occur.

2. Trial ⚿397(6)—Findings enumerating terms of written agreement for sale of property necessarily inferred alleged oral modifications were not agreed on.

Findings enumerating terms of written agreement for sale of real property, adding that sale was authorized to be negotiated on terms and conditions as aforesaid, necessarily inferred alleged oral modifications regarding restriction were not agreed on.

3. Trial ⚿404(1)—Findings should be construed to uphold judgment.

Findings should receive a construction which will uphold, rather than defeat, a judgment.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by H. F. Metcalf and another, copartners doing business under the firm name and style of Metcalf & Ryan, against J. A. Hill. Judgment for plaintiffs, and defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondents.

THOMPSON, J. This is an appeal from a judgment for broker's commission for procuring a purchaser for real property who was ready, willing, and able to buy it upon the terms specified.

December 13, 1924, the appellant signed a written contract with respondents agreeing to pay $2,000 commissions for the sale of a Los Angeles lot upon terms which were specifically enumerated. Within the five days' limitation of time the respondents procured a purchaser who was ready, willing, and able to purchase the property upon the written terms prescribed. The appellant, however, refused to consummate the sale, insisting that it was orally agreed the conveyance was to include a restrictive clause prohibiting the use of the property for public garage purposes. The written contract of employment contained no such restriction.

The appellant pleaded, and, over the objection of the respondents, offered evidence in support of his claim, that: "The written memorandum [contract] did not contain the clause agreed to between the plaintiffs and defendant to the effect that the title to be conveyed by the defendant should be subject to a condition subsequent prohibiting the use of the property which was the subject of contract, as a public garage, * * *" for the reason that said restriction was willfully omitted by the plaintiffs. No fraud, mistake, or ambiguity was pleaded or proved, such as would authorize the admission of oral evidence to vary the terms of the written contract, pursuant to section 1856 of the Code of Civil Procedure.

All that the appellant contends is that, upon the execution of this written agreement, he insisted that it should contain the restriction mentioned, but that the respondents avoided the effort to include it, saying: "There was not space enough [in the document] to insert the same." Appellant asserts that the respondents agreed to be bound by the restriction to the same extent as though it were inserted in the contract, and that, relying upon this verbal promise, he signed the agreement. He assigns as error the omission on the part of the trial court to specifically find upon this issue respecting the alleged restriction.

Much of the record of the trial is devoted to this issue, upon which there was an absolute conflict. Respecting the execution of this contract, the witness Shaughnessy, who, as respondents' salesman, procured the execution of the instrument, testified: "* * * I took this paper to Mr. Hill and explained * * * that I was satisfied they [the prospective purchasers] would buy if he would give us a listing definite in writing. So I said, 'With that in mind, while I was waiting for you over at your other garage, I wrote this authority out, and, if that is all right, will you sign it for us, and I will take it back to Mr. Tanner?' He says, 'Let me see it.' He sat back and read it carefully. He said, 'That is all right; I will sign that.' He turned to his desk and signed it and handed it back to me. Q. (by Mr. Schwartz, attorney for respondents): At the time you were in Mr. Hill's office on the day he signed Exhibit No. 2? Well, I think he * * * denied that anything was said about a reservation. Mr. Dunnigan (attorney for appellant): Yes, he said he never heard of it until after it was signed."

Upon this state of the record the court found that the written contract of employment was executed by the appellant, specifically enumerating all of its terms, but omitting any reference to the alleged restriction. The finding included the following language: "* * * The defendant * * * authorized the plaintiffs in writing * * * to sell said real property * * * and agreed in writing to pay plaintiffs the sum of $2,000 * * * for negotiating the sale of said real property *upon the terms and conditions as aforesaid.*"

[1] Even though the allegations of the answer were sufficient upon which to authorize the introduction of evidence varying the terms of the written instrument, the appellant may not complain for there was no ruling of the court sustaining the objections to the testimony and it was not excluded. Moreover, the evidence was conflicting as to the existence of the alleged agreement to be bound by the restriction contended for by the appellant, and the issue was resolved against him. On appeal, this court will therefore assume that the oral agreement did not occur.

[2] Nor can it be said that the court failed to adopt findings upon this subject. Having specifically adopted findings which enumerated the terms of the written agreement, and adding that the sale was authorized to be negotiated "upon the terms and conditions as aforesaid," necessarily infers that the alleged oral modifications regarding the contended garage restriction was not agreed upon. Phillips v. Stark, 65 Cal. App. 136, 140, 223 P. 443; Tower v. Wilson, 45 Cal. App. 123, 134, 188 P. 87. In 24 Cal. Jur. 976, § 208, it is said: "If a full finding is made upon an issue, it is not necessary expressly to negative issues which are contradictory thereto, for such a finding is an implied negation of all facts to the contrary, which are not found."

[3] Findings should receive a construction which will uphold, rather than defeat, a judgment. Ensele v. Jolley, 188 Cal. 297, 303, 204 P. 1085.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

97 Cal. App. 603

GAZAVE v. GAZAVE. (Civ. 6705.)

District Court of Appeal, First District, Division 1, California. March 18, 1929.

1. Divorce 🔑253, 254—In divorce action, findings and decree, with reference to property of parties, held sufficient.

In divorce action, where findings gave legal description of residence of parties, which was also the case in interlocutory decree which awarded such property to wife, and findings regarding other property did not specifically describe property, but it was so described in decree awarding it to husband, findings and decree were sufficient.

2. Husband and wife 🔑266—Agreement, whereby wife released husband from all claims of every nature, and particularly claims for alimony, costs, and attorneys' fees, was not relinquishment of wife's interest in community property.

Agreement, whereby wife released husband from all claim that she had upon him of every nature, and particularly all claims she had upon him for alimony, support, maintenance, costs, attorneys' fees, or other claims of whatsoever nature arising out of marital relation, was not a relinquishment of wife's interest in community property, but only of claims for alimony, costs, and attorneys' fees.

3. Divorce 🔑253—Evidence showed that husband and wife upon reconciliation agreed to abrogate agreement, whereby wife released claims against husband for alimony, etc.

Evidence *held* to show that husband and wife, upon their reconciliation, intended and agreed to abrogate agreement, whereby wife released claims against husband for alimony, costs, and attorneys' fees.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action for divorce by Belle Gazave against Julian Gazave. From an interlocutory judgment or decree, defendant appeals. Affirmed.

W. P. Butcher, Jr., of Santa Barbara, for appellant.

Victor J. Miller, of Ventura, for respondent.

PER CURIAM. An appeal by the defendant from an interlocutory judgment or decree entered in an action for divorce on the ground of extreme cruelty.

The court made a division of certain real and personal property which it found to be the community property of the spouses. Defendant contends that the findings and decree do not conform to the issues; that the findings are uncertain and do not support the decree; that the property set aside to the plaintiff was not community property, and that the award to her was an abuse of discretion.

[1] The complaint alleged that the community property "consisted of their home in Santa Barbara, lots in Redwood City," with money in bank, stocks in oil companies, bonds, and an automobile, the value of which was unknown to the plaintiff. No exception to the pleading on the ground of uncertainty was taken by demurrer or otherwise, and the defendant by his answer denied "that the home of plaintiff and defendant in Santa Barbara * * * or the lots in Redwood City" were community property, but, on the contrary, were his own separate property.

The evidence clearly identifies the Santa Barbara property as being the residence of the parties, and in the findings its legal description is given, which was also the case in the interlocutory decree, and this property, with certain household furniture, was awarded to the plaintiff. In the findings the Redwood City property was not specifically described; it was, however, so described in the decree, and awarded to the defendant. We find no merit in defendant's objections to the sufficiency of the findings or the decree.

[2, 3] Defendant bases his contention, that the property awarded to his wife was not community property, upon the following agreement executed and acknowledged by her:

"For and in consideration of the sum of five hundred dollars ($500.00) to me in hand paid, the receipt whereof is hereby acknowledged by my husband, Julian Gazave, I hereby release my said husband, Julian Gazave, from all claim that I may have upon him of every nature, and particularly of all claims I may have upon him as my husband for alimony, support, maintenance, costs, attorneys' fees, or other claim of whatsoever nature arising out of the marital relation. And I hereby release unto him and his heirs all claim that I now have or may have in the future upon his estate, and agree in the event of his death to make no claim upon his estate by reason of my being his wife. And I hereby release him from all claims to arise in the future in the nature of support, maintenance, costs or attorneys' fees or any other claims arising out of the marital relation.

"Dated at Ventura, California, this 14th day of October, 1916. [signed] Belle Gazave."

It appears from the testimony that some time before the date of the agreement the parties separated and each instituted a proceeding for divorce against the other. It was then that the agreement was made, but they were subsequently reconciled, resumed marital relations, and, according to the testimony of the plaintiff, her husband assured her that the agreement had been destroyed. They continued to live together until July 14, 1925, and the property awarded to the plaintiff in the present proceeding was acquired in 1921. The agreement was not in terms a relinquishment of her interest in the community property, but only of claims for alimony, costs, and attorneys' fees, nor should it be given that construction. Moreover, it is clear from the testimony that the parties upon their reconciliation intended and agreed to abrogate it.

The evidence discloses no ground for the contention that the trial court abused its discretion by awarding the home and furnishings to the plaintiff, and the judgment is accordingly affirmed.

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97 Cal. App. 532

WEISENBERG v. HIRSCHHORN et ux.*
(Civ. 6711.)

District Court of Appeal. First District, Division 1, California. March 13, 1929.

Rehearing Denied April 12, 1929.

1. Vendor and purchaser ⚿334(1)—Vendee, tendering to vendor deed to property purchased, and asking refund of purchase price, as contract provided for, could recover as in debt full amount agreed to be paid.

Where contract of purchase for one-third interest in parcel of land contained provision giving vendee option or privilege to have, upon 30 days' notice, within year from date, purchase price refunded to him by vendors, together with interest at rate of 7 per cent. per annum upon surrendering and reconveying to vendors the interest sold within time provided, and vendee gave notice, as provided for by contract, and tendered deed, he was entitled to recover as in debt full amount agreed to be paid.

2. Vendor and purchaser ⚿301—Vendor under executory contract may tender deed and sue for full purchase price.

The vendor, under an executory contract, is entitled to tender a deed and sue for the full purchase price of property sold.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Samuel Weisenberg against Max Hirschhorn and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Duke Stone and R. C. Campbell, both of Los Angeles, for appellants.

Harry Sherr, of Los Angeles, for respondent.

DOOLING, Justice pro tem. On March 10, 1925, plaintiff and respondent Weisenberg bought from defendants and appellants for $3,200 a one-third interest in a parcel of land. The contract of purchase contained a provision giving respondent "the option or privilege to have upon thirty days' notice, within one year from the date hereof, the said sum of $3,200 refunded to him by the parties of the first part (i. e., appellants), together with interest at the rate of 7 per cent. per annum to date of such refund upon surrendering and reconveying to the parties of the first part the one-third interest in the said property thus held by him."

[1, 2] Within the time provided respondent gave appellants notice that he wished his money refunded, and tendered them a deed of his one-third interest in the property. Appellants refused to refund the money, and respondent brought this action for $3,200, with interest at 7 per cent. as provided in the contract, and renewed the tender of the deed. Judgment followed for plaintiff as prayed, and defendants took this appeal. Appellants claim that respondent's only remedy was for damages for the difference between the market value of the land and the amount agreed to be refunded, citing Dean v. Hawes, 21 Cal. App. 350, 131 P. 885, and the same case on a second appeal, 29 Cal. App. 689, 157 P. 558. It is true that in the cited case the court held that that was the proper measure of damages. But in that case the tender of the deed was not renewed, and the court pointed out that under those circumstances the plaintiff could not keep the land and recover the full amount of the purchase price in addition. But where, as here, the vendee tenders a deed, he can recover as in debt the full amount agreed to be paid. Needles v. Coffee, 27 Cal. App. 532, 150 P. 791; Van Denmark v. California Home Assn., 43 Cal. App. 685, 185 P. 866. The rule could hardly be otherwise, since the vendee in such a case is in no different position than a vendor under an executory contract would be, and the rule is well settled that the vendor is entitled to tender a deed and sue for the full purchase price. North Stockton, etc., Co. v. Fischer, 138 Cal. 100, 70 P. 1082, 71 P. 438; Amaranth Land Co. v. Corey, 182 Cal. 66, 186 P. 765; Burg Bros. v. Bercut, 73 Cal. App. 114, 238 P. 166.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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97 Cal. App. 693

SMITH et al. v. POHLMAN. (Civ. 6207.)

District Court of Appeal, Second District, Division 1, California. March 20, 1929.

Account ⚿20(3)—In accounting parties held entitled to equal division of land with accounting as to personalty, judgment lien against lands offsetting inequalities.

In action by sons against mother for accounting as to property placed in mother's hands in trust, each party *held* entitled to undivided third interest in land, and parties were entitled to accounting as to remaining assets, notwithstanding finding as to unequal distribution of some funds previously, but, on ascertaining several amounts due, that party to whom specified amount is due from either or each of the others shall be entitled to judgment lien as against undivided one-third interest in land of party from whom such amount is owing.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

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*Rehearing denied.

Action for accounting by Ernest B. Smith and others against Elizabeth A. Pohlman, née Elizabeth A. Smith. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

Lucien Gray, of Los Angeles, for appellant.

Henry O. Wackerbarth, of Los Angeles, for respondents.

HOUSER, Acting P. J. Briefly, the record discloses that the plaintiffs are the sons of defendant; that certain funds having come into the hands of all the parties, in which each was equally pecuniarily interested, the entire amount was placed in the hands of the mother in trust; thereafter, following various successful business transactions therewith, a portion of the funds was invested in land, the title thereof being held in the name of the mother, and the remainder of the funds was distributed *unequally* among the parties. Unhappy differences having arisen as between the sons on the one side and the mother on the other, an action was commenced by the sons against the mother, which resulted in a judgment to the effect that as to an undivided two-thirds of the land the mother held the title thereto in trust for the sons—so that each of the parties was entitled to an undivided one-third interest in the land. As to the remaining assets of the trust, consisting of personalty, a reference for an accounting was ordered to the end that "when the amounts due to each of the parties are determined by such referee, the parties hereto shall be entitled to a judgment for the amounts due to them respectively."

Appellant seeks a reversal of the judgment on the ground that, since from the findings made by the trial court it appears that an unequal distribution of the personalty of the trust was had among the parties, it necessarily follows that as to the land each of the parties could not be entitled to an undivided one-third thereof. Respondents contend that, if at the time the land was purchased each of the parties was equitably entitled to an undivided one-third therein, subsequent dealings among the parties with the remainder of the assets of the trust, by which one or more of the parties became equitably indebted to the third party, would not have the effect of altering the quantum of estate held by each of the parties in the land. From the findings made by the trial court it appears that each of the sons is largely indebted to the mother; and in that connection, appellant urges the point that a money judgment in favor of the mother against either or each of the sons would not be a proper determination of the matter or afford adequate protection to the mother.

Neither argument nor authority is necessary as preliminary to a conclusion that if the entire estate be considered a trust, the question of in whom the title to the land resided is of no great importance. In the light of the facts, it is manifest that as to the entire trust the only equitable distribution possible is to permit the decree of the trial court to remain intact, but with the additional proviso that on ascertaining the several amounts due to or from either of the parties to the action, that party to whom a specified amount is due from either or each of the others shall be entitled to a judgment lien as against the undivided one-third interest in the land of the party from whom such amount is owing.

Modified as herein suggested, the judgment is affirmed.

We concur: YORK, J.; CRAIL, Justice pro tem.

97 Cal. App. 643

MATTESON v. BANK OF ITALY.★
(Civ. 6593.)

District Court of Appeal, First District, Division 2, California. March 18, 1929.

Rehearing Denied April 18, 1929. Hearing Denied by Supreme Court May 16, 1929.

1. Appeal and error ⇒211—Plaintiff, not objecting to trial court's consideration of grounds for nonsuit not included in motion, cannot object on appeal.

Plaintiff, not objecting to trial court's consideration of grounds argued for nonsuit not included in original motion, cannot so object on appeal for first time.

2. Estoppel ⇒90(1)—One discovering another acting in error must exercise reasonable diligence in giving notice, if he intends to hold erring party responsible (Civ. Code, § 3516).

It is legal duty of one who discovers another acting in error to exercise reasonable diligence in giving notice of error, if he intends to hold erring party responsible for it, since acquiescence in error takes away right of objecting to it, under Civ. Code, § 3516.

3. Banks and banking ⇒151—Depositor whose passbook is written up and returned must report to bank without unreasonable delay any errors discovered.

Depositor whose passbook is written up and returned to it by bank is bound to report to bank without unreasonable delay any errors which might have been discovered.

4. Estoppel ⇒90(1)—One conceiving and persisting for unreasonable time in intention not to enforce responsibility for error cannot change intention to erring party's injury (Civ. Code, § 3512).

One who conceives and persists for an unreasonable length of time an intention not to enforce responsibility for an error should not be permitted to change intention to injury of erring party, under Civ. Code, § 3512.

★Rehearing denied. Hearing denied by Supreme Court.

5. Trial 🔑139(1)—To justify submission of question to jury, proof must raise more than mere conjecture that fact is as alleged.

In order to justify submission of any question of fact to jury, proof must be sufficient to raise more than a mere conjecture or surmise that fact is as alleged, and must be such that rational, well-constructed mind can reasonably draw from it conclusion that fact exists.

6. Banks and banking 🔑90—Wife knowingly permitting bank, erroneously paying her money to husband, to rest for three years in belief payment was properly made to bank's injury, held barred by laches from recovering money.

Where bank erroneously paid proceeds of wife's stock to husband and wife knowingly permitted it to rest for three years in belief that payment was properly made or was not objected to by her, during which time bank made no effort to recover money from husband, and lost right to recover money from husband, wife was barred by laches from recovering money from bank.

7. Pleading 🔑427—Where action was tried, argued, and submitted without objection, on theory defense of plaintiff's laches was available, it was unnecessary to plead laches.

Where plaintiff was sole witness in action, and action was tried, argued, and submitted without objection by plaintiff, on theory that defense of plaintiff's laches was available to defendant, it was unnecessary to plead laches.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action to recover money received for plaintiff's account by Luella Matteson against the Bank of Italy. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Fred A. Watkins, of Long Beach, and James A. Ballentine, of San Francisco, for appellant.

Louis Ferrari and J. J. Posner, both of San Francisco, for respondent.

NORTON, Justice pro tem. In this case plaintiff, a married woman, took certain stock of the Security Fire Insurance Company of Davenport, Iowa, her separate property, to defendant bank and handed it to a clerk at the bank to have it sent to Davenport to collect the money for the purchase price of the stock. She indorsed the stock and signed a sight draft which was presented to her by the clerk and instructed the clerk to deposit the money for her in the bank when it was received. Her husband was in the bank at the time talking with its manager, but was not near enough to participate in or hear the conversation with the clerk.

Plaintiff and her husband had a joint account in the savings department of the bank, which is the only account either of them had with the bank prior to the receipt of this money, but apparently the purchase price of the stock was not deposited in this account nor to the credit of the wife, but was by the bank paid to her husband or deposited to his account, from which he withdrew it to make other investments.

The bank did not notify plaintiff of the receipt of the money for the stock nor that it had been paid to her husband, but her husband advised her shortly after its receipt by the bank that it had been so received, and about three months after its receipt by the bank told her that he had taken the money and used it to make other investments.

Plaintiff made no complaint to the bank nor inquired of it regarding this money for approximately three years after she knew that her husband had received it, though on several occasions during this time she drove to the bank with her husband and remained outside in an automobile while he went into the bank to transact business.

In March, 1926, relations between plaintiff and her husband not being very cordial, and plaintiff having found a bank book of their joint account among his possessions, she went over to the bank to see whether there was anything in this account. She did not go for the purpose of inquiring concerning the purchase price of her stock, and testified that it was only by chance that this subject was mentioned on that visit and came to be discussed for the first time between her and the bank. A short time later, in that month, her husband left her, and still later in the year 1926, this action was commenced to recover from the bank the money collected by it in January, 1923, and paid to her husband.

This cause was tried before a jury, and at the conclusion of plaintiff's case a motion for judgment of nonsuit was granted by the trial court, from which judgment plaintiff prosecutes this appeal.

The motion for nonsuit was based on two grounds: (1) That the plaintiff's testimony was too vague and insufficient to prove the allegations of the complaint. (2) That the transaction as testified to was barred by the statute of limitations.

In the argument on the motion, defendant's counsel presented and extensively argued other grounds not included in the orginal motion, including the ground of plaintiff's laches and acquiescence in the payment by the bank to her husband.

[1] Appellant makes the point that no ground not stated in the motion should have been considered by the court, but we believe this objection to be untenable. The remaining grounds for nonsuit urged by respondent were fully argued by counsel for both parties, were manifestly understood both by them and the trial judge to be before the court, and, as plaintiff did not then object to their consideration by the trial judge, she cannot now be heard to so object for the first time. Le-

ballister v. Morris, 59 Cal. App. 699, 211 P. 851.

[2] Plaintiff testified that she objected to her husband taking her money, and voiced these objections to him without receiving any satisfactory explanation from him, that she had arguments with him about putting the money back in the bank, and that during the last few months they lived together their relations were not harmonious, by reason of his not putting it back.

Thus, she had the matter of the bank's error in mind from March, 1923, to March, 1926, but although she had ample opportunity to do so, she made no mention of it to the bank. It follows, therefore, that, unless she planned to await the result of her husband's investments, enjoying the fruits if successful and recouping from the bank if unfortunate, she must have formed the purpose of acquiescing in the erroneous payment made to her husband and have persisted in this purpose up to the time in March, 1926, when, as she testified, the matter was by chance discussed by herself and an official of the bank.

No adjudicated case presenting identical facts has been brought to our attention, but it seems clear that there is a legal as well as a moral duty imposed on one who discovers another acting in error to exercise reasonable diligence in giving notice of the error if he intends to hold the erring party responsible for it.

Acquiescence in error takes away the right of objecting to it. Section 3516, Civ. Code. He who takes the benefit should bear the burden. Sec. 3521, Civ. Code.

In Dana v. National Bank of Republic, 132 Mass. 156, the court said that the plaintiffs, who were the depositors, whose clerk had altered a check after it had been signed, owed to the bank "the duty of exercising due diligence to give it information that the payment was unauthorized. They cannot now require the defendant to correct the mistake to its injury, from which it might have protected itself but for the negligence of the plaintiffs."

[3] It is well established that a depositor, whose passbook is written up and returned to it by a bank, is bound to report to the bank without unreasonable delay any errors which may have been discovered. California Vegetable Union v. Crocker Nat. Bank, 37 Cal. App. 743, 174 P. 920; Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 P. 704, 41 L. R. A. (N. S.) 529; Janin v. London & San Francisco Bank, 92 Cal. 14, 27 P. 1100; Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 S. Ct. 657, 29 L. Ed. 811.

It is true that these cases proceed to some extent on the theory that a balanced passbook returned to the depositor is akin to a stated account which the usages of business require to be examined and objected to if erroneous, but the fundamental principle supporting them is the rule that the depositor who negligently or intentionally to the injury of the bank for an unreasonable period leaves it in ignorance of its error or of a fraud committed upon it, cannot charge the bank with the loss thus sustained.

[4] On the other hand, one who conceives and persists for an unreasonable length of time in the intention not to enforce responsibility for an error should not be permitted to change his intention to the injury of the erring party. "One must not change his purpose to the injury of another." Section 3512, Civ. Code.

[5-7] In this case, the bank is not charged with fraud nor with intentional conversion of the money of plaintiff. It erroneously paid the money to her husband, and plaintiff knowingly permitted it to rest for three years in the belief that the payment was properly made or was not objected to by her, during which time it therefore made no effort to recover the money from him and at the expiration of which time, if any penal offense had been committed by him, the statute of limitations apparently barred his prosecution.

The first intimation received by the bank of any objection on the part of plaintiff was but a few days before her husband left her and went to Los Angeles. It cannot be doubted that the right to recover this money from the husband during the three years when he was readily available, was doing business with the bank and had recently received the money, was a valuable right to the bank of which it had in practical effect been deprived by plaintiff's failure to notify it of her objection within a reasonable time after her discovery of the erroneous payment.

"Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was thereby prevented from taking steps by the arrest of the criminal, or by an attachment of his property, or other form of proceeding to compel restitution." Leather Manufacturers' Bank v. Morgan, supra.

The question whether injury resulted from the negligence or laches of plaintiff is one for determination upon the facts of each particular case, and has generally, but not always, been submitted to the jury. In some cases, of which Janin v. London & San Francisco Bank, supra, is an example, the facts were such that the court held as a matter of law that injury could not have resulted and that this question was properly not presented to the jury. In sustaining the action of the trial judge in the last-mentioned case, the court said: "In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury."

In the present case, the injury to the bank occasioned by plaintiff's delay is so obvious that we believe no other inference could have been drawn, and that the jury would not have been warranted in finding that the defendant was not prejudiced by the conduct of plaintiff.

Her lack of reasonable diligence in notifying the bank of its error and prosecuting her claim is such that the most favorable inference which can be drawn is that she acquiesced in the payment to her husband, and it is our opinion that she should not now be permitted to withdraw this acquiescence.

"If it appears, however, as it does in the instant case, that a party has been deprived of an advantage they might have had if the claim had been seasonably insisted on, or if such party be subjected to any hardships that might have been avoided by reasonably prompt proceedings by the claimant, a court of equity will not interfere to give relief, but will remain passive." Blethen v. Pacific Mutual Life Insurance Co. of California, 47 Cal. App. Dec. 433, at page 440.[1]

Defendant did not specifically plead in its answer either estoppel, laches, or acquiescence, but, if it be conceded that it were ordinarily necessary to so plead, plaintiff was the sole witness in this action, and the action was tried, argued, and submitted without objection by plaintiff, on the theory that the defense of plaintiff's laches was available to defendant, and it is the opinion of the court that the motion for nonsuit was properly granted.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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97 Cal. App. 650

MILK PRODUCERS' ASS'N OF SAN DIEGO COUNTY v. WEBB. (Civ. 6205.)

District Court of Appeal, Second District, Division 1, California. March 19, 1929.

1. Agriculture ⇨6—Evidence held to support findings for co-operative milk producers' association against member for damages for failure to deliver milk.

Evidence *held* sufficient to support findings of trial court in plaintiff's favor in action by co-operative milk producers' association against member thereof for breach of agreement to deliver minimum quantity of milk to association.

2. Damages ⇨74—Parties to contract may provide for liquidated damages in case of breach.

Parties to contract may provide for amount of liquidated damages to be paid upon breach of its terms, subject to exceptions provided by Civ. Code, § 1671.

3. Damages ⇨85—Court's allowance of liquidated damages of 50 cents for each 100 pounds of milk under minimum amount agreed to be delivered held justified in action by milk producers' association against member.

In action by co-operative milk producers' association against member thereof for breach of contract to deliver minimum quantity of milk to association over period of one year, allowance by trial court of liquidated damages provided for by contract and consisting of 50 cents for each 100 pounds of milk below the minimum amount agreed to be delivered, *held* justified.

4. Appeal and error ⇨1011(1)—Reviewing court will not disturb findings of trial court, where evidence is conflicting.

Where there is a conflict in the evidence, reviewing court will not disturb the findings and judgment of the trial court made in accordance with plaintiff's evidence.

5. Agriculture ⇨6—Provision of contract of association with dairyman that membership should cease on noncompliance with terms thereof held not to prevent association's recovery against member for breach.

Provision of contract between co-operative milk producers' association and member thereof that membership should cease in case of failure of member to comply with terms of produce sale agreement did not prevent association from recovering liquidated damages under agreement, for failure of member to deliver minimum amount of milk provided for by contract, where there was no showing that the association abandoned or had any intention of abandoning the contract.

6. Damages ⇨85—Liquidated damages for failure to deliver milk to association held properly allowed from three days after association's service of notice of default until end of contract year, where member refused payment.

In action by co-operative milk producers' association against member thereof for breach of contract to deliver minimum quantity of milk with provision for liquidated damages based upon difference between minimum amount of milk required by contractor and that actually delivered and provision for termination on 30 days' notice prior to end of each yearly period, damages were correctly assessed by trial court from date three days after service of notice on member demanding damages for breach until end of contract year, where member refused payment.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by the Milk Producers' Association of San Diego County against E. H. Webb. From a judgment for plaintiff, defendant appeals. Affirmed.

Luce & Swing, of San Diego, for appellant.
Sweet, Stearns & Forward, of San Diego, for respondent.

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[1] For opinion on hearing by Supreme Court, see 198 Cal. 91, 243 P. 431.

YORK, J. The plaintiff and respondent is in the nature of a co-operative association organized and operated for the benefit of its members, all of whom are dairymen.

The appellant applied for and was granted membership in the association in February, 1919, at the same time entering into a produce sale agreement with the plaintiff association, whereby it was agreed that he was to deliver to and the association was to buy from him a certain specified minimum quantity of milk per diem. Among others, the produce sale agreement contained the following provisions:

"Sec. 17: This contract may be terminated by either of the parties hereto by service upon the other party 30 days prior to the end of any yearly period from June 1, 1917, of a written notice stating that this contract will be terminated on the following June 1."

"Sec. 15: It is mutually understood that it is now and ever will be extremely difficult and impracticable to ascertain the amount of damage that would be suffered by said Association upon the failure of the seller to deliver milk as in this contract provided, because this agreement is one of a series identical in terms and is part of a cooperative movement by milk producers which depends wholly upon performance of each and every produce sale agreement, and it is therefore agreed that said association shall be entitled after three days' written notice from the Board of Directors, as liquidated damages, to the sum of fifty cents ($.50) for each and every hundred pounds of milk which said seller shall fail to deliver less than the minimum amount of such milk herein agreed to be delivered."

It is undisputed that appellant failed to give the notice, as required in section 17, prior to June 1, 1923, the end of the current year, and that, beginning with July 16, 1923, he failed to deliver to the plaintiff association any milk, but sold it to a rival distributing company without the consent of the plaintiff, thereby violating the terms of his produce sale agreement. It is also undisputed that on October 9, 1923, plaintiff caused a notice to be served upon appellant demanding payment before October 12, 1923, of the sum of $3,174.69, as liquidated damages for such violation. Appellant refused to pay the amount demanded, and this action was commenced on April 17, 1924, to collect such damages.

Appellant's main defense to the action was that under section 8, art. VIII, of the by-laws of the plaintiff association, his violation on July 16, 1923, of the terms of the produce sale agreement constituted a cancellation of his membership in the association and a termination of the produce sale agreement.

The trial court gave judgment to the plaintiff for the sum of $2,294.48, as liquidated damages for the period commencing October 13, 1923 (three days after service of notice by plaintiff upon appellant), and ending May 31, 1924, the date of the termination of the contract.

The appellant appeals from this portion of the judgment generally on the ground that it is not supported by the evidence and that the conclusions of law and judgment are erroneous. In his brief, appellant cites nine specifications of error, several of which are included in his contention that the contract sued upon is invalid and void. He contends that this is not a proper case for the imposition of liquidated damages; that the judgment was erroneous because the amount of liquidated damages decreed was not provided for in the contract, by stipulation nor proved as actual damages; that the contract had been abandoned by both parties, and therefore cannot be enforced by plaintiff.

[1] Upon an examination of the record in this case, we are convinced that there is sufficient evidence to support each and every finding made by the trial court and that the judgment is amply supported by the evidence.

It was shown by the evidence that appellant had made application for a reduction in the minimum amount of milk required to be furnished by him under his contract, several times during the period covered and each time his application was granted.

The appellant contends that the produce sale agreement was invalid for various reasons. In his answer to the complaint, he failed to plead invalidity of the contract, and his contention upon this point is therefore without merit.

[2, 3] It is an elementary rule of law that parties to a contract may provide for the amount of liquidated damages to be paid upon a breach of its terms, under the exceptions provided by section 1671 of the Civil Code, and there is sufficient evidence in the record of the instant case to support the judgment of the trial court that the plaintiff should be allowed the amount of damages provided by the terms of the contract involved here.

[4] The appellant contends that there was insufficient proof of actual damage suffered by plaintiff to support the judgment of the trial court. Upon an examination of the record we find that there was sufficient proof introduced, and the most that can be said for appellant's argument here is that he introduced some evidence tending to refute the claims of the plaintiff as to the damage suffered, and, where there is a conflict in the evidence, this court will not disturb the findings and judgment of the trial court made in accordance with plaintiff's evidence.

[5] Another contention of appellant is that section 8, art. VII, of the by-laws of plaintiff association, providing that, if any member ceases to comply with the terms of his produce sale agreement, his membership shall cease, effects an immediate termination of the contract, which is binding upon both parties to it, and equivalent to an abandonment. **As**

to this, there was no evidence introduced at the trial tending to show that the plaintiff had abandoned or had any intention of abandoning the contract, but, on the contrary, it was affirmatively shown that the plaintiff continued to stand upon and to rely upon the terms of the contract in its effort to collect the damages provided thereunder.

[6] Appellant assigns as error the amount of damages assessed by the trial court, and insists that the court had no right to arbitrarily fix the period during which liquidated damages should run. Upon an examination of sections 15 and 17 of the produce sale agreement, supra, and of the notice actually given by the plaintiff and the reply thereto by the appellant, together with the evidence upon this point adduced at the trial, we are of the opinion that the amount of damages was correctly assessed by the trial court running from the date of breach of the contract by appellant to the date of its termination, viz. October 13, 1923, which was three days after the date of service of notice by plaintiff upon appellant, to May 31, 1924, the date upon which the court found that the contract had been terminated.

For the foregoing reasons, we are of the opinion that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: HOUSER, Acting P. J.; CRAIL, Justice pro tem.

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97 Cal. App. 659

McKENZIE v. LOS ANGELES LIFE INS. CO. et al. (Civ. 3614.) ★

District Court of Appeal, Third District, California. March 19, 1929.

Rehearing Denied April 18, 1929. Hearing Denied by Supreme Court May 16, 1929.

1. Insurance 🔑603—Evidence sustained findings that receipt releasing insurer from further liability under accident policy was obtained by fraud.

Evidence *held* to sustain trial court's findings that receipt releasing insurer from further liability under accident policy was procured by means of fraud on insured.

2. Evidence 🔑408(1)—Receipt is explainable by parol.

A receipt is always subject to explanation by parol evidence.

3. Insurance 🔑603—Insured's failure to deny genuineness and execution of receipt releasing insurer from further liability held not to preclude attack for fraud (Code Civ. Proc. § 448).

In suit on accident policy, where insurer set up release from further liability, failure of plaintiff to deny, pursuant to Code Civ. Proc. § 448, genuineness and due execution of receipt as it appeared in answer, *held* not to preclude plaintiff from challenging effect of receipt on ground of fraud.

4. Insurance 🔑603—Rescission of receipt relieving insurer from liability, and restoration of money received, held unnecessary in suit on policy, where receipt was procured by fraud and money was due.

Where court found that receipt releasing insurer from further liability under accident policy was procured by means of fraud, it was unnecessary for insured, in seeking further recovery on the policy, to rescind the receipt and restore the money for which it acknowledged receipt, where there was no dispute as to the right of insured to retain such sum of money under terms of the policy.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by James H. McKenzie against the Los Angeles Life Insurance Company, formerly known as the Mutual Indemnity, Accident, Health & Life Insurance Company of California, and the People's Mutual Life Insurance Company. From the judgment, last-named defendant appeals. Affirmed.

See, also, 274 P. 484.

Butler, Van Dyke & Desmond, of Sacramento, and A. B. Weiler, of San Francisco, for appellant.

J. J. Henderson and W. A. Green, both of Sacramento, for respondent.

THOMPSON, J. This is an appeal from a judgment for compensation under the terms of an accident insurance policy for injuries sustained. The appellant contends that a receipt in full, which was signed by the respondent, and which is set up in the answer as a defense, bars the recovery.

[1] The respondent was insured against accident by the Los Angeles Life Insurance Company. This policy was sold and transferred to the appellant People's Mutual Life Insurance Company, which thereafter became obligated to respondent as insurer. While this policy was in full force, on August 4, 1926, the respondent, who was a plasterer by occupation, sustained a severe injury to his left ankle and heel, which totally incapacitated him for a period of time and compelled him to resort to a hospital for treatment. Three monthly payments of $100 each were made to respondent by drafts upon the insurance company. Upon the backs of these drafts was printed the following form of receipt:

"By my endorsement I discharge and release Mutual Indemnity Accident, Health & Life Insurance Company of California and accept the amount of this check as *full* payment and satisfaction of any and all claims and all attending and after effects therefrom, which I myself, my heirs, executors, administrators, assigns or beneficiaries now have or may hereafter have under policy No. 23431 for or on account of injury sustained by me on or about August 4, 1926."

★Rehearing denied. Hearing denied by Supreme Court.

Upon the making of each payment, the receipt was required to be signed by the insured. Before signing these receipts for the first three payments, the word "full," which is hereinbefore italicized, was changed to read "part" payment. Upon receiving the fourth payment this receipt was signed by the respondent without this word having been changed. This suit was brought for a balance of compensation alleged to have subsequently accrued. Judgment was rendered in favor of the respondent for the sum of $940.

The trial court found that at the time the respondent signed this receipt, "plaintiff's eyes were somewhat affected and he could not read the endorsement appearing on the back of said last check; that plaintiff was not aware * * * that a full release of all claims was printed on the back of said check; * * * that said * * * last check was not accepted in full settlement. * * *" In further justification of respondent's signature to the receipt, the court also found that the respondent and the agent of appellant who presented this check and procured his signature were close personal friends and members of the same union, and that upon inquiry on the part of respondent this agent assured him that "the check was only part payment and only good for one month's compensation under the policy." The court further found that, relying upon these false statements, and being unable to read for himself, the respondent unwittingly signed the receipt in full. The evidence supports these findings of the court. This testimony of the fraudulent inducements to procure the signature to the receipt in full was received in evidence over the objection of appellant upon the grounds that it was incompetent since the respondent had failed to deny, pursuant to section 448 of the Code of Civil Procedure, the genuineness and due execution of the receipt as it appeared in the answer and because the $140 had not been repaid and there was no effort to rescind the instrument.

[2, 3] A receipt is always subject to explanation by parol evidence. In Jones on Evidence (3d Ed.) 763, § 491, it is said: "Receipts which are executed in the form of releases under seal purporting to be in full of all demands may be explained by proof of fraud or mistake." The failure to deny an instrument which is set up as a defense in the answer admits only the genuineness of the document and its due execution. Section 448, Code Civ. Proc. By the use of the term "genuineness" is merely meant that the document pleaded is the identical instrument which it purports to be, and that it appears in the exact form in which it passed between the parties. The admission of the due execution means only that the instrument was regularly signed and delivered in the form in which it appears. Moore v. Copp, 119 Cal. 429, 51 P. 630. The admission of the genuineness and due execution of the instrument by failure to deny it pursuant to the provisions of section 448 of the Code of Civil Procedure does not preclude a person from challenging the effect of the document on the ground of fraud, mistake, or undue influence, so long as he does not attack its presumed genuineness or due execution. Baird v. Pac. Elec. Ry. Co., 39 Cal. App. 512, 179 P. 449; Garcia v. Cal. Truck Co., 183 Cal. 768, 192 P. 708; Newsom v. Woollacott, 5 Cal. App. 722, 91 P. 347.

[4] In the present case the evidence amply supports the findings to the effect that the receipt in question was procured to be signed by means of fraud. It was not necessary, under the circumstances of this case, to first seek to rescind the document and restore the money for which it acknowledged receipt. There was no dispute between the parties as to the right of the respondent to this sum of money under the terms of the policy. All that the appellant claims is that no further sums were due for the reason that respondent had receipted in full for all future claims.

Mr. Robinson, the agent for appellant, testified that he obtained the receipt under the following circumstances: "I told McKenzie that Dr. Harris had told me he would be able to return to work within a short time and that his policy called for payments of $100 per month during total disability and $40 per month during partial disability. I stated I intended to go to Los Angeles for the holidays and would like to clean up the entire matter and I proposed to him that I pay him $100 for one month of total disability, which would be for December, and then one month at $40 which would be for the month of January, as Dr. Harris had stated he could return to work during January."

It will be observed that Robinson concedes the respondent would be totally disabled during December and partially disabled during January. He conceded that respondent would be entitled to the entire sum of $140, which he then paid to him. No other evidence was adduced relative to this subject. There was no controversy over the fact that respondent would be entitled to this payment for the months of December and January. There is no evidence whatever to indicate a dispute over the amount which would become due or to warrant the inference that a compromise occurred. This money which was paid therefore belonged to the respondent according to the uncontradicted evidence, and it was not necessary for him to return it as a prerequisite to the maintenance of this action for other and further sums claimed to have subsequently accrued. It has been uniformly and repeatedly held that one is not required to restore that which he would be entitled to retain under any circumstances. Garcia v. Cal. Truck Co., 183 Cal. 767, 771, 192 P. 708; Menefee v. Oxnam, 42 Cal. App. 81, 95, 183 P. 379; Haserot v. Keller, 67 Cal. App. 661, 673, 228 P. 383. The case of Garcia v. Cal. Truck Co., supra, upon which the appellant in this case chiefly relies, is authority for the preceding declaration of principle. That case, however, was based upon an entirely different state of facts. The plaintiff in that case, while crossing a street in Los Angeles, was struck and injured by a runaway team. He made a claim against the owner of the team for damages. The amount of this claim was unliquidated and uncertain. There was evidently a dispute over the amount of compensation. This dispute was settled by the payment of $350, which the plaintiff accepted "in compromise of my claim against said California Truck Company," and as payment in full for "'any and all causes of action, costs, charges, claims or demand of whatever name or nature, in any way arising or growing out' of the accident." The court quite properly said: "The plaintiff originally had a claim for unliquidated damages for personal injuries. Solely in consideration of the settlement and release of this claim, which he now seeks to avoid, he received $350 from defendant. The simple rescission of the contract of release would leave him with a disputed claim for damages, and with no right whatever to retain this money paid him for an abandonment of all claim for damages. * * * The money paid was not his in any event, but was his only in the event that there had been a valid release of the claim for damages."

In the present case there was no condition imposed nor implied upon which the title to the $140 was to depend. That sum was conceded to belong to him *in any event*. The only dispute in this action is whether the respondent released the appellant from any future monthly payments which he might claim. Neither the language of the receipt, nor the testimony of appellant's witness indicates that the $140 was paid as a compromise. Just the contrary appears from the undisputed evidence. It would be absurd to hold that this $140 which belonged to the respondent must first be returned before he would be permitted to maintain an action for other subsequent disputed payments under the insurance policy, which could in nowise affect the right or title to installments which had already been conceded to be due, and which were unconditionally paid. All of the cases recognize the principle illustrated in the distinction which we have drawn between the Garcia Case and the present action. We are cited to no authorities to the contrary.

It follows that a rescission of the receipt was not required; restoration of the money which was unquestionably due and which was paid was unnecessary. The evidence sufficiently supports the findings of fraud in procuring the respondent's signature to the purported release.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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97 Cal. App. 452

GAMMON et al. v. EALEY & THOMPSON.
(Civ. 3677.)

District Court of Appeal, Third District, California. March 11, 1929.

1. Appeal and error ⚷685—Where motion to dismiss jury for failure to pay jury fees was not passed on below, and no court rules were contained in record, reviewing court could not determine whether granting jury trial was error.

Reviewing court could not determine whether granting jury trial was error, where motion below to dismiss jury for failure to pay jury fees in accordance with court rules was never passed on, and no rules of court were contained in record.

2. Evidence ⚷42—Rules of superior court are not subject to judicial notice in District Court of Appeal.

District Court of Appeal does not take judicial notice of rules of the Superior Court.

3. Pleading ⚷248(13)—Allowance at trial of amendment of original complaint charging false representations as to productivity of land, so as to set forth particular crops which defendants represented could be raised, held not error.

In action for damages for fraud in connection with exchange of real estate, in which original complaint alleged that defendants represented land was excellent for raising crops, when in truth it was unsuitable for that purpose, allowance at beginning of trial of amendment setting forth that crops raised were gyp corn and black-eyed beans, and that defendants represented land would produce 17 sacks of beans per acre, *held* not error, since amendment did not change cause of action.

4. Evidence ⚷424—Evidence that plaintiff's agent did not examine land, but relied on representations of brokers, held admissible in action against brokers for fraud, though contract for exchange provided each party had examined property.

In action against brokers for damages for false representations, made to induce plaintiffs to enter into contract for exchange of properties, parol evidence, offered to show that plaintiff's agent had not examined or investigated land taken in exchange, and that in making exchange he relied on representations of defendants, *held* admissible, though contract for exchange of properties provided that each party had examined and investigated property for himself, and did not rely on representations of agent, since contract as to brokers was not within parol evidence rule.

5. Evidence 🔑424—Parol evidence rule does not apply, where controversy is between party to contract and third person.

Where controversy is between party to written contract and one who is neither party nor privy, rule excluding parol evidence to explain, vary, modify, or contradict writing does not apply.

6. Fraud 🔑58(2)—Material misrepresentations of brokers as to productivity of land held sufficiently proved in action for fraud in inducing exchange of property.

Material misrepresentations of brokers, attempting to induce exchange of properties, that land was adopted to agricultural purposes, that similar land was producing good crops of gyp corn and beans, and that land contained only small quantity of alkali, and within reasonable time could be sold for $250 an acre or more, *held* sufficiently proved in action for fraud in inducing exchange, in view of testimony that land would produce crops in only negligible quantities, and was unfit for agricultural purposes, because containing excessive quantities of alkali.

7. Principal and agent 🔑48—Agent owes utmost good faith toward his principal.

Relation of principal and agent is fiduciary in character, and law imposes on agent highest good faith toward his principal.

8. Fraud 🔑11(1)—False statement of opinion, or false opinion expressed to one entitled to rely thereon, may be actionable.

Mere expressions of opinion, honestly made, are not actionable; but false statement of opinion, or false opinion expressed to one entitled to rely on it, may form basis for action for deceit.

9. Fraud 🔑11(1)—Representation of brokers that land had only small amount of alkali was statement of fact on which stranger to land could rely in entering into contract of exchange.

Statement of brokers that property sought to be exchanged had only small amount of alkali, not enough to injure or damage growing crops, was statement of fact on which principal's agent, who was stranger to land, could rely in entering into contract for exchange of properties.

10. Fraud 🔑11(2)—Statements as to value may constitute statements of fact amounting to fraudulent representations.

Statement of value of property is not always mere expression of opinion, but may constitute a positive affirmation of fact, and, in that event, may be a fraudulent representation, warranting rescission, like any other representation of fact.

11. Fraud 🔑64(1)—In case of doubt, question whether representations as to value were intended as expressions of opinion is one of fact.

Where there is doubt whether representations of value were intended and understood as expressions of opinion, question for determination whther they constituted representations of opinion or of fact is one of fact for court or jury.

12. Fraud 🔑64(5)—Whether brokers knew or should have known representations were false held question for jury in action for fraud.

In action against brokers for fraud in inducing exchange of properties, question whether defendants knew or should have known that representations to the effect that land contained only small quantity of alkali, which would not injure growing crops, were false, *held* question for jury.

13. Fraud 🔑13(2)—Representations of brokers, though ignorant of fact that alkali rendered land unfit for growing crops, that alkali deposits were so small as not to injure crops, constituted fraud (Civ. Code, § 1572, subd. 2).

Representations of brokers that land exchanged contained alkali in such small quantities that crops would not be injured or damaged constituted fraud, under Civ. Code, § 1572, subd. 2, if, in fact, alkali existed in such excessive quantities as to render land unfit for growing of crops, though such fact was not known to brokers.

14. Appeal and error 🔑1064(1)—Where brokers, sued for fraudulent misrepresentations, made no attempt to deny agency, erroneous statement in instruction that agency was admitted was harmless.

In action against real estate brokers for fraud in inducing exchange of property, error of trial court in stating in instruction that it was admitted that defendants were acting as plaintiff's agents at time of exchange *held* harmless, where no attempt was made by brokers to deny the agency.

15. Trial 🔑194(14)—Instruction as to representations that alkali on land was mere trifle held not erroneous, where testimony showed statement that there was small amount of alkali.

In action against brokers for fraudulent representations inducing exchange of properties, instruction permitting plaintiff's recovery if defendant spoke of alkali on the land as a mere trifle, whereas he knew of its existence thereon in substantial quantities, *held* not erroneous for use of word "trifle," where testimony was that defendant had said there might be a small amount of alkali on the land.

16. Fraud 🔑58(1)—Evidence held to sustain verdict for plaintiffs against brokers for fraud in inducing exchange of properties.

In action against brokers for false representations as plaintiff's agents, inducing exchange of properties by virtue of false statements as to presence of alkali on land and its productivity, evidence *held* sufficient to sustain verdict for plaintiffs.

17. Fraud 🔑22(1)—Plaintiffs held not precluded from asserting their agent relied on representations of brokers concerning productivity of land exchanged by fact that plaintiff's agent visited land.

Fact that plaintiff's agent visited land before entering into contract for exchange of properties did not prevent plaintiff from claiming that he relied on representations of brokers concerning character of land and soil and productivity thereof.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Earle T. Gammon and others against Ealey & Thompson for damages arising from an exchange of real estate. Judgment for plaintiffs, and defendants appeal. Affirmed.

Hawkins & Hawkins and J. M. Walthall, all of Modesto, for appellants.

George A. Work, of Sacramento, and Nathan B. McVay, of Modesto, for respondents.

JAMISON, Justice pro tem. This is an action for damages arising from an exchange of real estate; respondents claiming that appellants were their agents in the transaction, and had made false representations to them to induce them to make the exchange. The facts are as follows:

Respondents were the owners of about 66 acres of land, located near Modesto, upon which there was a deed of trust for $22,000. Appellants are real estate brokers, having their office at Modesto. E. A. Gammon is the father of respondents, and as their agent and attorney in fact acted for them in the exchange of said property. In July, 1924, said Gammon called on appellants at their office in Modesto and requested their aid in selling or exchanging said land. Appellants thereupon undertook to sell or exchange said land, and after several efforts to effect an exchange they notified him that they had a chance to make an exchange, and on March 6, 1925, said Gammon called on appellants in response to said notice. Appellants then informed Gammon that they had an opportunity of exchanging respondents' land for a tract of land of 110 acres owned by one Connetto, upon which there was an incumbrance of $3,500. This Connetto land was located about nine miles from Modesto.

Gammon testified that appellant Ealey took him to the land, but that he made no particular examination of it, further than to get a general idea of its location; that, while he had theretofore engaged in farming, he knew nothing about the character of the land or soil in the neighborhood of the Connetto land; that the Connetto land had been recently plowed. He also gave testimony that his eyesight was not good; that upon this visit to the land he saw something he thought might be alkali, but that Ealey informed him that what he saw was gypsum; that Ealey represented to him that the Connetto land contained only a small amount of alkali, but not enough to injure or damage crops growing thereon; that gyp corn and black-eyed beans would be good crops to plant on the Connetto land, and that these crops did well on land in that vicinity, similar land producing 17 sacks of beans to the acre; that appellants could within a reasonable time sell 10 acres of the said Connetto land for $400 per acre and the remaining 100 acres for $250 per acre. Gammon testified that he was on the Connetto land only 20 or 30 minutes; that he made no examination of it, for the reason that he knew nothing about land in that locality, and because he placed confidence in Ealey, and believed in and relied upon the said representations of Ealey.

None of the respondents had anything to do with the exchange, nor were any of them ever on the Connetto land until after the exchange. Respondents produced evidence to the effect that in the spring of 1925 they rented the Connetto land to experienced farmers, who had farmed lands in the vicinity of the Connetto lands; that these tenants planted some 20 acres in gyp corn, and that these 20 acres produced only 29 sacks; that they planted some 20 acres in beans, and produced therefrom only some 60 sacks; that the failure of the Connetto land to produce profitable crops was owing to the presence of excessive quantities of alkali.

Various witnesses produced by the respondents placed the value of the Connetto land at from $10 to $30 per acre. Dr. Walter Techow, an expert chemist specializing in soil analysis, testified that he went on the Connetto land in February, 1927, and took samples from 30 borings he made on said land; that the analysis of the borings showed excessive amounts of both the white and black alkali; that in his opinion it would not be practicable to eradicate the alkali. The process of eradicating the black alkali would be too expensive. He further testified that black alkali is difficult to detect in recently plowed ground; that it caused recently plowed ground to have the appearance of rich soil. It appears without contradiction that the Connetto land is valuable only for agricultural purposes. Appellants produced a number of witnesses whose testimony directly and positively conflicted with that of respondents upon all material matters, except upon the question of agency.

This case was tried by a jury. It returned a verdict in favor of respondents for $5,000. Appellants filed a motion for a new trial, which was denied by the court. This appeal is from the judgment.

[1, 2] The first point urged by appellants for a reversal is that the court should not have granted respondents a jury trial. It appears that, four days before the day set for the trial of this case, appellants filed a motion to dismiss the jury upon the ground that respondents had not, with five days after demanding a jury, paid the jury fees in accordance with the rules of the court. The motion was never passed upon by the court. When the case was called for trial, the court stated that it would be tried by a jury. No

rules of the court are contained in the record. This court does not take judicial notice of the rules of the superior court. Sweeney v. Stanford, 60 Cal. 363. This alleged error of the court is without merit, as is also the second point relied upon by appellants, that the amendment to the complaint, at the beginning of the trial, added new causes of action.

[3] The original complaint alleged that appellants falsely and fraudulently represented that the Connetto land was excellent for the purpose of raising crops, when in truth, it was unsuitable for raising any crops whatever. The amendment was simply an amplification of the foregoing allegation, setting forth that among the crops raised by appellants were gyp corn and black-eyed beans, and that appellants represented to said Gammon that the said Connetto land would produce 17 sacks of beans per acre. This amendment did not change the cause of action.

[4, 5] When Gammon and Ealey returned to appellants' office from the Connetto land, they found Connetto there, and, after same discussion, they entered into an agreement for the exchange of the lands of respondents and Connetto. The following clause appeared in said agreement: "Each party hereto has examined and investigated the property of the other party for himself or herself, and neither party relies upon any representation made by said agent or other representation not contained therein."

There is another clause therein which, in substance, is to the effect that said Ealey & Thompson is the mutual agent of both parties in said exchange of lands, each party to pay the commission due said agent without reference to the other party, that this provision is inserted expressly for the benefit of the said agent. This agreement was drawn up in the office of appellants and was signed by Connetto and Gammon immediately after it was prepared. Appellant Thompson testified that it was dictated by himself and Ealey after the parties had reached an agreement. Appellants offered the contract in evidence, respondents objected to its introduction, and thereupon the court said that it was of the opinion that the first paragraph hereinbefore quoted might be introduced for the purposes of impeachment. It appears that thereafter the said agreement became a part of the record and was made an exhibit for the defendant.

Appellants contend that their objection to any evidence that would vary or contradict the terms of this contract should have been sustained, that no evidence in contradiction to said contract should have been received to the effect that said Gammon had not examined or investigated the Connetto land for himself, or that in making the exchange he relied upon the representations of appellants. The trial court committed no error in admitting this evidence. In the case of Greve v. Echo Oil Co., 8 Cal. App. 275, 96 P. 904, the court said: "Where the controversy is between a party to a written contract and one who is neither a party to it nor a privy to one who is, the rule excluding parol evidence to explain, vary, modify or contradict the writing does not apply. In such case neither the party nor the stranger to the contract is bound by the rule excluding parol evidence." Smith v. Moynihan, 44 Cal. 53; Hussman v. Wilke, 50 Cal. 250; Greenleaf on Evidence, vol. 1, § 279.

[6] The next point claimed by appellants for reversal is that respondents failed to prove any material misrepresentations were made by them. We see no merit in this point. E. A. Gammon testified that Ealey told them that the Connetto land was adapted to agricultural purposes, that similar land in the vicinity was producing good crops of gyp corn and 17 sacks of beans to the acre; that the Connetto land contained only a small quantity of alkali, not enough to injure crops growing thereon; and that within a reasonable time he could sell 10 acres of the land for $400 per acre and the remaining 100 acres for $250 per acre. Respondents produced witnesses who testified that the land would produce crops of gyp corn and beans in only negligible quantities; that the land contained excessive quantities of alkali that rendered it unfit for agricultural purposes. Several witnesses testified that a large part of said Connetto land was worthless. Others testified that the market value of the land would not exceed from $10 to $30 per acre.

[7-9] There is no contradiction in the evidence of the proof produced on the part of respondents that appellants were the agents of respondents in the exchange. That being the case, the law imposes upon the agent the highest good faith toward his principal. Barrios v. Foley, 83 Cal. App. 105, 256 P. 573; Langford v. Thomas, 200 Cal. 192, 252 P. 602. The relation of principal and agent is fiduciary in character. Williams v. Lockwood, 175 Cal. 598, 166 P. 587. The mere expressions of opinion honestly made are not actionable, but a false statement of an opinion, or a false opinion expressed to one entitled to rely upon it may form the basis of an action for deceit. Phelps v. Grady, 168 Cal. 73, 141 P. 926. The representation alleged to have been made by Ealey that the Connetto land had only a small amount of alkali, not enough to injure or damage growing crops, was a statement of a fact upon which Gammon had a right to rely, Gammon being a stranger to the land and by reason of his reliance upon the representations of Ealey making no investigation of the land himself. Palladine v. Imperial Valley Ass'n, 65 Cal. App. 727, 225 P. 291.

[10, 11] A statement as to the value of property is not always made as a mere expression of opinion upon which the other party has no right to rely. Crandall v. Parks, 152 Cal. 772, 93 P 1018; Pomeroy's Eq. Juris. § 878; Dickey v. Dunn, 80 Cal. App. 724, 252 P. 770. In the case last cited the court said: "A statement as to value is not always made as a mere expression of opinion. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made; and when it is such it is like any other representation of fact, and may be a fraudulent representation warranting rescission." Where there is a doubt whether or not such representations were intended and understood as expressions of opinion the question for determination is for the court or jury. Stockton v. Hind, 51 Cal. App. 131, 196 P. 122; French v. Freeman, 191 Cal. 579, 217 P. 515. Appellants contend that no proof was offered showing that the alleged misrepresentations were known, or should have been known to appellants to be untrue.

[12] This contention cannot be upheld. There is ample evidence establishing the fact that both of the appellants knew that the Connetto land contained alkali in quantities; that both had visited the Connetto land before the exchange and knew it was spotted with alkali. Ealey, on cross-examination, testified that plenty of these alkali spots could be seen; that a week previous to the trial he drove over the Connetto land and saw plenty of alkali spots, and that in this respect it was in the same condition as it was when he took Gammon to the land preceding the exchange; that in December, 1924, he went on the land for the purpose of negotiating a trade between Weatherby, who was then the owner of the land, and Connetto; that at that time the land was in the same condition it was when traded to respondents; that on another occasion he and Thompson visited the land with a Mr. and Mrs. Craycroft, from whom he secured a loan for Connetto.

It thus appears from the evidence that Ealey was familiar with the Connetto land; that he had been over it and examined it on the occasions before he took Gammon to the land preceding the exchange; that he knew there was considerable quantity of alkali in the land; that he saw many alkali spots all over the land. Ealey further testified that he had been a real estate broker at Stockton, some nine miles from the Connetto land, for ten years; that he frequently appraised the value of lands in that vicinity. Upon this evidence, we are of the opinion that the questions of whether or not appellants knew, or should have known, at the time said alleged representations were made, that they were or were not true, was a question for the jury.

[13] Even if appellants did not know that the Connetto land contained alkali in such excessive quantities as to render the land unfit for agricultural purposes, yet, if they represented to Gammon that the Connetto land contained alkali in such small quantities that the same would not injure or damage crops growing thereon, when, in fact, the alkali existed in such excessive quantities as to render the land unfit for the growing of crops thereon, such representations would have constituted fraud. Subdivision 2, § 1572, Civ. Code; McMahon et al. v. Grimes et al. (Cal. Sup.) 275 P. 440.

[14] Appellants complain of that part of instruction No. 2 given by the court, wherein it is stated that it is admitted that at the time the exchange was made defendants were acting as agents for the respondents. In their answer appellants deny that they were respondents' agents in making the exchange of said property. Respondents' testimony was that through their attorney in fact, E. A. Gammon, they arranged with appellants to exchange their said land; that on two occasions appellants notified Gammon that they had prospective opportunities to make the exchange, but these failed of consummation; that the commission for making the exchange to be paid appellants was the sum of $1,000; that payment of this commission was arranged by giving appellants a mortgage for that amount on the Connetto land after the exchange took place. In the agreement between respondents and Connetto that was prepared in appellants' office, and which was dictated by appellants, it was stated that they were respondents' agents. Said Gammon testified that appellants were respondents' agents in the said exchange. Each of the appellants testified in the trial of this action, but neither in any manner denied the said agency. While, strictly speaking, there was no direct admission of the agency, there was no attempt made by appellants to deny its existence. We are of the opinion that this error in the instruction, if it can be termed such, did not seriously affect the substantial rights of appellants; nor did the use of the word "trifle," as used in instruction No. 7 constitute error.

[15] In this last-named instruction the court told the jury that, if appellant Ealey, while the agent of respondents, knew of alkali in the soil of the Connetto land in substantial and detrimental quantities, and thereafter while such agent told Gammon that there was some alkali in the land, but spoke of it as a mere trifle, in a manner calculated to quiet apprehension and prevent further investigation or inquiry, and that said Ealey knew of its existence there in substantial and detrimental quantities, and that neither respondents nor E. A. Gammon so knew, then the conduct of said Ealey was wrongful. E. A. Gammon testified that Ealey said to him that there might be a small amount of alkali in the Connetto land, but not enough to injure or damage crops growing thereon. Accord-

ing to Webster, a trifle means a little, and a little means small; therefore it is apparent that the jury could not have been confused by the use of the word "trifle," instead of "small."

[16] There is a sharp and decided conflict in the evidence, except upon the question of the appellants representing respondents as their agents in the exchange. We have not attempted to detail the conflicting evidence produced by appellants, for the reason that the evidence produced by respondents furnishes substantial support for the verdict of the jury, and this court, under these conditions, is bound by that verdict.

[17] We are of the opinion that Gammon, as the agent of respondents, in making the said exchange, relied entirely, as to the character of the Connetto land and its soil, upon the representations of appellants; neither he nor respondents were familiar with the said land, nor had any knowledge that it contained alkali in detrimental quantities, nor does the fact that Gammon visited the land preclude him from saying he relied upon appellants' representations. Palladine v. Imperial Valley Ass'n, supra; French v. Freeman, supra.

We find no errors in the record that require a reversal of this case, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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97 Cal. App. 608

PEOPLE v. HAYDIS. (Cr. 1760.)

District Court of Appeal, Second District, Division 1, California. March 18, 1929.

1. Intoxicating liquors ⚷222—Failure of information for possessing intoxicating liquor to allege possession was not within exceptions in Volstead Act held not fatal defect.

Failure of information for possessing intoxicating liquor to allege that defendant's possession thereof was not within exceptions contained in Volstead Act, making possession lawful under certain circumstances, *held* not to render information defective.

2. Criminal law ⚷1130(2)—Argument concerning weight of evidence and defendant's health is unavailing, where no contention is made that evidence is insufficient to support conviction.

Argument of appellant in supplemental brief as to weight of evidence and condition of defendant's health is unavailing, where no contention is made that evidence is insufficient to support verdict of guilty.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Abraham Haydis was convicted of possession of intoxicating liquor, and he appeals. Affirmed.

Herman Allen, of San Diego, and Leo D. Daze, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIL, Justice pro tem. Appellant was convicted of possession of intoxicating liquor. He had suffered four prior convictions of the same offense. At the time the prosecution was ready to offer its evidence, appellant objected to the introduction of evidence on the ground that the information failed to state a public offense. The objection was overruled, and appellant now assigns the ruling as error.

[1] Appellant contends that the information fails to state a public offense, for the reason that there is no allegation in the information that the possession of the intoxicating liquor was not within the exceptions contained in the Volstead Act making the possession of such liquor lawful under certain circumstances. A similar contention was made in the case of People v. Cencevich, 64 Cal. App. 39, 44, 220 P. 448, and was determined adversely to the appellant therein.

[2] Appellant filed a supplemental brief in which he argues the weight of the evidence and the condition of the defendant's health. He does not contend, however, that the evidence is insufficient to support the verdict, and this contention is also without merit.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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97 Cal. App. 664

PEOPLE v. LLOYD. (Cr. 1678.)

District Court of Appeal, Second District, Division 2, California. March 19, 1929.

1. Criminal law ⚷778(5)—Refusal of instruction that defendant charged with manslaughter was not required to show excuse or mitigation beyond reasonable doubt held not erroneous (Pen. Code, § 1105).

In prosecution for manslaughter, the refusal of instruction to effect that defendant was not required to show excuse or mitigation beyond a reasonable doubt or even by preponderance of the evidence, *held* not erroneous, since, under Pen. Code, § 1105, defendant in a manslaughter case did not have burden of establishing excuse or mitigation as in case of murder charge.

2. Criminal law ⚷829(9)—Refusal of instruction that making of criminal charge raised no presumption of guilt held not erroneous, in view of instructions given (Pen. Code, § 1096, and § 1096a, as added by St. 1927, p. 1039).

In prosecution for manslaughter, the refusal of instruction designed to acquaint jury with general rule that making of criminal charge against one raises no presumption of his guilt, *held* not erroneous, in view of fact that jury was instructed fully as to presumption of innocence and concerning doctrine of reasonable doubt by the giving of text of Pen. Code, § 1096, in accordance with authority of section 1096a, as added by St. 1927, p. 1039.

3. Automobiles 🔑357—Refusal of instruction requiring finding of criminal negligence to warrant conviction for manslaughter, based on involuntary killing, held not erroneous (Pen. Code, § 7, subd. 2, and §§ 192, 367d; Motor Vehicle Act, § 112).

In prosecution for manslaughter under Pen. Code, § 192, based on involuntary killing, refusal of instruction requiring a finding of criminal negligence in order to warrant conviction, *held* not erroneous, as it would have precluded conviction on finding that defendant was driving automobile while in a state of intoxication in violation of section 367d, and Motor Vehicle Act, § 112 (St. 1923, p. 517, Deering's Gen. Laws 1923, Act 5128); negligence not being an element or characteristic of any act positively denounced as a crime in accordance with provisions of Pen. Code, § 7, subd. 2, declaring signification to be accorded certain words found in the Code.

4. Homicide 🔑309(1)—Instruction as to necessity of lawful act being committed in unlawful manner and commission thereof without due caution and circumspection held properly refused as confusing (Pen. Code, § 192).

In prosecution under Pen. Code, § 192, for manslaughter, based on involuntary killing, instruction that conviction on ground defendant was engaged in commission of lawful act required proof that lawful act was done in an unlawful manner, and further referring to commission of lawful act without due caution and circumspection, *held* properly refused as confusing.

5. Homicide 🔑309(1)—Instruction defining phrase "without due caution and circumspection" and relating to finding of commission of lawful act in unlawful manner held ambiguous (Pen. Code, § 192).

Instruction in a prosecution under Pen. Code, § 192, for manslaughter, based on involuntary killing defining phrase "without due caution and circumspection" as the doing of an act otherwise lawful, in a culpable or reckless manner, and requiring finding beyond reasonable doubt that defendant drove his automobile in a reckless manner at the time of the accident in order to warrant conviction on theory that defendant performed lawful act in an unlawful manner, *held* properly refused as being ambiguous.

6. Criminal law 🔑829(4)—Question as to conduct to be pursued by automobile driver confronted with emergency held sufficiently covered by instruction given (Pen. Code, § 192).

In prosecution for manslaughter under Pen. Code, § 192, based on killing of pedestrian by defendant while driving an automobile, refusal of instruction relating to conduct defendant should pursue when confronted with an emergency *held* not erroneous as being sufficiently covered by instruction given.

7. Criminal law 🔑781(4)—Instruction as to observing verbal statements or alleged admissions with caution, held properly refused as too general.

Instruction that, in respect to all verbal statements or alleged admissions, it might be observed that these ought to be observed with caution, *held* properly refused as being so general as to be meaningless.

8. Criminal law 🔑1130(2)—Appellate court is not required to decide points as to refusal of instructions identified only by reference to pages of transcript.

Where many requested instructions refused by trial court were identified only by reference to pages of clerk's transcript on which instruction occurred, appellate court was not required to decide points so meagerly presented.

Appeal from Superior Court, Los Angeles County; Edward Henderson, Judge.

Charles E. Lloyd was convicted of manslaughter, and he appeals. Affirmed.

Thos. P. White, of Los Angeles (A. P. G. Steffes, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WORKS, P. J. Defendant was charged with the crime of manslaughter, and was convicted. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

The killing which led to appellant's conviction was involuntary. The catastrophe occurred at about 10 o'clock at night. Immediately preceding the tragic event appellant, along with a large number of other drivers of automobiles, was held on Wilshire boulevard, in the city of Los Angeles, at the easterly line of Western avenue, by the automatic traffic signals maintained at the intersection. As the assembled cars stood, in several lines, appellant was at the extreme left and at or near the middle line of Wilshire. Upon proper signal, the cars moved forward in a body, crossed Western and moved westward along Wilshire. A short block west of Western, and parallel to it, Manhattan avenue enters Wilshire from the north, but is not prolonged across it. One Lloyd Youmans had parked his automobile at the south curb of Wilshire immediately opposite the confluence of Manhattan with that thoroughfare. He had crossed Wilshire afoot for the purpose of doing some shopping on the north side of the boulevard. This duty having been performed, he was returning to the south side of Wilshire along an imaginary prolongation of the easterly sidewalk of Manhattan. He reached a point at or near the middle of Wilshire as the traffic lately released from the Wilshire-Western intersection approached from the eastward. At the middle of Wilshire, and upon an imaginary prolongation of the easterly curb line of Manhattan, a traffic "button" was embedded in the pavement. At or near this point Youmans stopped and looked toward the west, but apparently not toward the east. He was then run down by the car driven by appellant and was killed. There was much evidence that, because of the great number of headlights approaching the Wilshire-Manhattan intersection from both directions, along Wilshire, it was very difficult to see Youmans as he stood near the traffic button. Indeed, the drivers of some cars did not perceive him until an instant before he was struck down. Appellant says he saw him when he was about 16 feet from appellant's car and directly ahead. However, there was ample evidence that at the moment of the catastrophe a part of appellant's car was 2 or 3 feet southerly from the traffic button, that appellant was driving at the rate of 40 miles an hour, and that he was intoxicated.

[1] Appellant complains that the trial judge refused to give to the jury various instructions proffered by him, and no other points are made for a reversal. In defending one of the refused instructions, appellant says that, the killing of Youmans by him having been shown by the prosecution, the burden was cast upon appellant to excuse or mitigate his apparent offense, and that the instruction was offered for the purpose of acquainting the jury with a rule of law to the effect that the excuse or mitigation need not be shown beyond a reasonable doubt, nor even by a preponderance of the evidence. The instruction was unnecessary, as no such burden as appellant contemplates is cast upon a defendant in a manslaughter case. Section 1105 of the Penal Code reads: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." This section seems so plain as to completely answer appellant's contention. As the burden to which appellant refers is not imposed upon the defendant when the charge is murder, and the evidence of the prosecution tends to show only that he is guilty of manslaughter, it would seem obvious that the Legislature did not intend to cast the burden upon a defendant when the original charge is manslaughter. Certainly, the section does not say that the burden is cast upon one charged with the latter crime. However, it has been decided that, under a charge of assault with intent to commit murder, section 1105 has no application, as the "principle of the shifting of the burden of proof in cases of homicide is purely a creation of the statute, and must be limited to the words of the statute." People v. Gordon, 88 Cal. 422, 26 P. 502. See, also, People v. Lopez, 81 Cal. App. 199, 253 P. 169. The mandate of the section, by its express terms, is limited to "a trial for murder." The instruction was properly refused.

[2] Appellant offered an instruction designed to acquaint the jury with the general rule that the making of a criminal charge against one raises no presumption of his guilt, and it was refused. After saying that an indictment does raise such a presumption under certain circumstances, appellant proceeds in his brief: "This presumption, however, does not apply during the trial of a defendant before a petit jury. The reasoning of the rule adopted by the courts is that the facts of the case have been passed upon by a grand jury of reputable citizens and that their verdict, we might say, expressed by the filing of their indictment is sufficient to create a presumption of guilt for certain purposes. The trial jury in this case having been apprised of the indictment of the defendant by the grand jury, should in the interests of justice have been cautioned concerning this matter of such great importance to the defendant." We think the proffered instruction was unnecessary, and that it was therefore properly refused. The jury was instructed fully as to the presumption of innocence, and concerning the doctrine of reasonable doubt. Particularly the text of section 1096 of the Penal Code was given. This section contains the statement that "a defendant in a criminal case is presumed to be innocent until the contrary is proved," and it exhibits a satisfactory definition of "reasonable doubt." Section 1096a of the same code, as added by St. 1927, p. 1039, reads: "In charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given."

[3] One of appellant's claims of error relates to a lengthy instruction which was offered, but which was refused. It is necessary to quote but a part of this proposed instruction in order completely to justify the action of the trial judge in declining to present it to the jury: "The Court instructs the jury that under the provisions of Section 20 of the Penal Code of this State, in every crime of public offense there must exist a union, or joint operation of act and intent, or criminal negligence. Now, in cases of this kind, where the Indictment charges manslaughter, the overt act, of course, consisting in the driving of the automobile, and, of course, there is no deliberate intent charged against a person in a manslaughter case

such as this one; that the defendant deliberately intended to kill the deceased; but the law says that one may be guilty of a crime, to-wit, manslaughter, if as a result of their act a person is killed, although they may not have any intent to kill the person, provided only, however, if they are guilty of criminal negligence. In this case, therefore, in order to sustain a conviction, the prosecution must prove to your satisfaction beyond a reasonable doubt that the defendant was guilty of criminal negligence, and unless the prosecution does prove to your satisfaction beyond a reasonable doubt that the defendant Charles E. Lloyd was guilty of criminal negligence then he is entitled to an acquittal; because unless there was criminal negligence on the part of the defendant Charles E. Lloyd, then there is no joint operation of the act and intent, or criminal negligence, necessary to constitute a criminal offense. Now the word negligence, according to Subdivision 2 of Section 7 of our Penal Code, means a want of such attention to the nature or probable consequences of the act or omission as a prudent person ordinarily bestows in acting in his own concerns. Therefore, before you can be convinced beyond a reasonable doubt that this defendant Charles E. Lloyd was guilty of criminal negligence you must be convinced beyond a reasonable doubt that he did not use due caution or circumspection on the night of the accident, to the extent of culpability." This language—and there was nothing in the remainder of the proffered instruction to correct it—was bound, if read to the jury, to give that body an incorrect understanding of the law. The request was, in effect, that the jury be told that, in order that a conviction might result, it must be found that appellant was guilty of criminal negligence. Such a finding was not necessary as a prelude to a verdict of guilty. The jury might have refused to believe that appellant was driving at an excessive rate of speed at the time of the catastrophe, and that he was on the left side of the thoroughfare, and yet might have convicted him under a finding that he was driving his car while in a state of intoxication. That part of section 192 of the Penal Code which relates to actions like this is to the effect that involuntary manslaughter may occur "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act * * * in an unlawful manner, or without due caution and circumspection." If the jury had determined to convict appellant solely because he was driving while intoxicated, its verdict would have resulted under that part of section 192 relating to the "commission of an unlawful act, not amounting to felony" and not under that part of it which follows the language just quoted, as section 367d of the Penal Code makes it a misdemeanor to drive an automobile while intoxicated, while under section 112 of the Motor Vehicle Act (Stats. 1923, p. 517; Deering, Gen. Laws, 1923 ed., Act 5128) the offense may be either a misdemeanor or a felony. It seems a contradiction of terms to say that criminal negligence is predicable of an act which is a crime, and we have found no definitions to the effect that negligence is an element or a characteristic of any act positively denounced as a crime. Indeed, subdivision 2 of section 7 of the Penal Code seems to indicate directly the contrary. The section declares the signification to be accorded certain words found in the Code, and the subdivision reads: "The words 'neglect,' 'negligence,' 'negligent,' and 'negligently' import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." It can hardly be said that an act which constitutes a positive crime can bear any relation to the want of attention a prudent man, acting in his own concerns, ordinarily bestows "to" the nature or probable consequences of his acts or omissions. Crimes like those defined by section 367d of the Penal Code and 112 of the Motor Vehicle Act do not spring from lack of prudence, but from a willful disobedience of the express mandates of penal laws. We do not fail to observe that these considerations may make it necessary some time to determine whether section 20 of the Penal Code, referred to in the proposed instruction, comprises at the present day a complete statement of the point which the Legislature assumed to treat when the section was enacted. If one driving an automobile while intoxicated is not guilty of criminal negligence—and it may be observed here, in addition to what has already been said, that at some stages of drunkenness some men may drive with great caution and circumspection—if, we say, he is not guilty of negligence, then is there, when he is charged with manslaughter, "a union or joint operation of act and intent"? There is an intent to drive while intoxicated, but is that intent of interest when the charge is involuntary manslaughter? Can intent ever be of interest under such a charge, when death has resulted through the "commission of an unlawful act," as to which act itself the intent is clear? We do not answer these questions at present, but it appears not to be improper now to state them.

[4] The trial judge refused to give, upon the request of appellant, an instruction which contained the following: "I instruct you that in order to convict the defendant of the crime of manslaughter charged in this Indictment on the ground that the defendant was engaged in the commission of a lawful act, the prosecution must prove that the lawful act was one which might produce death,

and which did produce death, and the prosecution must go further and prove to your satisfaction beyond a reasonable doubt that the lawful act was done in an unlawful manner. Before you can convict this defendant of the crime of manslaughter as charged in this Indictment on the theory that the defendant was engaged in the commission of a lawful act without due caution and circumspection, you must be convinced beyond a reasonable doubt that the actions and conduct of the defendant on the night in question were culpable, that is to say, that he, and he alone, was to blame for the accident." It will be observed that the first sentence of this quotation closes with the statement that "the prosecution must go further and prove * * * that the lawful act was done in an unlawful manner." This is not a correct statement of the law. By the terms of section 192 of the Penal Code an involuntary manslaughter may result from the commission of a lawful act either "in an unlawful manner" or "without due caution and circumspection." The second sentence in the quotation we have made from the proffered instruction adds ambiguity and uncertainty to the inaccuracy of statement inherent in the first. The first sentence refers, generally, to the commission of a lawful act and says, as we have seen, that it must have been committed in an unlawful manner. The second sentence refers, specifically, to a lawful act committed without due caution and circumspection, and assumes to state a rule of law as to such an act committed in that manner. In other words, the first sentence positively excludes a lawful act committed without due caution and circumspection, while the second, immediately following this shutting of the door, proceeds to treat of the excluded subject. The jury could not have understood such an instruction, and it was therefore properly refused.

[5] Appellant proposed the following instruction, which was refused: "The phrase, 'without due caution and circumspection,' as used in the definition of manslaughter, means the doing of an act, otherwise lawful, in a culpable or reckless manner. I therefore charge you that before you can find the defendant guilty of manslaughter on the theory that he performed a lawful act, which might produce death, in an unlawful manner, without due caution and circumspection, you must be convinced beyond a reasonable doubt that the defendant drove his automobile in a reckless manner, that is to say, in disregard of the rights of pedestrians and other vehicles upon Wilshire boulevard at the time of the accident, and unless you are so convinced, then I charge you that you should acquit the defendant." That this instruction is ambiguous, and that, if given, it must have confused the jury, is to us patent. The phrase, "without due caution and circumspection," is first defined, and the proffered instruction then *therefore* charges what must be shown the jury before it can convict because of the commission of a lawful act "in an unlawful manner, without due caution and circumspection," whereas, under the language of the statute, the meaning of the phrase "without due caution and circumspection" bears no relation to the idea conveyed by the phrase "in an unlawful manner." The statute, in so far as it is touched upon in the proposed instruction now under examination, as we have already pointed out, contemplates the crime of manslaughter as arising from a lawful act committed in an unlawful manner *or* without caution and circumspection. It will be observed that the proffered instruction is also complicated by the omission of this word "or" in the place in which it ought to occur. The instruction was properly refused.

[6] The trial judge refused to give the following proposed instruction: "The court instructs the jury that where doubt exists as to what conduct a defendant should have pursued in a particular case, and intelligent men and women differ as to the proper action to be had, the law does not impute guilt to anyone, if, from the omission to adopt one course instead of another, fatal consequences follow. Therefore, if in the situation which confronted this defendant at the time of the accident in question, you feel that he made an error of judgment in the course which he took, and you feel that by taking another course that was open to him the accident could have been avoided, but that he did not commit an unlawful act, not amounting to a felony, or do a lawful act, which might produce death in an unlawful manner, and that he did not act without due caution or circumspection, then I instruct you that your verdict should be for the defendant and you should acquit him." Appellant complains of the refusal because of the presence in the offered instruction of the language relating to the conduct which a defendant in such a case as this should pursue when confronted with an emergency. We think the point was sufficiently protected by an instruction which the judge gave, and which reads thus: "The court instructs the jury that if from the evidence you believe that at the time of the accident in question the defendant was not guilty of negligence and was exercising that care, circumspection and caution which an ordinarily prudent man, seeing what the defendant saw, confronted with what confronted the defendant, surrounded by traffic and other conditions as was the defendant, would have exercised, then I instruct you it is your duty to return a verdict of not guilty." We refer to this instruction merely as meeting the point made here by appellant, without considering whether it was in all respects proper.

[7] Appellant asked for the following brief

instruction: "In respect to all verbal statements or alleged admissions, it may be observed that these ought to be observed with caution." The request was refused, and appellant contends that the ruling was error. We think it was not. The offered instruction is so general as to be meaningless. We think the jury could not possibly have understood what was meant by it if it had been given.

[8] The closing portion of appellant's brief commences thus: "Without burdening this court with an extended quotation of the several other instructions requested by the defendant that were refused by the trial court, we shall merely refer to the pages of the clerk's transcript upon which these instructions occur. We would request permission in the event that the same becomes necessary to argue these points on oral argument to demonstrate their applicability to the issues presented to the jury." From this beginning it was not to be expected that the points made upon "the several other instructions requested" would be so presented as to require us to decide them, and they are not. Not "several," but many, requested instructions are laid before us either without sufficient means of identification of their contents or without appreciable argument, sometimes without either. We are not called upon to decide points so meagerly presented. The oral argument referred to in the quotation has never been requested, and the statement concerning it has first come to our attention since the submission of the cause for decision.

Judgment and order affirmed.

We concur: CRAIG, J.; THOMPSON, J.

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97 Cal. App. 698

LECKEY v. HOLST. (Civ. 5560.)

District Court of Appeal, Second District, Division 1, California. March 20, 1929.

1. Brokers 🔑53—Broker is "procuring cause," when he brings together owner and person ready, able, and willing to purchase or lease on terms fixed.

When broker has found a purchaser or lessee ready, able, and willing to buy or lease on terms fixed, and either procured from that person a valid contract binding him to purchase or lease, or brought the parties together, thus enabling the lessor to secure a contract, had he so desired, broker is "procuring cause" of transaction.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Procuring Cause.]

2. Brokers 🔑60—That lease was void, and memorandum insufficient under statute of frauds, is immaterial, where principal agreed to pay broker "for her efforts."

In broker's action to recover commission, where principal contended that lease was invalid, and memorandum thereof insufficient under statute of frauds (Civ. Code, § 1624, and Code Civ. Proc. § 1973), doubt as to sufficiency of agreement is resolved in favor of broker, where principal subsequently agreed to pay broker "for her efforts" in securing lease, and it was not error to admit agreement in evidence.

3. Brokers 🔑60—After bringing parties together, broker's right to commissions is not affected by failure to execute valid lease.

Fact that property owner and proposed tenant, brought together by broker, execute writing which is not binding as between themselves, does not affect broker's right to recover commission for services rendered.

4. Appeal and error 🔑1071(6)—Failure to find that broker, suing for commissions, did not secure tenant, was not prejudicial, where court found broker rendered services in securing tenant.

In action for broker's commissions for bringing parties together, failure to find on affirmative allegation in answer that broker did not secure tenant for owner was not prejudicial, where court did find that broker rendered services to owner in securing tenant.

Appeal from Superior Court, Los Angeles County; George H. Thompson, Judge.

Action by Roberta Paxton Leckey against Anna A. Holst. Judgment for plaintiff, and defendant appeals. Affirmed.

J. D. Taggart and Timon E. Owens, both of Los Angeles, for appellant.

N. B. Nelson, of Los Angeles, for respondent.

YORK, J. Plaintiff, a real estate broker, brought this action to recover broker's commission. The defendant was the owner of property on Western avenue, in the city of Los Angeles, which she was desirous to improve with a building and to lease the same for a term of years. With this in mind, defendant (appellant here) made an oral agreement with plaintiff to secure a tenant for her property, whereupon the plaintiff introduced appellant to Sid Grauman, who wished to open a theater in the neighborhood of appellant's lot on Western avenue. The appellant, in company with the plaintiff, called at the office of Mr. Grauman on April 1, 1921, and an agreement was executed by the terms of which appellant agreed to build a theater and lease it to Mr. Grauman for a period of 15 years at a monthly rental of $850. Mr. Grauman was to furnish certain equipment, and the plans and specifications were to be subject to his approval.

On April 14, 1921, appellant made a contract with Arthur H. O'Brien, an architect, to furnish plans and specifications for the proposed theater building at an agreed price of $600, $500 of which was subsequently paid to him by appellant. On May 31, 1921, plaintiff and appellant had a conference, at which time appellant asked plaintiff to pay her $350, which was commission due to her from plaintiff upon a prior transaction made between them. Plaintiff refused to make settlement of the $350, until appellant would give her note or a writing promising to pay plaintiff the $1,000 commission for the lease of the Western avenue lot. After some discussion, an agreement was drawn whereby appellant agreed to pay plaintiff the sum of $1,000 "for her efforts in securing the lease; the said amount of $1,000 to be paid when agreement is signed, or else to be paid $50 per month for a period of 22 months for first 2 years of the rental period, which begins when the theater is completed."

July 20, 1921, appellant signed an acceptance of the Edwards Building Company's proposal to erect a theater building on the Western avenue lot. On January 28, 1922, Sid Grauman paid appellant $500 to reimburse her for the amount she had paid to Architect O'Brien for plans and specifications, whereupon appellant agreed to release Grauman from any obligation accruing under the agreement to lease of April 1, 1921, and he wrote the word "Canceled" across the face of same. On February 4, 1925, plaintiff commenced this action. The trial court rendered judgment in favor of plaintiff, and appellant appeals from such judgment.

Appellant contends that the writing of April 1, 1921, which was attached to and made a part of plaintiff's complaint and introduced in evidence as Plaintiff's Exhibit 1, is not only an insufficient memorandum to satisfy the statute of frauds (Civ. Code, § 1624, and Code Civ. Proc. § 1973), but is also insufficient to create a valid lease, for the reason that it is indefinite and uncertain, in that it does not state when the term of the tenancy would begin, and contained no agreement as to the character of the building to be erected, and that therefore—since it fails to contain all the vital and essential elements of a lease—it is fatally defective and void.

[1] Appellant maintains that, in order for plaintiff to collect her commission, she must have been the procuring cause of securing a valid and enforceable lease between the appellant and the lessee. Unquestionably the law is that a broker is the procuring cause of a transaction, when he has proved that he found a purchaser (or lessee) ready, able, and willing to buy or lease the property upon the terms fixed, and either that he procured from that person a valid contract binding him to purchase or lease, *or that he brought the parties together*, thus enabling the lessor to secure a contract, had he so desired. 4 Cal. Jur. p. 585, § 26, and cases there cited.

[2] Any doubt as to the sufficiency of the agreement of April 1, 1921, is resolved in favor of the respondent, because the appellant on May 31, 1921, at a time when she was negotiating with Mr. Grauman as to the plans and specifications of the theater building and before he had approved them or bound himself to proceed with the lease, signed the agreement promising to pay plaintiff $1,000 *for her efforts* in securing a tenant for the proposed building.

Appellant contends that the trial court erred in overruling her objection to the admission in evidence of the April 1 agreement on the ground that it was incompetent, irrelevant, and immaterial, and maintains that, since the agreement did not contain all of the essential terms of a lease, expressed with such degree of certainty that it could be understood without recourse to parol evidence to show the intent of the parties as to the time the term should begin, it did not satisfy the statute of frauds, and that this defect could not have been cured by plaintiff, even though appellant had made a more specific objection to its introduction into evidence. We believe this contention has been answered by the statements hereinbefore made.

Appellant contends that finding numbered 3 is not supported by the evidence. This finding is to the effect that respondent accepted employment and rendered services to appellant in securing a tenant on the terms and conditions acceptable to and accepted by appellant, and that thereupon appellant made an agreement with the tenant. Appellant urges that such finding is dependent upon the sufficiency of the agreement of April 1, 1921, to constitute a lease.

[3] The evidence conclusively shows that plaintiff brought appellant and Sid Grauman together to negotiate a lease, and that an agreement to lease was drawn. Plaintiff was not required to go further, and the fact that the appellant and the proposed tenant executed a writing, which was not binding as between themselves, cannot affect plaintiff's right to recover her commission for the services which she rendered. We are of the opinion that there is sufficient evidence in the record to support this finding of the trial court.

Appellant next contends that the finding of the trial court as to the account stated between the parties is not supported by the evidence. It was undisputed that the two parties had had prior business dealings, and that the plaintiff was indebted to the appellant in the sum of $350; that the appellant asked plaintiff to pay her this amount, but plaintiff refused to do so until appellant signed the writing of May 31, in which she promised to pay plaintiff $1,000 for her efforts in securing a tenant for the proposed building. It is undoubtedly true that this writing is ambiguous as to the time and manner of payment, but an examination of the record will show that there was ample evidence to support the finding of the trial court as to an account stated between these parties.

[4] Appellant maintains that the trial court erred in failing to find upon the affirmative allegation in the answer to the effect that plaintiff did not secure for the defendant any lessee or tenant, etc. We are of the opinion that finding numbered 3, which finds that plaintiff rendered services to the defendant in securing a tenant as lessee of said premises, etc., sufficiently covers this situation, so that no prejudice resulted because of failure to make a specific finding upon this point.

The judgment is therefore affirmed.

We concur: HOUSER, Acting P. J.; CRAIL, Justice pro tem.

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97 Cal. App. 537

PEOPLE v. ALBORI. (Cr. 1732.) ★

District Court of Appeal, Second District, Division 2, California. March 14, 1929.

Rehearing Denied March 28, 1929. Hearing Denied by Supreme Court April 11, 1929.

1. Criminal law 🔑1173(1)—In prosecution for assault with intent to murder, refusal to instruct that offense of assault was necessarily included held not prejudicial error.

In prosecution for assault with intent to murder, refusal to instruct that offense of assault was necessarily included *held* not prejudicial error, where indictment charged assault with deadly weapon, limiting proof to that particular kind of assault, especially since refusal to so instruct, if erroneous, was not harmful to defendant.

2. Assault and battery 🔑96(3)—Evidence justified instruction that self-defense plea is unavailable, where assault is brought on person by his own procurement.

In prosecution for assault with deadly weapon, evidence *held* to justify instruction that plea of self-defense is unavailable, when assault is brought on person by his own procurement, or under appearance of hostility which he himself creates.

3. Assault and battery 🔑96(3)—Self-defense instruction, though subject to criticism standing alone, because of emphasis on intent of assailant, held not erroneous in view of other instructions.

In prosecution for assault with deadly weapon, instruction that one assaulted by another without intent to kill or to do great bodily harm, and who was not deceived as to character of assault, would not be justified in using deadly weapon in self-defense, though subject to criticism standing alone, because of emphasis on intent of assailant, *held* not erroneous, in view of instructions preceding and immediately following it.

4. Criminal law 🔑761(7)—Self-defense instruction held not erroneous for assumption of facts or comment thereon.

In prosecution for assault with deadly weapon, instruction that person assaulted without intent to kill or to do great bodily harm, who was not deceived as to character of assault, would not be justified in using deadly weapon in self-defense, *held* not erroneous for assumption of facts or comment thereon.

5. Criminal law 🔑829(5)—Refusal of self-defense instruction held not error, where subject-matter was covered by instructions given.

In prosecution for assault with deadly weapon, refusal of instruction that, if defendant were assailed by another with fists under circumstances leading reasonable man to apprehend great bodily injury, he would have right to defend himself as reasonable man would, *held* not error, where subject-matter was covered in instructions given.

6. Assault and battery 🔑95—In prosecution for assault with deadly weapon, whether defendant provoked attack on himself, and whether circumstances would have excited fears of reasonable man, held properly submitted to jury.

In prosecution for assault with deadly weapon, questions whether attack on defendant with fists was provoked by defendant, and whether circumstances of it were of such character as to excite fears of reasonable man, *held* properly submitted to jury.

7. Assault and battery 🔑96(3)—Self-defense instruction, requiring circumstances to be such that reasonable man would believe himself in danger, held not erroneous.

In prosecution for assault with deadly weapon, instruction as to self-defense, requiring circumstances to be such that reasonable man, situated as defendant was, would be justified in believing himself in danger, and instructing that no man can be exclusive judge of reasonableness of appearances on which he acts, *held* proper.

8. Assault and battery 🔑96(2)—Instruction relative to right of one to defend friend who had been assaulted held properly refused under evidence (Pen. Code, § 197, subd. 3).

In prosecution for assault with deadly weapon, refusal of instruction that one not related to another, coming on such person after he has been assaulted, has no right to use force on another whom he believes guilty of assault on his friend, *held* not error under evidence, notwithstanding Pen. Code, § 197, subd. 3.

9. Criminal law 🔑830—Court need not separate proper from improper portion of requested instruction.

In criminal case, court is not bound to separate proper from improper portion of requested instruction.

10. Assault and battery 🔑96(3)—Refusal to instruct that, if assault were justifiable under self-defense, there would have been no transferred intent, held not erroneous.

In prosecution for assault with deadly weapon, refusal to incorporate in instruction on

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★Rehearing denied. Hearing denied by Supreme Court.

issue of transferred intent statement that, if assault were justifiable under self-defense plea, there would have been no transferred intent, *held* not erroneous.

11. Criminal law ⚿1158(3)—Trial court's conclusion, supported by substantial showing that juror was not guilty of misconduct, cannot be disturbed.

Trial court's ruling that juror was not guilty of misconduct cannot be disturbed, where such ruling was by denial of motion for new trial, and there was substantial showing to uphold it, especially where proof of misconduct was on information and belief, and by evidence of statements of juror himself.

12. Criminal law ⚿1035(3)—Any misconduct of judge in commenting on facts is not reversible, if not called to his attention at time.

Any misconduct of trial judge in commenting on facts is not reversible error, where counsel did not call it to court's attention at time, and give him opportunity to correct harm, if any was done.

13. Criminal law ⚿995(6)—Refusal to make sentences for assaults with deadly weapon run concurrently held not error (Pen. Code, § 669, as amended by St. 1927, p. 1056).

In prosecution for assaults with deadly weapon on two persons, refusal to entertain motion that sentences be made to run concurrently *held* not error, under Pen. Code, § 669, as amended by St. 1927, p. 1056.

14. Assault and battery ⚿92—Evidence held to support conviction for assaults with deadly weapon.

Evidence *held* sufficient to support conviction for assaults with deadly weapon, where defendant shot two persons after fist fight.

15. Criminal law ⚿747—Under conflicting evidence, it is jury's province to determine who is telling truth.

Where evidence was conflicting in criminal prosecution, it was jury's province and duty to determine who was telling truth, and not province of reviewing court.

Appeal from Superior Court, Los Angeles County; Wm. C. Doran, Judge.

Marco Albori was convicted of assaults with a deadly weapon, and he appeals. Affirmed.

Hearing denied by Supreme Court; PRESTON and LANGDON, JJ., voting for a hearing.

See, also, 272 P. 321.

Thomas P. White and Otto Christensen, both of Los Angeles (Vincent C. Hickson and A. P. G. Steffes, both of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

THOMPSON, J. Two indictments were returned by the grand jury of Los Angeles county against the defendant, both of them charging him with assault with intent to commit murder; one of them alleging that he did commit an assault with a deadly weapon upon the person of one Dominick Conterno, and the other that he committed an assault with a deadly weapon upon the person of Harry Judson. Verdicts of guilty of assault with a deadly weapon were returned by the jury, and this appeal is from the judgments pronounced upon the verdicts and from an order denying the defendant's motion for a new trial.

[1] Before reviewing in detail the testimony which appellant says is insufficient to support the verdicts, we shall address ourselves to the other specifications or assignments of error in the order set out in his brief, the first of which is that the court erred in refusing to give an instruction requested by him to the effect that the offense of assault is one necessarily included in the offense charged in the indictments, and instructed the jury that the defendant might "be convicted of either the crime of assault with a deadly weapon with intent to commit murder, or the crime of assault with a deadly weapon." It is well for us to note at this juncture that Conterno and Judson were both shot and injured during the disturbance out of which the charge against appellant arose. The Attorney General asserts that it was this act of shooting for which the appellant was put on trial, and not for a fist fight which preceded it. We have already observed that, while the indictments charged the offense of assault to commit murder, yet they stated the facts constituting the assault by saying that appellant did "willfully, unlawfully, feloniously and with malice aforethought, commit an assault with a *deadly weapon* upon the person," etc. (Italics ours.)

Our first consideration, therefore, is to determine the effect of this language in the indictment. In People v. Owens, 3 Cal. App. 750, 86 P. 980, it is said: "By placing the words 'with a deadly weapon' in the indictment the people were limited to proving that particular kind of an assault, and the defendant was informed of the particular character of the assault which he was to meet." In view of the established fact that Conterno and Judson were both injured by pistol shots, the language above quoted that "the people were limited to proving that particular kind of an assault" would seem to indicate that the indictments here were drawn for the express and sole purpose of trying appellant to determine whether he fired the shots. The statement of the Supreme Court in People v. Madden, 76 Cal. 521, 18 P. 402, is also illuminating. It reads: "The defendant having fired his pistol at Jacobson during the fight which occurred at Ferris' saloon, if guilty at all, was guilty of something beyond a simple assault. In this view we think defendant sustained no injury in the refusal to direct the jury that they might render a verdict against defendant of a simple assault." There are numerous authorities to the effect that, where the evidence is such as to make it clear that if the defendant is guilty at all, he is guilty of the offense charged, and not of any included offense, it is proper to refuse to instruct the jury that they may convict of an included crime. People v. Swist, 136 Cal. 524, 69 P. 223; People v. Wright, 93 Cal. 564, 29 P. 240; People v. Barry, 90 Cal. 41, 27 P. 62; People v. Tolli (Cal. App.) 268 P. 1078; People v. Di Donato (Cal. App.) 265 P. 978.

These cases are helpful in aiding us to arrive at a conclusion upon the effect of the language employed in these indictments. Had it been established beyond any doubt that the appellant had fired the pistol which injured Conterno and Judson, a refusal to instruct on simple assault would have been proper under the authorities cited. By parity of reasoning the logic of the language employed in and quoted from People v. Owens, supra, becomes apparent. The indictments charged the appellant with having fired the shots, and with nothing less; the people were limited by their choice of words to proof of an offense not less than "assault with a deadly weapon."

Flowing from this situation there is another reason why the appellant may not complain of the refusal of the court to instruct the jury that it might find appellant guilty of assault. In People v. Lopez, 135 Cal. 23, 66 P. 965, we read: "Again, the instruction complained of was not harmful to the defendant. The jury were fully instructed as to the ingredients of the offense of an assault with intent to murder and of an assault with a deadly weapon, and were then, in effect, told that, if they were not satisfied that defendant was guilty of one of these offenses, they must acquit him altogether. It will be presumed that they heeded this instruction and performed their whole duty in accordance with it. If they had not been satisfied beyond a reasonable doubt that the defendant was guilty of either of the higher crimes, but were satisfied that he was guilty of assault, under the instructions they would have acquitted him. The error, then, if any was committed, was favorable to defendant, and the case should not be reversed on account of it." Almost identical language is again employed by the Supreme Court in the case of People v. Watts, 198 Cal. 776, 796, 247 P. 884, where the defendant was charged with murder, and the jury were told to find him guilty of murder in the first degree or acquit him. These authorities so aptly state the situation here, and so effectually conclude appellant, that further comment is unnecessary.

[2] The next three assignments of error by the appellant are all based upon the instructions given and refused relative to the question of self-defense. He first notes an objection to an excerpt from the instruction on this subject which reads as follows: "Whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts, the plea of self-defense under such circumstances is unavailable." Appellant's assertion that this portion of the instruction is erroneous is based upon his statement that there was no evidence which justified it. He concedes that it states a correct principle of law.

There is testimony that prior to the firing of the shots the appellant asked a Mr. Freeman while they were in the washroom of the ship café, where the disturbance began, "who the jane was" with whom Freeman was dancing, and when the appellant was told that it was none of his business he knocked Freeman down, cutting his mouth, and causing the blood to run; that a few seconds later, when Freeman re-entered the café, the appellant knocked him down again and said, "Get up, and I will give you a right." Following this incident, Conterno testified that he "approached Freeman while he was still on the floor and said, * * * 'What is the matter, Mr. Freeman?' or 'Who hit you?' and somebody had said, 'Why, the man to your left,' and, just as I turned and looked, why I saw this man" (appellant), "pretty good sized man there, and at that instant he made a pass at me, as though he wanted to hit me, and at that instant I got in a fight myself with him."

It cannot be successfully argued that the testimony to which we have just made reference did not justify the jury in finding as a matter of fact that the appellant had instigated the fight which led up to the shooting, and thereby had put himself in a position where the "plea of self-defense" was unavailable to him under the law as stated in the instruction.

[3-6] Appellant next complains because the court instructed the jury as follows: "The court instructs the jury that a person, on whom another is making a mere assault with the fist, not with the intent to kill or do great bodily harm, and who is not deceived as to the character of such assault, is not justified in using a deadly weapon in self-defense," and because the court refused to give two instructions, requested by the appellant, to the effect that, if he were assailed by another with his fists under such circumstances as to lead a reasonable man to apprehend great bodily injury, he would have the right to defend himself as a reasonable man would, and, if he so acted, would be entitled to an acquittal.

Standing alone, the instruction of which the appellant complains would be subject to criticism, because of its emphasis of the intent of the assailant, which is not the governing factor; but it was immediately preceded and immediately followed by instructions covering the proper subject-matter of the instructions requested by the appellant, and, when the instructions covering the right of self-defense are read as a whole, it is apparent that the jury could not have misunderstood its purport. In no less than five other instructions they were told that if, on the night in question, the defendant had reasonable ground to and did believe that he was in danger of great bodily injury, or of having a felony committed upon him, he was entitled to use such force in self-defense as a reasonable man would have used under such circumstances.

Considering the instructions as an entirety, they covered the subject fully and fairly, and the one complained of could only have been interpreted by the jury as meaning that, if the appellant did not have reasonable grounds and did not actually believe that he was in danger of great bodily harm from an assault with fists, he was not justified in using a deadly weapon in self-defense. As thus viewed, the instruction does not violate the law relating to self-defense. Nor do we find in the language attacked the assumption of facts or comment thereon which counsel asserts. The instruction states only a hypothetical situation, which may or may not have been found by the jury actually to have existed. It is sufficient to assert that one view of the testimony adduced would support the jury's conclusion that an attack upon the appellant was provoked by him, and that his assailants did not indicate to him, or to a reasonable mind, a threat of doing great bodily injury.

As already noted, the subject-matter of the requested instruction was covered in instructions given to the jury, with the possible exception that the trial judge did not in express words say that "great bodily injury may be inflicted by use of the fists." He did say to them, however, that "'necessary self-defense' includes *every case* where there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and where the circumstances are sufficient to excite the fears of a reasonable man." (Italics ours.) For the court to have stated that "great bodily injury may be inflicted by use of the fists" would have been the statement of a commonplace, a situation comprehended by the instruction which said that self-defense is available in "every case" where a reasonable man would be fearful of great bodily injury. Whether the attack with fists was not provoked by appellant, and whether the circumstances of it were of such a character as to excite the fears of a reasonable man, were questions properly submitted to and left with the jury under the instructions. Nothing additional was necessary.

[7] Appellant also contends that the court committed error when it gave the following instruction: "A person may have a lively apprehension that he is in imminent danger, and believe that his apprehension is based on sufficient cause and supported by reasonable grounds; that such apprehension is reasonable and warranted from appearances as they present themselves to him. If, however, he acts on these appearances, he does so at his peril, because the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts, but prescribes a standard of its own, which is not only, did the person acting on the appearances himself believe that he was in deadly peril of his life or of receiving great bodily harm, but would a reasonable man, situated as the defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in danger?" and in connection therewith refused to give three instructions proposed and requested by him.

With respect to the instruction given appellant says that it was telling the jury that the "law gives no man the right to determine for himself the character of the imminent danger," and then argues that the law does not punish an honest mistake concerning the extent of the danger which may have confronted him. He relies upon People v. Thomson, 145 Cal. 717, 79 P. 435, to support his argument, but we think that one short quotation from that case, expressing the central point of the opinion, is sufficient to refute the argument. It reads: "If the appearances are such as to justify *a reasonable man in believing* that it is necessary to instantly kill another in order to save himself from death or great bodily injury, and *he does so* believe, he is not required to exercise any 'due care' and 'circumspection' as to the manner of killing." (Italics ours.)

The instruction here given did not limit the right of self-defense by imposing the requirement that the manner of the shooting had necessarily to be with due care and circumspection, but it did with all propriety fix the standard by which to judge the necessity of self-defense to be the actions of a reasonable man under all the apparent circumstances, and quite properly denied the appellant the right to be the sole judge of his course of action. That there can be no doubt as to the correctness of the instruction, reference may be had to the language of the Supreme Court in People v. Glover, 141 Cal. 233, 74 P. 745. Of the instructions which were not given in this particular it may be said generally that they were covered by the instructions given, and of one of them we observe that it was redundant, and inclining to the argumentative. Therefore, if it had been given, it would have confused and tended to befog the jury's mind upon the standard of action required of one acting in self-defense. There was no error in their refusal.

[8, 9] The defendant requested the court to give an instruction as follows: "The court instructs the jury one who is not related to another, and comes upon that person after such person has been assaulted, but when the assault is completed and is not in progress, has no right to use force upon another whom he believes was guilty of an assault upon his friend. Subdivision 3 of section 197 of the Penal Code of California restricts the right of self-defense to the person himself who is assaulted, or when committed in the lawful defense of a wife or husband, parent, child, master, mistress, or servant of such person."

The appellant now maintains that it was error for the court to have refused to give the instruction. There is no testimony that Conterno used force or assaulted the appellant in the defense of Freeman. The prosecution theory and testimony supporting it is that, while the appellant was inviting Freeman to arise and receive "a right," Conterno came upon the scene, whereupon the appellant gave indication of attacking Conterno. The defense testimony tends to establish an assault by Conterno without provocation, but not in defense of Freeman. There is no situation which the jury might have found to which the latter part of the offered instruction would have been applicable. And, had the court given the instruction in the form proposed, it could not have failed to befuddle the mind of the jury with respect to the issues of the trial, and incidentally with the plea of self-defense interposed by the defendant. Under such circumstances, it was proper for the court to refuse the instruction. The court is not bound to separate the proper from the improper portion. People v. Davis, 135 Cal. 162, 67 P. 59; People v. Wagner, 29 Cal. App. 363, 155 P. 649.

[10] The appellant, while conceding that it was proper for the trial court to have instructed the jury upon the issue of transferred intent, says that it should have incorporated in the instruction, as was done in the one proposed by him, but not given by the trial judge, a statement that if the assault were justifiable—that is, done in the exercise of appellant's right of self-defense—there would have been "no transferred intent." We have already observed that the jury were fully instructed upon the law and right of self-defense, and it is inconceivable that they could have understood that, if they believed appellant was acting in self-defense, they should do other than acquit him. This is especially true, in view of the fact that in the instructions with respect to the verdicts of assault with intent to murder or assault with a deadly weapon, which might be returned by the jury, the trial judge instructed them that it was necessary for them to determine that the assault was not committed in self-defense before either verdict might be found. Under these circumstances it was not improper for the court to refuse the requested instruction or to fail to incorporate its substance in the one given.

[11] Appellant very insistently urges that he was deprived of an orderly trial by jury, and that the jury received evidence out of court. The record upon which he bases this argument was made up for use and was used upon his motion for a new trial. He filed three affidavits, in one of which one of his counsel averred that on the fourth day after the verdict was returned he (counsel) had a conversation with the deputy district attorney who prosecuted the defendant, wherein the deputy told affiant that he knew that the defendant would never get an acquittal, because a juror named Henderson was absolutely against him; that the trial judge had told him "the other day that the bailiff had told" the trial judge "that this juror Henderson was saying among the other jurors that your witness Perry * * * had received $5,000 from Marco to testify for him in the first trial, and that he [juror Henderson] knew your witness Perry, and knew that he was a friend of Marco's, and that he had only testified because Marco paid him the $5,000." An affidavit by the deputy district attorney, filed in response to the one from which we have just quoted, denied that the conversation took place at the time mentioned or at any other time.

Two additional affidavits were filed by the defendant, in which the affiants (one of them being one Grainger and the other the witness Perry) stated that they called on juror Henderson on September 13, 1928; that Perry told Henderson that he had heard that the latter had stated that he, Perry, had received $5,000 for giving his testimony, and that Henderson had made this statement in the presence of other jurors prior to the return of a verdict; that in response to these statements Henderson replied that he had so stated, and that he had heard the rumor from "a crowd in Inglewood"; that "other jurors knew of others who were getting paid"; it "was a rotten mess, and we wanted to clean them up." The state presented the affidavit of Henderson in reply to those filed by the defense, in which this juror denied that at any time he had had the conversation with Perry and Grainger set forth by them, and denied that he had discussed the witness Perry with any of the jurors, or stated to them, or any of them, that Perry had received $5,000 for testimony given at the first trial.

It is obvious that the facts upon which both of appellant's claims are founded were squarely put in issue by the affidavits filed by the prosecution. The affidavit of Henderson denied that he had made the statement to other jurors, and the affidavit of the deputy district attorney denied that he had ever quoted the trial judge as saying that he had information from the bailiff concerning any misconduct. Under these circumstances it was incumbent on the trial judge to determine the issue. Undoubtedly, if he had believed that the jury had received testimony in any manner other than through the regular channels of trial procedure, he would have granted a new trial. By his denial of the motion for a new trial he evidenced his conviction that the juror was not guilty of misconduct, and where, as here, there is a substantial showing to uphold that conclusion, the ruling cannot be disturbed. In the case of People v. Sing Yow, 145 Cal. 1, 78 P. 235, quoted with approval in People v. Oxnam, 170 Cal. 211, 149 P. 165, after determining that a motion for a new trial is addressed to the sound discretion of the trial judge, it is said with respect to counter affidavits:

"As has already been shown, it is well settled in this state that it is for the trial court to determine whether or not the newly discovered evidence is of such a character as to make it reasonably probable that it would produce a different result on another trial, and in the determination of that question we can conceive of no good reason why the trial court should be limited to a consideration of the affidavits offered by defendant and the record of the trial. Such certainly has not been the practice in this state. In People v. Fice, 97 Cal. 459 [32 P. 531], the record shows that the counter affidavits were entirely devoted to a contradiction of the alleged facts proposed to be proved by the newly discovered witnesses, and this court said: 'Upon the ground of newly discovered evidence it is sufficient to say that the affidavits offered in support thereof were fully contradicted by counter affidavits on the part of the prosecution, and for that reason the court below exercised a proper discretion in refusing to grant the motion.' See, also, Thompson v. Thompson, 88 Cal. 110 [25 P. 962]; People v. Mesa, 93 Cal. 580 [29 P. 116]; Merk v. Gelzhaeuser, 50 Cal. 631; Doyle v. Sturla, 38 Cal. 456. It has been held in many cases in other states that it is entirely competent to show by counter affidavits on motion for new trial that a newly discovered witness is unworthy of credit. Williams v. Baldwin, 18 Johns. [N. Y.] 489; Parker v. Hardy, 24 Pick. [Mass.] 246; Pomroy v. Columbia Ins. Co., 2 Caines [N. Y.] 260; Erskine v. Duffy, 76 Ga. 603; Greenleaf v. Grounder, 84 Me. 50 [24 A. 461]; Moore v. State, 96 Tenn. 209 [33 S. W. 1046]; 1 Graham and Waterman on New Trials, *p. 485. In other cases, counter affidavits as to the alleged facts to be testified to by new witnesses were allowed. Coast Line R. R. Co. v. Boston, 83 Ga. 387 [9 S. E. 1108]; Harmon v. Charleston, etc., Ry. Co., 88 Ga. 261 [14 S. E. 574]; Harris v. Rupel, 14 Ind. 209; Searcy v. Martin-Woods Co., 93 Iowa, 420 [61 N. W. 934]; Ames v. Howard, 1 Sum. 482; Lorig v. Davenport, 99 Iowa, 479, 68 N. W. 717; Finch v. Green, 16 Minn. 355 (Gil. 315); State v. Burd, 115 Mo. 405 [22 S. W. 377]; Burlingame v. Cowee, 16 R. I. 40 [12 A. 234]; Dignowitty v. State, 17 Tex. 521 [67 Am. Dec. 670]; Nicholas v. Commonwealth, 91 Va. 741 [21 S. E. 364]; Holland v. Huston, 20 Mont. 84, 49 P. 390; Hammond, etc., Ry. Co. v. Spyzchalski, 17 Ind. App. 7, 16 [46 N. E. 47]. In a note, in volume 14 of the Encyclopedia of Pleading and Practice, p. 913, it is said that it is uniformly held that on the hearing of such a motion the court may examine counter affidavits to determine whether a new trial would promote justice or result in a different judgment."

That there is a further fatal defect in the argument of counsel upon the question now under consideration is patent from the language employed in People v. Kady, 60 Cal. App. 661, 214 P. 293, where a very similar objection was under scrutiny. The court says: "One of the grounds upon which the motion for a new trial was based was that of misconduct of the jury, consisting first, in an alleged experiment, made by one of the jurors while the trial was in progress to determine how long it would take a box, similar to those in which merchandise of the defendants had been placed, to burn after being ignited. The sole evidence offered in support of this ground was an affidavit of the attorney for the appellant. While this affidavit contained the preliminary phrase that the affiant offered the same, 'based upon his personal knowledge of the facts therein contained,' at the hearing of the motion it was admitted by said counsel that he had no actual knowledge of the facts, but that the latter were intended to be stated upon information and belief, from statements made by the jurors. The district attorney very properly objected to a consideration of the affidavit on the ground that the law required direct proof of the facts sought to be presented, and that any statement made solely upon information and belief would not be proper evidence. The position of the prosecutor on that question is fully sustained by the decisions. People v. Findley, 132 Cal. 301, 64 P. 472; Gay v. Torrance, 145 Cal. 144, 78 P. 540. Defendant asked leave to call the jurors to the witness stand to require them to testify as to the alleged misconduct, to which procedure the court properly sustained objection. Nothing in our law is more firmly established than that the verdict of the jury may not be impeached by the evidence of the jurors themselves, with the single exception that it may be shown by the jurors that the verdict was determined by chance. The early cases are reviewed and the rule restated in People v. Azoff, 105 Cal. 632, 39 P. 59, to which citation may be added People v. Findley, supra, and the case of People v. Chin Non, 146 Cal. 561, 80 P. 681."

[12] The appellant also asserts that the trial judge was guilty of misconduct and deprived appellant of a fair and impartial trial by commenting on the facts. The asserted misconduct is said to have been committed by the judge, when he asked a defense witness on cross-examination four short questions concerning his knowledge of the time daylight occurred on June 27, and his comments during a discussion with counsel, based upon his judicial knowledge concerning the twilight period before the sun rises, and that one-half hour before sunrise it is sufficiently light for a hunter to shoot ducks. Assuming that there was misconduct, and we are unable to perceive any, it is a sufficient answer to say that counsel did not call it to the court's attention at the time, and give him an opportunity to correct the harm, if any was done. Under a familiar rule, to support which it is unnecessary to cite authorities, the assignment must be disallowed.

[13] It is next argued that the court erred in refusing to entertain a motion that the sentences be made to run concurrently. Section 669 of the Penal Code (amended by St. 1927, p. 1056) discloses a legislative intent that the terms of imprisonment should ordinarily run consecutively; it being there stated in a proviso, however, "* * * that in exceptional cases the judgment, in the discretion of the court, may direct that such terms of imprisonment, or any of them, shall run concurrently." That the trial judge entertained an idea that the term which a defendant is required to serve rests with the prison board is not the controlling factor. There is nothing in this case to make of it the "exceptional case" mentioned in the statute. Had appellant been convicted of the offenses charged, instead of the lesser and included offenses, there might possibly have been room for argument; but the offense of assault with a deadly weapon in a room filled with people, any one of whom was apt to be fatally injured, is of such a serious character that we see no reason why appellant should not pay the price of both shots. Certainly the situation is not one demanding exceptional solicitude for fear of overpunishment.

[14, 15] Finally we are brought to the point where it is necessary to dispose of appellant's contention that the evidence is insufficient to support the verdicts. We have already mentioned the bullet wounds received by Conterno and Judson. There was ample testimony supporting the conclusion that appellant fired the shots which inflicted the injuries. We have also referred to testimony which supports the belief that appellant was the aggressor in the fight with Freeman, as well as the one which followed with Conterno. Without going into too great detail, the testimony of the witness Freeman sufficiently evidences the fact that there was support for the view of the jury that appellant did not shoot in self-defense. This witness says that, during the fist fight between Conterno and appellant, some one grabbed Conterno's tuxedo coat and ripped it; that Conterno let go of appellant, pulled off his coat, throwing it into the lobby, and started back toward appellant, whereupon the latter said something about cleaning out the "'rat joint'" or something of that sort; pulled his gun real quick, and fire the shots which caused the injuries. The testimony of this witness would be sufficient, but there is other evidence supporting the conclusion of the jury that the shots were not fired in self-defense. And, although the evidence was badly in conflict, and all of the prosecution witnesses did not agree upon the details, it was the jury's province and duty to determine who was telling the truth, and not the province of this court.

Judgments and orders affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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BOWMAN v. BOWMAN et al. (Civ. 3730.)★

District Court of Appeal, Third District, California. March 18, 1929.

Rehearing Denied April 17, 1929. Hearing Denied by Supreme Court May 16, 1929.

1. Divorce 🔑167—Second wife held entitled to notice of divorced wife's motion to vacate decree, and hearing of application to vacate order granting it (Civ. Code, § 61; Code Civ. Proc. § 389).

Second wife *held* entitled to notice of divorced wife's motion to vacate decree, as one whose rights were prejudicially affected by granting thereof, within Civ. Code, § 61, and to hearing of her application to set aside such order for divorced wife's fraud in concealing from court fact that she had acquiesced in decree, under Code Civ. Proc. § 389, whether or not she was necessary or proper party to proceeding.

2. Divorce 🔑167—Divorced wife held guilty of laches barring suit to annul husband's second marriage, and estopped to apply for annulment of divorce decree.

Divorced wife, not moving to vacate final decree until about ten months after first learning of its entry, but acquiescing in and expressing satisfaction with it and accepting support, maintenance, etc., granted her thereby, after learning of husband's second marriage, *held* barred by laches from suing to annul second marriage, and estopped to apply for annulment of decree.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Suit by Frances C. Bowman against Horace D. Bowman and Bryan Houston Bowman, who filed a cross-complaint against plaintiff and defendant Horace D. Bowman. From

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★Rehearing denied. Hearing denied by Supreme Court.

a judgment for plaintiff and cross-defendants, cross-complainant appeals. Reversed and remanded, with directions.

Hearing denied by Supreme Court: RICHARDS and LANGDON, JJ., voting for a hearing.

Hill Morgan & Bledsoe, of Los Angeles, for appellant.

Sample & Harden, F. F. Grant, and Wright & McKee, all of San Diego, for respondents.

McDANIEL, Justice pro tem. This appeal is from the judgment on the judgment roll alone. Frances C. Bowman, as plaintiff, sued the defendants for annulment of the marriage of defendants Horance D. Bowman and Bryan Houston Bowman. The defendant Horace D. Bowman entered his voluntary appearance in the action, and by his answer admitted each and every of the allegations of the complaint herein and waived notice of the time of trial.

The defendant Bryan Houston Bowman answered with appropriate denials the averments of the complaint, and set up in separate counts certain affirmative defenses. She also filed a cross-complaint, making both the plaintiff, Frances C. Bowman, and the defendant Horace D. Bowman cross-defendants. They duly answered the cross-complaint. Each of them filed an answer to the cross-complaint. The court made findings of fact, conclusions of law, and entered judgment in favor of plaintiff, vacating, annulling, and setting aside the marriage of Horace D. Bowman and Bryan Houston Bowman, which was duly solemnized April 21, 1925, and denying the application of Bryan Houston Bowman, the cross-complainant for relief. Judgment was entered December 31, 1926.

The appeal presents the question as to whether or not the conclusions of law were supported by the findings, and whether or not, in view of the findings of fact, the cross-complainant should have been granted the relief prayed for in her cross-complaint. The findings show the action was tried August 27, 1926, by the court without a jury; the parties were represented by counsel. The court found that respondents Frances C. Bowman and Horace D. Bowman intermarried October 16, 1915, and ever since have been and now are husband and wife; that on September 28, 1923, in the superior court of San Diego county, California, Frances C. Bowman, as plaintiff, commenced an action, numbered 40,202, and obtained an interlocutory decree October 13, 1923, entitling her to a final decree of divorce from Horace D. Bowman, after the lapse of one year; that on or about July 27, 1924, the said Horace D. Bowman and Frances C. Bowman, said husband and wife, became reconciled; that she forgave him the offenses constituting her said cause of action, and they lived together as husband and wife until October 22, 1924, when they again separated, she going to Pasadena to live and he to Los Angeles; that they were not living together as husband and wife at the time of the entry of the final decree, October 28, 1924.

The remaining findings of fact and conclusions of law will be set out verbatim:

"IV. That at all times said defendant and cross-complainant Bryan Houston Bowman knew of the reconciliation and separation of the said Frances C. Bowman and the said Horace D. Bowman, and of the facts recited in paragraph III hereof.

"V. That on or about October 28, 1924, the said defendant Horace D. Bowman caused to be entered in the records of the superior court of the county of San Diego, state of California, in said action No. 40,292, a final decree of divorce, wherein and whereby it was purported to be decreed that the bonds of matrimony theretofore existing by and between the said Frances C. Bowman and the said Horace D. Bowman were dissolved; that said final decree of divorce further provided for the awarding of the custody of the minor children of the said marriage of the said Frances C. Bowman, and for the payment of certain sums of money for the support and maintenance of said children; that the said Horace D. Bowman procured said final decree of divorce to be entered as aforesaid in the following manner:

"That on or about October 28th, 1924, the said Horace D. Bowman requested his attorney, David P. Hatch, to call by long distance telephone, the attorney for the said Frances C. Bowman, and to request the said attorney for the said Frances C. Bowman to have said final decree of divorce entered; that the said Horace D. Bowman did not tell or notify the attorney for the said Frances C. Bowman that he, the said Horace D. Bowman, and the said Frances C. Bowman had, prior thereto, became reconciled subsequent to the entry of the interlocutory decree of divorce in said action, or that the said parties had, after becoming reconciled, separated, and were at said time living separate and apart; that the said Horace D. Bowman did not notify the said attorney for the said Frances C. Bowman of any facts or matters, or make any statements or representations to him, other than to request him to have said final decree of divorce entered; that the said attorney for the said Frances C. Bowman thereupon, pursuant to the request of the said Horace D. Bowman, caused said final decree to be entered, by preparing said final decree and presenting it to the court for signing; that the said attorney for said Frances C. Bowman did not make any statements or representations to the court at the time of presenting the said final decree of divorce for the signature of the court, and did not make any disclosures to the court as to the prior reconciliation and separation of the said parties, and that at the time of the signing, filing and entering of said final decree of divorce, the court did not know that the said parties had, prior thereto, become reconciled, and had lived together as husband and wife, or that the said parties had thereafter, and prior to the signing, filing and entering of said final decree of divorce, separated, and were at said time living separate and apart.

"VI. That from and after the separation of the said Horace D. Bowman and the said Frances C. Bowman on or about the 22nd day of October, 1924, the said Horace D. Bowman and the said Frances C. Bowman continued to live separate and apart, and that the reconciliation previously effected by and between them on or about said date terminated, and that at the time of the signing, filing and entering of said final decree of divorce, the said parties were not living together as husband and wife, and that they continued to live separate and apart thereafter until long after the marriage of the said Horace D. Bowman and the said defendant and cross-complainant Bryan Houston Bowman.

"VII. That the said Horace D. Bowman did not notify the said Frances C. Bowman of the fact that he had, through her attorney, caused said final decree of divorce to be signed, filed and entered on or about October 28th, 1924, until some time during the early part of January, 1925; that in causing said final decree of divorce to be signed, filed and entered as aforesaid, the attorney for the said Frances C. Bowman did not, prior thereto, inquire of the said Frances C. Bowman as to whether or not she desired said final decree of divorce to be signed, filed and entered, and did not thereafter notify her of the fact that said final decree had been signed, filed and entered; that the said Frances C. Bowman first knew of the fact that said final decree had been filed and entered about or during the first part of January, 1925; that thereafter the said Frances C. Bowman made no effort whatsoever to cause said final decree of divorce to be set aside or vacated until after the marriage of the said Horace D. Bowman to the said Bryan Houston Bowman, but, on the contrary, the court finds that the said Frances C. Bowman, upon being informed of the fact of the entry of the said final decree of divorce in the early part of January, 1925, acquiesced therein, expressed satisfaction therewith, and was willing and desirous that said decree stand as a valid and subsisting final decree of divorce until after the marriage of the said Horace D. Bowman and the said Bryan Houston Bowman, when for the first time said Frances C. Bowman manifested any desire to, or did make any effort whatsoever to have said final decree of divorce set aside, annulled or vacated.

"VIII. That on the 21st day of April, 1925, the said Horace D. Bowman and the said defendant and cross-complainant Bryan Houston Bowman were intermarried, and thereafter to and until about the 1st day of October, 1925, lived together as husband and wife; that the said Frances C. Bowman became aware of the marriage between the said Horace D. Bowman and the said defendant and cross-complainant Bryan Houston Bowman on or about the 1st day of May, 1925; that at all times after said marriage of the said Horace D. Bowman and the said Bryan Houston Bowman, the said parties resided in the city of Santa Monica as husband and wife up to or about the 1st day of October, 1925, and that during all of the said period the said Frances C. Bowman was also residing in the said city of Santa Monica; that on or during the month of August, 1925, the said Horace D. Bowman and the said Bryan Houston Bowman began to have difficulties, and thereafter the said Horace D. Bowman entertained the idea of having the marriage of himself and the said Bryan Houston Bowman annulled; that thereupon the said Horace D. Bowman and the said Frances C. Bowman entered into an agreement and conspiracy in which they conspired and agreed that the said Frances C. Bowman should appear before the superior court of the county of San Diego in the aforesaid divorce action No. 40,292, and represent to the court in said action that the said final decree of divorce, filed and entered in said action, had been obtained against her consent, and that at the time of the filing and entry of said final decree of divorce, that she and the said Horace D. Bowman were reconciled, and were living together as husband and wife, and that she, the said Frances C. Bowman, never at any time desired said final decree of divorce to be filed and entered, and that she had never acquiesced therein, and that she, upon learning of the filing and entering of said final decree of divorce, proceeded with due diligence to have said final decree of divorce vacated, annulled and set aside, and it was further agreed by and between the said Horace D. Bowman and the said Frances C. Bowman that the appearance and motion of the said Frances C. Bowman for the annullment and vacation of the said final decree of divorce should be kept secret from the said Bryan Houston Bowman, and that the said Bryan Houston Bowman should not be notified thereof, and that the said Horace D. Bowman would make no opposition to said appearance or said motion, but would acquiesce therein, and would do all that he could to aid and assist the said Frances C. Bowman in procuring and obtaining an order annulling and setting aside said final decree of divorce.

"IX. The court further finds that thereafter, pursuant to said agreement and conspiracy, the said Frances B. Bowman filed in the superior court of the county of San

Diego, in the aforesaid divorce action No. 40,292, a notice of motion that she, the said Frances C. Bowman, would, on November 2, 1925, move said court for an order vacating and setting aside the final decree of divorce theretofore filed and entered in said action; that in support of said motion, the said Frances C. Bowman filed, and caused to be filed, certain affidavits, including an affidavit signed and sworn to by her; that in said proceedings the said Frances C. Bowman was represented by F. F. Grant, an attorney at law, who had been her attorney of record at all times in said action; that no notice of said motion was given to the said Bryan Houston Bowman, and no papers or process served upon her, but that said proceedings were kept secret from the said Bryan Houston Bowman, and that she had no knowledge or information thereof; that in the affidavit signed and filed by the said Frances C. Bowman in support of said motion to set aside and vacate said final decree of divorce, the said Frances C. Bowman, pursuant to said agreement and conspiracy with the said Horace D. Bowman, alleged and set forth, that subsequent to the interlocutory decree of divorce, there had been a reconciliation between her and the said Horace D. Bowman, and that at the time of the entry of said final decree of divorce, to wit, on October 28, 1924, that she and the said Horace D. Bowman were reconciled and living together as husband and wife; that she did not know of or consent to the entering of said final decree of divorce; that she did not want a divorce; that the said defendant did not tell her that he had entered a final decree of divorce, but that later she learned that he had secured a final decree of divorce 'away back in the month of October, 1924'; that the said Frances C. Bowman further recited in said affidavit that very soon after she learned that the final decree of divorce had been entered, she began to find out what she could do about setting aside said final decree of divorce, and that she consulted with friends and some attorneys concerning the possibility of having said final decree of divorce set aside and vacated; that the said Frances C. Bowman did not, by affidavit or otherwise, inform the court, on the hearing of said motion to set aside and vacate said final decree of divorce, that at the time of the entry of said final decree of divorce, that she and the said Horace D. Bowman were living separate and apart, or that their prior reconciliation had been terminated, nor did she, by affidavit or otherwise, inform the court, on the hearing of said motion, nor was the court informed by any one, that the said Frances C. Bowman upon hearing of the filing and entering of said final decree of divorce during or about the 1st day of January, 1925, acquiesced therein or expressed satisfaction therewith, or that she, the said Frances C. Bowman, did not, for a period of seven or eight months thereafter, make any effort, or take any steps, to have said final decree of divorce set aside, annulled or vacated; that the said Horace D. Bowman did not make any opposition to the granting of said motion, nor file any contest thereto, but, on the contrary, pursuant to his agreement and conspiracy as aforesaid with the said Frances C. Bowman, the said Horace D. Bowman, by his silence and acquiescence and failure to contest, and by actively aiding the said Frances C. Bowman in the filing of said motion, and in keeping secret from the said Bryan Houston Bowman all knowledge or information concerning said proceedings and motion, permitted the court to believe on the hearing of said motion that he had perpetrated a fraud upon said court in having said final decree of divorce signed, filed and entered.

"X. The court further finds that the purpose and motive of the said Horace D. Bowman in conspiring and agreeing with the said Frances C. Bowman as aforesaid, and in doing, and failing to do, the things aforesaid, was to enable him, the said Horace D. Bowman, to obtain a decree of annulment, annulling and setting aside the marriage which he had prior thereto contracted with the said Bryan Houston Bowman, and to enable him, by so doing, to defeat and defraud the said Bryan Houston Bowman of her rights growing out of said marriage, and that the motives of said Frances C. Bowman were to enable her and the said Horace D. Bowman to defeat and defraud the said Bryan Houston Bowman of her rights growing out of the said marriage, and to enable her to maintain this action to annul and set aside said marriage; that thereupon and pursuant thereto, and without being advised as to all of the true facts, the superior court of San Diego county, in said case No. 40292, granted the motion of the said Frances C. Bowman, and caused an order to be signed, made, filed and entered, setting aside, vacating and annulling the final decree of divorce theretofore entered in said action on October 28, 1924; that the said defendant, Bryan Houston Bowman, was not present at the hearing of said motion, nor was she represented by counsel, or any one; that she had no opportunity to be present at the hearing of said motion, and had no knowledge thereof, and no opportunity to defend herself.

"XI. The court further finds that pursuant to the said conspiracy and agreement by and between the said Horace D. Bowman and the said Frances C. Bowman, the said Frances C. Bowman, after obtaining said order setting aside and annulling said final decree of divorce, commenced this action to annul and set aside the marriage between the said Bryan Houston Bowman and the said Horace D. Bowman, and that the said Horace D.

Bowman, although a party defendant in this action, has at all times during the pendency of this action, actively aided and assisted the said Frances C. Bowman in the prosecution of this action against the said defendant and cross-complainant, Bryan Houston Bowman.

"XII. The court further finds that subsequent to the signing, filing and entry of the said final decree of divorce in said action No. 40292, the said plaintiff, Frances C. Bowman, accepted the provisions and benefits of said final decree of divorce, by receiving and accepting from the said Horace D. Bowman the amounts of money provided in said decree for the support and maintenance of the children named in said decree until said decree was set aside and annulled, as hereinbefore set forth.

"As conclusions of law from the foregoing findings of fact the court finds:

"First. That the said defendant and cross-complainant, Bryan Houston Bowman, was not a necessary or indispensable party to the proceedings had in the superior court of San Diego county in case No. 40,292, wherein the said Frances C. Bowman sought and obtained an order setting aside, annulling and vacating the final decree of divorce theretofore filed and entered in said action, and was not entitled to notice of said proceedings, nor to the service of any of the papers therein, and is not entitled to complain of the procuring of the order setting aside and vacating said final decree.

"Second. That the said Bryan Houston Bowman is not entitled to a judgment vacating or annulling the order of said Superior Court setting aside said final decree of divorce in said action, nor is she entitled to a judgment that said final decree of divorce be restored or declared to be a valid and subsisting final decree of divorce, nor is she entitled to any relief whatsoever.

"Third. That the said plaintiff, Frances C. Bowman, is entitled to a judgment vacating, annulling and setting aside the marriage between the said Horace D. Bowman and the said Bryan Houston Bowman. That each party pay his or her costs. Let judgment be entered accordingly."

Appellant contends that the learned trial court erred and judgment should be reversed for the following reasons: (1) That the appellant, Bryan Houston Bowman, was a necessary and indispensable party in the action or motion to set aside the final decree of divorce; (2) irrespective of whether appellant was a necessary or proper party to the proceeding to vacate the final decree of divorce, she is entitled, as one whose rights have been injuriously affected thereby, to complain of the fraud practiced upon the court, and to have said order set aside in an independent suit in equity; (3) that the fraud practiced in procuring the setting aside of said final decree of divorce was extrinsic and not intrinsic fraud; (4) that the respondents, under the facts found by the court, were estopped to attack or in any way set aside said final decree of divorce.

Respondents, in their reply brief, call attention to an omission in appellant's statement of facts of a fact admitted in appellant's answer, to wit, "The trial court was informed at the hearing on the motion to vacate the final decree of divorce that Horace D. Bowman had entered into a second marriage with Bryan Houston Bowman," and argues, in support of the order in the proceedings for vacating the final decree and the judgment in this suit, "that the order setting aside the final decree was in all respects a proper order, that no fraud was committed in procuring the said order, and that, therefore, such order must be permitted to stand."

Respondent, although not an appellant, criticizes the findings of the trial court herein to the effect that Horace D. Bowman and Frances C. Bowman, the first wife, entered into a conspiracy to set aside the final decree and to institute the annullment action. After quoting the definition of conspiracy as being, "a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means," and citing in this connection the case of Pettibone v. U. S., 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419, argues, in reliance upon said authority, that the trial court should have found herein that Frances C. Bowman and Horace D. Bowman, acting in concert, did absolutely nothing in connection with the setting aside of the final decree or the bringing of this action, except to take legal and lawful steps; that the court found improperly that they conspired together or entered into a conspiracy.

That contention seems to overlook the charge herein in that the respondents conspired to accomplish the unlawful purpose of defrauding the second wife, Bryan Houston Bowman. Briefly stated, said respondent further argues that the said final decree of divorce was procured by extrinsic fraud upon the court; that the fact that the reconciliation had terminated had no bearing upon the questions of law involved; that the order setting aside the final decree was properly made; that no fraud was committed upon the superior court of San Diego county in obtaining the order setting aside the final decree; that the fact of Horace D. Bowman's second marriage did not deprive the court of power to set aside the final decree; that no grounds were shown herein sufficient to invalidate the order setting aside the final judgment, and, in conclusion, urges some general considerations expanding, recapitulating and adding to his said several points.

[1] The foregoing statement of facts and arguments indicates interesting features of this suit, but our conclusion upon the essential

legal propositions involved make it unnecessary to follow respective counsel in all their able and well-presented points and authorities. We determine that, irrespective of whether appellant was a necessary or proper party to the proceeding to vacate the final decree, she was entitled to notice of the application, as one whose rights as a wife have been injuriously affected by the order vacating the final decree of divorce, and that she is entitled to complain of the fraud practiced upon the court and upon herself, and, by her cross-complaint in equity, have the said order set aside and annulled.

In Bennett v. Wilson, 122 Cal. 509, 55 P. 390, 68 Am. St. Rep. 61, the court said: "The general rule is, that none but the parties to a judgment can have it set aside. But this rule is not without its exceptions, and third parties—persons not nominal parties—who are necessarily affected by the judgment, may be protected from its operation." This rule is reaffirmed by the Supreme Court in the same case. Bennett v. Wilson, 133 Cal. 379, 65 P. 880, 85 Am. St. Rep. 207. Carlisle v. Carlisle, 96 Mich. 128, 55 N. W. 673, was a case where the plaintiff obtained a decree of divorce which subsequently was set aside. Anna E. Carlisle, the second wife, who had not been given notice of the proceedings to set aside the decree of divorce, intervened, and on her petition, the order vacating the decree was set aside.

In that case, as in the case at bar, it was contended that as the second wife was not a party to the original suit of divorce, and, therefore, not a party to subsequent proceedings in that case, she was not entitled to notice, and could not intervene, even though the effect of the proceeding would be to destroy her rights as a legal wife. The court held she was entitled to notice of the proceeding to vacate the decree and, also, to maintain an independent action to set aside the judgment. The court said, in part, after an exhaustive review of the authorities: "To hold that in such a case the second wife, who had in good faith relied upon the decree sought to be set aside, was not entitled to notice, and had no right to intervene, would be rank injustice."

Respondent herein, on page 26 of his brief, says: "When the superior court knew that Bowman had remarried, it then became the province and duty of the court to consider the interests of the second wife." Respondent then quotes with approval 2 Bishop, Marriage, Divorce and Separation, § 496, relating to the sacred obligation upon the trial court in a divorce proceeding to look after the interest of all who cannot be present, as well as the rights of the public, and then continues: "The foregoing rules are of universal application in divorce actions. When it was once brought home to the trial court that Horace D. Bowman had remarried, that court must of necessity have taken that fact into consideration and weighed that fact in exercising its discretion. *The court might, had it so desired, brought the second wife before it or made such further investigation as the judge thereof deemed necessary to reveal those facts which would govern it in the exercise of a sound, judicial discretion.*" (Italics ours.)

It is further argued that as the court knew of the reconciliation, there was little else in the way of information, which could have been given, which would have affected the court's discretion, which it exercised in giving due consideration to the rights and status of all parties concerned. We agree with the propositions of law pertaining to the sacred duty of the trial court to protect all concerned. If, however, under the facts as stated by respondent it was a matter of discretion, we are convinced that the exercise of a wise and sound discretion would have required the court to issue its order that the second wife, Bryan Houston Bowman, be given her day in court and the application to be heard under the provisions of section 389, Code of Civil Procedure.

The granting of the motion to vacate the final decree prejudiced the rights of the cross-complainant, because it ipso facto destroyed her marriage. Section 61, Civ. Code. Rowland v. Horst, 188 Cal. 772, 207 P. 373, cited by appellant, is as follows: "Necessary parties to an action in the capacity of defendants are those who are interested in resisting the demands of the plaintiff either immediately or consequently and whose rights would be prejudicially affected by the controversy." See, also, Wickersham v. Comerford, 96 Cal. 433, 31 P. 358; Bergin v. Haight, 99 Cal. 52, 33 P. 760; Estate of Seaman, 51 Cal. App. 409, 196 P. 928; Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97. Other authorities having more or less bearing on this point will be referred to later.

[2] The second reason we find which would indicate that the judgment in this case should be reversed is that, in our view, the order made in the proceedings in the divorce suit after the entry of the final decree was void, as being in excess of the jurisdiction of the court, because (1) Frances C. Bowman was guilty of laches, as affirmatively appears in findings VII and IX, in delaying her application for suit herein from the early part of January, 1925, when it is found she first knew of the entry of said final decree, until November 2, 1925, a delay of approximately ten months; (2) she was estopped from the right to make application for an annulment of the final decree, as it affirmatively appears from said findings that when she first learned of the final decree in the early part of January, about three months after her own counsel had applied for and obtained the said

decree on October 28, 1924, she acquiesced therein, expressed satisfaction therewith, and was willing and desirous that said decree should stand as a valid and subsisting decree. After she learned of the marriage of Horace D. Bowman to Bryan Houston Bowman, which took place in April, 1925, Frances C. Bowman accepted all of the benefits granted her by the said decree in the way of support, maintenance, and the custody of minor children, etc. She thereby confirmed and ratified the action of her attorney, Mr. Grant, in causing the issuance of said final decree. She made no effort thereafter to have said decree set aside until November 2, 1925, more than a year after its issuance, by which time the trial court had lost jurisdiction to vacate it or set it aside, under the well-established law of this state.

Wheelock v. Superior Court of San Diego County, 67 Cal. App. 601, 227 P. 931, was a proceeding in prohibition to restrain the superior court from vacating a final decree of divorce. The court therein said: "If the motion which was finally made to respondent court more than seven months after the entry of the final decree of divorce be regarded as one invoking the inherent power of the court to set aside orders and judgments procured through fraud, irrespective of the provisions of section 473 of the Code of Civil Procedure, it was unseasonably late." That case is based on facts similar in some respects to those involved in the proceedings before the trial court on the motion to vacate the final decree of divorce. It reviews many California decisions and we believe is controlling in principle upon the issue here. We cite, also, Consolidated Construction Co. v. Pac. Electric Ry., 184 Cal. 244, 193 P. 238; 19 Cor. Jur. 170, § 424.

In her application to the trial court in the divorce proceedings to vacate the final decree Frances C. Bowman concealed from the court the fact that she had accepted, acquiesced in and expressed satisfaction with said final decree, and her wish and desire that it stand as a valid and subsisting decree for months after its issuance. That concealment was fraud practiced by her upon the court and undoubtedly fraudulent as to the cross-complainant and appellant herein. Whether or not this was extrinsic and not intrinsic fraud need not here be decided. As shown, there are other ample grounds for the reversal of the judgment in this case.

The judgment is reversed and the cause remanded, with directions to the trial court to enter its judgment against the plaintiff, Frances C. Bowman, denying her prayer for annulment of the marriage of Bryan Houston Bowman with Horace D. Bowman. It is further ordered that judgment be entered in favor of Bryan Houston Bowman, appellant and cross-complainant, as prayed for in her cross-complaint, against both the said cross-defendants; and that the order made in action entitled "Frances C. Bowman v. Horace D. Bowman," No. 40,292, in said superior court, purporting to set aside and vacate the final decree in said action, be set aside, vacated and annulled, and that the said final decree of divorce therein stand as a subsisting and valid decree of divorce, dissolving the bonds of matrimony formerly existing between Frances C. Bowman and Horace D. Bowman, and that appellant have and recover all her costs herein.

We concur: FINCH, P. J.; THOMPSON, J.

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97 Cal. App. 524

BOTTI et al. v. SAVILL. (Civ. 6591.)

District Court of Appeal, First District, Division 2, California. March 13, 1929.

1. Automobiles 🔑244(6, 58)—Evidence held to justify finding that automobilist was free from negligence, and pedestrian killed while attempting to cross highway at night was guilty of contributory negligence proximately causing his death.

In action for death of one struck by automobile while attempting to cross highway at night, evidence that there was sufficient space in center of highway for deceased to have remained there safely while defendant's automobile passed, and that deceased had been drinking intoxicants, *held* sufficient to warrant jury's finding that defendant was free from negligence, and that deceased was guilty of contributory negligence proximately causing his death.

2. Appeal and error 🔑1033(5)—Instruction submitting public or private character of lane crossing highway held more favorable than prejudicial to plaintiffs, suing for death of one struck by automobile.

In action for death of one struck by automobile, where answer denied there was an intersection at place of accident, thus placing burden on plaintiffs to prove an obstructed view of approaching intersection, but plaintiffs introduced no evidence on issue, and all evidence showed accident occurred north of intersection, and that view was not obstructed, *held*, that instruction submitting public or private character of lane intersecting with highway was more favorable to plaintiffs than prejudicial.

3. Trial 🔑295(6)—Instructions on duty of motorist crossing intersection, when read together, held not misleading.

In action for death of one struck by automobile, instruction that Motor Vehicle Act (St. 1923, p. 517), as amended, did not require defendant to reduce speed until he was actually crossing intersecting highway, when considered in connection with other instructions on duty of motorist under Motor Vehicle Act, § 113a, and necessity of motorist having control of automobile, *held* not misleading.

4. Trial 🔑296(4, 5)—Instruction that motorist had right to assume pedestrian would not unnecessarily expose himself to danger held not misleading, in view of evidence and other instructions.

In action for death of one struck by automobile, instruction that defendant had right to assume that deceased would not voluntarily and unnecessarily expose himself to danger *held* not to have been misleading, in view of evidence, and of other instructions making it duty of defendant to observe highway ahead and operate automobile in a careful manner.

5. Negligence 🔑141(8)—Instruction that, if decedent was guilty of "contributory negligence," even in slightest degree, which "negligence" proximately contributed to accident, plaintiffs were not entitled to recover, held not erroneous.

Instruction, in action for death of one struck by automobile, that if decedent was guilty of "contributory negligence," even in the slightest degree proximately contributing to cause of accident, plaintiffs were not entitled to recover, *held* not erroneous, as a failure to exercise requisite amount of care under any circumstances, is "negligence," and term "contributory negligence" in itself implies a want of ordinary care.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Contributory Negligence; Negligence.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Delina Botti, individually and as guardian ad litem for certain minors, against E. J. Savill. Judgment for defendant, and plaintiffs appeal. Affirmed.

Roland J. White and Cooley & Gallagher, all of San Francisco, for appellants.

J. E. McCurdy, of San Mateo, and Redman & Alexander, of San Francisco, for respondent.

NORTON, Justice pro tem. This action was brought by the plaintiffs to recover damages for death claimed to have been caused through the negligent operation of an automobile by the defendant. The plaintiffs are the widow and minor children of Louis Botti, who was struck and killed by the defendant's automobile while crossing the state highway in San Mateo county.

Defendant denied the alleged negligence, and affirmatively charged the deceased with contributory negligence. The case was tried before a jury, which returned a verdict in favor of defendant. Motion for a new trial was made and denied, and this is an appeal from the judgment under section 953a of the Code of Civil Procedure. Insufficiency of the evidence, and that the court erroneously instructed the jury to the prejudice of the appellants, are the grounds relied upon for a reversal.

[1] The accident occurred about 11 o'clock p. m. on the night of December 26th, while deceased was crossing the state highway in San Mateo county at a point a few feet north of Ludermann lane, Lomita Park. The highway runs north and south, and the lane intersects it from the west. There is evidence to show that the deceased on the night of the accident had entertained Lee Mazzotti and his wife at his home, located on the east side of the state highway; that about 11 o'clock that night the deceased and Mazzotti started for the home of a friend of the deceased, who lived on the west side of the state highway. They entered the highway from its easterly side a few feet north of its intersection with Ludermann lane. It was the intention of deceased and Mazzotti to cross to the westerly side of the highway and proceed westerly up Ludermann lane. The paved portion of the highway at the place where the accident happened is 40 feet wide, with four traffic lanes to accommodate two cars abreast in each direction.

The defendant was driving south on the highway in the extreme westerly lane, with the right wheels of his automobile from three to five feet from the west edge of the paved portion of the highway. There were no cars ahead of him or alongside of him; but there was a car traveling south behind him on the inside traffic lane, and a few feet from the center line of the pavement, and approximately 50 feet behind the defendant's car. The defendant was traveling between 25 and 30 miles an hour. His lamps illuminated the highway for a distance of 75 feet ahead of his machine and at a distance of 40 feet ahead he could see the road from 3 to 5 feet to his left. The deceased and his companion, Mazzotti, saw the defendant's automobile when they first entered the highway, and when it was from 600 to 900 feet away, and as they proceeded across the highway and at the time of the accident there was a double line of cars going north in the two traffic lanes on the east side of the pavement. The deceased and Mazzotti, with deceased to Mazzotti's left, together walked and ran through the northbound traffic, paused momentarily when they reached the center of the highway, and then ran 15 feet past the center of the highway and immediately in front of defendant's automobile, then from 40 to 50 feet distant and approaching at a speed of between 25 and 30 miles per hour. Decedent and Mazzotti then separated. Mazzotti jumped forward and westerly, out of the way of defendant's automobile. Decedent stopped and stood still upon the pavement in front of the machine, and was struck by the left front fender of the car as the defendant turned to the west in an effort to avoid him without running down his companion.

The deceased knew that defendant's car was approaching the path he was pursuing at the time he started to cross, and could have seen it if he had looked from the time he emerged from the northbound traffic when he reached and stopped in the center of the highway and at all times thereafter. The defendant could not see the deceased until he emerged from behind the northbound traffic and was past the center line of the highway, and came into the space made visible by his lights. Deceased was then 40 or 50 feet ahead of him. He then applied both the service and emergency brakes and swerved to the right, in an effort to avoid the accident. The line of traffic coming from the south was from 3 to 5 feet east of the center line of the highway. There was sufficient space for deceased to have remained there in safety until the defendant's automobile had passed.

There is evidence in the record from which the jury could have concluded that deceased had been drinking intoxicants. There is sufficient evidence in the record for the jury to have found that defendant was free from fault and that the negligence of the deceased was the proximate cause of the accident resulting unfortunately in his death.

[2] The appellants first complain of an instruction that submitted the public or private character of Ludermann lane to the jury. The character of the lane was immaterial, unless in approaching it the view was obstructed, and this question was submitted to the jury by another instruction requested by appellants.

The answer denied that there was "an intersection at the place of the accident" and the burden rested upon the appellants to prove an obstructed view in approaching the intersection if they relied on the fifteen-mile-per-hour limit. They introduced no evidence upon the issue, and in their opening statement to the jury based their right to recover upon a different theory, and all the evidence in the case showed that the accident occurred north of the intersection, and there was an entire absence of evidence that the view was obstructed. Therefore submitting the question to the jury was more favorable to appellants than prejudicial.

[3] In the next instruction complained of the trial court instructed the jury to the effect that, if they believed Ludermann lane was a public highway, the Motor Vehicle Act (St. 1923, p. 517, as amended), did not require the defendant to reduce his speed until he was actually crossing it, and "that he was not required to reduce his speed while he was approaching it." This instruction was given in connection with the instruction proposed by appellants as to the speed in traversing an intersection where the view is obstructed, and had no reference to the general duty of the defendant to exercise due care under section 113a of the Motor Vehicle Act. The jury could not have understood the instruction to mean that the defendant was licensed to travel at the speed limit under all circumstances.

The court, moreover, gave an instruction in the language of section 113a, and further instructed the jury that it was the duty of an operator of an automobile to operate the same at such rate of speed and in such manner as will enable him to retain control over the same, and to seasonably stop it or check its speed in the event it is necessary to do so. The instructions must be considered as a whole, and in their proper relation to the other instructions given in the case, and, so considered, these instructions could not have been misleading.

[4] The court instructed the jury that the defendant had the right to assume and act upon the assumption that the deceased "would not voluntarily and unnecessarily expose himself to danger." While the instruction is open to the construction placed upon it by the appellants that the defendant had a right to assume that the road was clear, the evidence in this case is such that the jury could not have so understood it, or have been misled by it, in view of the other instructions given at appellants' request as to the duty of defendant to observe the highway ahead and operate his automobile in a careful and prudent manner, so as to avoid injury to the deceased, and hence could not have resulted in harm to appellants.

[5] We are not impressed by the argument of appellants criticizing the instruction requested by the defendant and given by the court, to the effect that, if the jury found that the decedent was guilty of contributory negligence, even in the slightest degree, and that such negligence on his part proximately contributed to the cause of the accident, appellants were not entitled to recover. Negligence is the failure to exercise ordinary care, and it is inaccurate to refer to degrees of negligence in cases of this character. A failure to exercise the requisite amount of care under any circumstances is negligence, and the term "contributory negligence" in itself implies a want of ordinary care. Steinberger v. California Electric Garage Co., 176 Cal. 386, 168 P. 570; Metcalfe v. Pacific Electric Ry. Co., 63 Cal. App. 331, 218 P. 486. In our opinion, the trial court committed no error in giving the last instruction objected to.

The judgment is ordered affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

MEMORANDUM DECISIONS

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206 Cal. 674

In the Matter of the Petition of Carrie A. LEWIS, for Appointment of Trustee. Cornelia J. MURRAY, Paul Stewart and A. T. Stewart, Appellants, v. Carrie A. LEWIS, Respondent. (L. A. 9772.)

Supreme Court of California. March 13, 1929.

In Bank.

Appeal from a judgment of the Superior Court of Los Angeles County; Elias v. Rosencranz, Judge, in an action for the appointment of a trustee. Affirmed.

Stewart & Stewart, of Los Angeles, for appellants.

Faucett & Ring, of Los Angeles, for respondent.

LANGDON, J. Carrie A. Lewis, filed a petition in the superior court, setting forth the following facts:

That on May 29, 1925, H. W. Hopkins, as trustee, and Cornelia J. Murray and petitioner, as cestui que trustent, made and executed a certain trust agreement covering certain described real property, a copy of which is attached to the petition; that by the terms thereof it was provided that, in the event of the demise or resignation of the said H. W. Hopkins as said trustee, R. F. Davis was to succeed him in said trusteeship; that prior to the filing of the petition Hopkins resigned, his resignation was accepted, and immediately thereafter Davis succeeded Hopkins as trustee, and ever since has been and now is the trustee of said trust estate; that on October 25, 1926, said Davis tendered his resignation as trustee in writing, and said petitioner accepted said resignation, subject to the approval of the court; that no property or assets of any kind has come into the possession or control of said Davis, and no accounting is necessary. It is then alleged that petitioner is in all respects competent to nominate a trustee, and that one Emma L. Wagner is a fit and proper person for such trustee, and it is prayed that she be appointed as such. It appears that the trust is, primarily, to furnish support and maintenance to petitioner during her lifetime, with the remainder after her death to Cornelia J. Murray, or her estate.

Cornelia J. Murray, Paul and A. T. Stewart filed an answer and counter petition, in which they deny the resignation of Hopkins as trustee and the incumbency of Davis as such; deny the extent of the property as set forth in the petition, and assert that Hopkins is chargeable as trustee; deny that petitioner is competent to nominate a trustee; and deny that Emma L. Wagner is a fit and proper person for trustee. It is then asserted that by an agreement dated May 26, 1926, the parties to the original trust instrument, and in addition thereto, Paul and A. T. Stewart, entered into another agreement, whereby Hopkins was directed and consented to deed all the property of the trust estate to Emma L. Wagner, for the necessary care and support of Carrie A. Lewis during her lifetime, and the remainder to be divided, two-fifths to the Stewarts and three-fifths to Cornelia J. Murray. It is alleged that Emma L. Wagner made it appear to counter petitioners that she had assumed control of said property under said agreement. There are also other allegations to the general effect that Emma L. Wagner was conspiring with petitioner, and was not a fit and proper person for the trustee under the trust.

The evidence adduced on the hearing is not before us, as the appeal is on the judgment roll alone. The trial court, however, found that all the allegations of the petition were true, except that an additional parcel of real property was included in the trust. It finds with reference to the agreement of May 26, 1926, that it was ineffectual for any purpose, and null and void and of no effect. There is no intimation in the record of the basis of this finding, and respondent has not seen fit to favor the court with a brief. The trial court also found that Emma L. Wagner was a fit and proper person to be appointed as trustee; that, upon the resignation of Hopkins, Davis became and continued trustee until October 25, 1926, subject to the power of the court to require an accounting from either of them. Emma L. Wagner was appointed trustee, accordingly, from which order an appeal has been taken.

There is nothing in the record to show any error in the proceedings. Appellant asserts that a question of law alone is presented, but, for aught that appears in the record, the evidence may have shown that the purported agreement of May 26, 1926, was never signed by petitioner or Hopkins, or that it was signed under duress, mistake or undue influence.

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

97 Cal. App. 295 1

A. W. BUCHEIT, Plaintiff and Appellant, v. Carter MULLALY and Helen Kjergaard, Defendants and Respondents. (Civ. 6202.) ★

District Court of Appeal, Second District, Division 1, California. March 1, 1929.

Rehearing Denied March 22, 1929. Hearing Denied by Supreme Court April 29, 1929.

Appeal from Superior Court, Los Angeles County; P. E. Keeler, Judge.

Birger Tinglof and Walter H. Hewicker, both of Los Angeles, for appellant.

C. C. Mishler and Julius V. Patrosso, both of Los Angeles, for respondents.

YORK, J. This is an appeal from a judgment rendered in favor of the defendants in an action instituted by the administrator of the estate of Charles B. Mullaly, deceased, brought for the benefit of Mary Bley, the divorced wife of decedent and the only creditor of the decedent's estate.

An examination of the transcript discloses that there was sufficient evidence introduced in the trial court to support each and all of the findings made by the trial court. The findings made by the trial court were sufficient to support the judgment. There are no objections here made by appellant to the introduction of evidence that merit discussion in this opinion.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; CRAIL, Justice pro tem.

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97 Cal. App. 695 2

C. D. CRITES, Plaintiff and Respondent, v. AAI ROCK SALT & CHEMICALS COMPANY (an Unincorporated Association) and W. D. Howard, X. H. Hollar, George Henderson, Knute B. Norswing and C. S. Chapman, as Trustees of said AAI Rock Salt & Chemicals Company, Defendants and Appellants. (Civ. 6210.)

District Court of Appeal, Second District, Division 1, California. March 20, 1929.

Appeal by defendants from a judgment of the Superior Court of Los Angeles County, J. Walter Hanby, Judge, in an action for services. Affirmed.

Holcomb & Holcomb, of Los Angeles, for appellants.

Oliver O. Clark, of Los Angeles, for respondent.

CRAIL, Justice pro tem. Defendant appeals from a judgment in favor of the plaintiff for $3,800 in an action brought to recover said sum alleged to be due him for salary as president.

Defendant contends that there was not sufficient evidence to sustain the findings, that the trial court erred in certain rulings on the admission of evidence, and also that it erred in denying defendant's motion for nonsuit interposed at the conclusion of plaintiff's case. However, there was substantial evidence to sustain the findings, there were no prejudicial errors in the rulings on the admission of evidence, and the motion for nonsuit was properly denied.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

★Rehearing denied. Hearing denied by Supreme Court.

CALIFORNIA REPORTER

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206 Cal. 706

WEST v. WEST. (L. A. 8935.)

Supreme Court of California. March 25, 1929.

1. Husband and wife 🔑298½—Where wife merely sought to have sufficient personal property sequestered to pay alimony, finding that property was husband's separate property held unauthorized (Civ. Code, §§ 137, 140, 141).

In action by wife for separate maintenance, in which wife merely sought to have "home place" set apart to her in fee and as to the balance of defendant's property sought no further relief except payment of permanent alimony and sequestration of sufficient quantity of defendant's personal property to secure regular payment thereof, question whether personal property referred to in complaint was community property or separate property of husband was immaterial, and determination of trial court that it was husband's separate property was unauthorized under Civ. Code, §§ 137, 140, and 141, where defendant's cross-complaint for divorce, which was denied made no averment as to status of properties outside of home place and sought no affirmative relief as to such properties.

2. Husband and wife 🔑298½—Court denying husband divorce was relieved of determining any issue raised by prayer of his cross-complaint as to status of personal property.

Trial court, by denying divorce to defendant on his cross-complaint in wife's action for separate maintenance, was thereby relieved of necessity or duty of determining whether personal property was community or separate estate of husband, even if such issue was presented by application for general relief in cross-complaint.

3. Husband and wife 🔑299(4)—Provision, in judgment for separate maintenance, that receivership of husband's property cease upon wife's death or further order, held not erroneous (Civ. Code, §§ 137, 140, 141).

In wife's action for separate maintenance under Civ. Code, §§ 137, 140, 141, provision in judgment that upon wife's death, or upon further order of court, receivership of husband's property for collection and payment of alimony should cease, *held* not erroneous, since award of alimony would cease to be effective after wife's death and same result would follow upon making of subsequent order.

In Bank.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Mary W. West against Amos L. West for separate maintenance. From the judgment, plaintiff appeals. Reversed in part, and affirmed in part.

Robert A. Morton and Lawler & Degnan, all of Los Angeles, for appellant.

Todd, Pawson & Watkins, of Long Beach, for respondent.

RICHARDS, J. The plaintiff commenced this action against her husband, the defendant, for divorce, alleging as the basis for the action the infliction upon her by the defendant of grievious bodily injury and grievious mental suffering amounting to extreme cruelty. She further alleged that she and the defendant were the owners and possessed of a large amount of community property, a portion of which consisted of real estate of the value of $7,500, which had theretofore been occupied by them as their family residence; and of personal property, consisting largely of promissory notes secured by mortgages, amounting in value, according to the information and belief of the plaintiff, to a sum in excess of $150,000; and that the defendant had also as his separate estate certain other personal property of a like character, alleged to be of a value in excess of $40,000, and from which community and separate estate he was deriving an income in excess of $1,000 per month. The plaintiff further alleged herself to be without any means for her support and maintenance and without the necessary means for the maintenance of her said action. She prayed that the bonds of matrimony existing between herself and the defendant be severed; that the real property and dwelling thereon be assigned to her; that the remaining community property be divided between herself and the defendant in such proportions as the court should deem just; that the defendant be required to pay such sum as the court should deem reasonable for the support of plaintiff during the pendency of this action and thereafter during her natural life; and that the defendant be further required to pay plaintiff's attorneys' fees and the costs and expenses incident to the prosecution of her said action. To this complaint the defendant filed an answer, denying the averments thereof as to any alleged cruelty on his part. He admitted the ownership of the dwelling house property and the alleged value thereof, but denied that the same was community property, and, on the contrary, alleged that it and all of the other personal property of which the plaintiff alleged defendant to be the owner were his separate property. The prayer of his answer was that plaintiff take nothing by her said action. Subsequent to the filing of said answer the plaintiff, by leave of court, presented an amended and supplemental complaint, wherein she changed the nature and purpose of her action from one for divorce to one for separate maintenance. She repeated and amplified her averments with respect to the defendant's various acts alleged to amount to extreme cruelty. She also repeated and amplified her averments with respect to property, alleging the dwelling house to be of the cost value of $12,500, repeating her allegations as to the amount and value of the personal property held in possession by the defendant, and in addition thereto alleging that the defendant was concealing and refusing to reveal to the plaintiff the exact nature and value of said last-named properties, and was conveying and transferring large portions thereof to persons unknown to plaintiff, with the intent and purpose of depriving the plaintiff of her rightful share and interest therein and was also conspiring to transfer a large part of said property beyond the jurisdiction of the court, with a view to rendering any judgment which might be made in respect thereto ineffectual. She therefore prayed for a decree of separate maintenance and that she be awarded the dwelling house property and the furnishings thereof, and that the court award for her support and maintenance the sum of $500 per month together with her costs and counsel fees incurred in the action. She further prayed for a restraining order preventing the defendant from concealing or disposing of any portion of the community property or from removing the same outside the state of California, and that in order to render said restraining order effectual the defendant be required to deposit a sufficient amount of said community property and personal property as security for whatever sums the court might award her by way of separate maintenance, and for such other relief as might be meet in the premises. The defendant responded to this amended and supplemental complaint with a cross-complaint, alleging desertion on the part of the plaintiff, and otherwise repeating by reference the averments and denials of his aforesaid answer, except that he expressly admitted that the family dwelling place was community property. The cause came to trial upon the issues as thus reframed, and, upon the completion thereof, the court made its findings of fact and conclusions of law wherein, upon the issue of cruelty, the findings of the court were in the plaintiff's favor, and upon the issue of the plaintiff's desertion of the defendant were also in her favor. Having thus found that the plaintiff was entitled to a decree for separate maintenance, the court, in its findings, proceeded to deal with the issues affecting the property rights and interests of the parties to the action. In so doing the court found that the family dwelling house was community property of the parties and awarded the same, together with the furnishings thereof, to the plaintiff in fee. The court further awarded to the plaintiff for her support and maintenance the sum of $250 per month, payable monthly, until the further order of the court. As to the remaining properties of the parties the court proceeded to make specific findings to the effect that all of said properties, amounting approximately to a value of $120,000, were the defendant's separate property; that at the time of the marriage of the parties in the state of Missouri in the year 1901, in which state the parties then resided, the defendant was possessed of real and personal property of the value of not to exceed $45,000 and which property was his separate estate and so continued to be down to the time of the removal of the parties to California in the year 1919; that the said property of the defendant and the accretions thereof while the parties continued to reside in the state of Missouri were the separate property of the defendant, subject only to certain dower rights existing in the wife under the laws of said state; that upon removing to California the defendant either brought with him or shortly thereafter sent for said property, which, with its accretions, amounted at that time approximately to a valuation of $100,000, and which latter sum the defendant invested in a loan and mortgage business in the city of Long Beach to which he gave his personal attention, and which at the time of the institution of this action amounted approximately to a valuation of $120,000. The court further found that the defendant was threatening to make such dispositions of said property as would prevent the same becoming or being made available for the plaintiff's support and maintenance, and that in order to insure to the plaintiff the payment of such sums as had been thus awarded to her, it was necessary that an amount of the properties of the defendant equivalent to a face value of $50,000 be impounded, and that for that purpose a receiver be appointed to take possession of so much of the properties of the defendant as would represent such valuation, and to pay the plaintiff from the increment thereof the sum of $250 per month for her support and maintenance until the further order of the court. The court, in its conclusions of law, further concluded that as to the properties thus impounded the receiver upon the death of the plaintiff or further order of the court should return the same to the defendant, his heirs or assigns. The judgment of the court followed its foregoing findings of fact and conclusions of law. Thereafter the plaintiff moved to vacate the judgment upon the ground that the conclusions of law upon which the same was predicated were not sustained by the findings of fact in so far as the same related to the property interest of the respective parties. Wherefore plaintiff moved that the court should make and enter its conclusion of law to the effect that the entire property held in possession by the defendant was community property and should make and enter its judgment in accordance with such substituted conclusions of law. The court upon the hearing upon said motion denied the same. The plaintiff's motion for a new trial was also denied. Whereupon plaintiff gave notice of her appeal to this court from that portion of the judgment wherein it was adjudged and decreed that the personal property, and the whole thereof as set forth in the findings of the court, was the defendant's separate estate. The plaintiff further appealed from that portion of the judgment directing the return of the impounded properties of the defendant to him or his heirs or assigns upon the plaintiff's death or further order of the court. Said appeal was taken and is presented to this court upon a bill of exceptions which embodies practically the entire evidence in the case.

[1, 2] The main contention of the appellant herein is to the effect that that portion of the findings and judgment of the trial court wherein it was undertaken to find and to adjudge the status of that portion of the properties involved in this action, other than the real property comprising the dwelling place of the parties, to be either the community or the separate property of the spouses was an immaterial issue in the instant action, and was therefore an issue which the trial court had neither the power nor the duty to determine, and hence that the findings and judgment of the trial court determining that the defendant was the owner and entitled to the whole of said personal property as his separate estate should be reversed on this appeal. We are of the opinion that the appellant herein is correct in this contention. This action, as finally framed by the plaintiff herein, is an action for separate maintenance, and for that form of relief alone, in so far as the plaintiff is concerned. In her amended and supplemental complaint herein, while the plaintiff alleges that all of the property, both real and personal, held and possessed by the defendant, constitutes community property, she only seeks to have that portion thereof which is described as the "home place" set apart to her in fee. As to all of the rest of said property she asks for no further relief than that out of the proceeds thereof she be awarded separate maintenance in the form of permanent alimony, amounting to $500 a month; and in order to secure the payment of such sum she asks for the sequestration in the hands of a receiver of a sufficient quantity of said personal property to assure the regular payment to her thereafter of her required support. Upon such a pleading upon the wife's part it would seem clear that the question as to whether the personal properties referred to in her said amended and supplemental complaint are the community properties of the parties to the action, or are the separate properties of the husband, would be an immaterial issue for the reason that no determination thereof is necessary; and for the further reason that under the provisions of sections 137, 140, and 141 of the Civil Code the trial court, in cases for separate maintenance, is given power to enforce its orders in that regard by recourse either to the community property of the spouses or to the separate property of the husband, and in the exercise of such power had authority to compel obedience to its said orders by the appointment of a receiver or by any other remedy applicable to the case. It is thus apparent that in so far as the plaintiff is concerned, and in so far as it was necessary to make an award to her of the precise relief she sought, the trial court was not required to make any determination as to whether the personal property referred to in her pleadings herein was as to any portion thereof community property or was as to the whole thereof the separate property of the defendant. When we turn to the pleadings of said defendant, we find that while it is true that he presented a cross-complaint seeking a divorce from the plaintiff upon the ground of desertion and in said cross-complaint averred that the only community property of the parties consisted of the dwelling house property or the "home place," he made no other averment as to the status of the remaining properties and as to such properties sought no

affirmative relief. It thus appears that as to the pleadings of the defendant and cross-complainant herein no triable issue was presented as to whether the personal property held or possessed by said defendant was or was not his separate estate. And even if such issue could be held to have been presented by the application in his cross-complaint for general relief, the trial court by its denial to him of a divorce upon the ground sought relieved itself of the necessity or duty of making any determination as to the status of said property, and as to whether or not the same or any portion thereof was community or separate estate. Such being the nature of the action, such the pleadings of the parties, and such the determination of the court as to the relief to which each or either of said parties was entitled, the question as to whether the personal properties sought to be involved in said action were, as to the whole or any portion thereof, the community properties of the parties or the separate property of the husband, was one which the trial court was not called upon to determine in order to grant the plaintiff the full relief which she sought and obtained; and this being so, we are constrained to hold that it was beyond the power of the trial court in this action and in respect to the material issues presented therein to find and to determine by its decree that the whole of the personal properties referred to by the pleadings herein constituted the defendant's separate estate, to the ownership of which he was declared to be entitled by the findings and decree of the court. The question as to the status of said property involving, as it does, a number of interesting problems of both law and fact, we do not for the foregoing reasons feel called upon to consider or determine in this limited form of action, and upon the present appeal.

[3] As to appellant's further contention that the trial court was in error in that portion of its judgment wherein it was, in substance, decreed that upon the plaintiff's death, or upon other or further order of the court, the receivership provided therein should cease, we find no merit in this contention, since in the event of the appellant's death the provision of the trial court with regard to her separate maintenance and the award of alimony would cease to be effective and the same result would follow upon the making of any later order by the trial court materially modifying its former direction in that regard; and thus in either event the trial court would retain, as in fact it did retain by that portion of said judgment, full power to restore to the defendant the aforesaid property, regardless of whether he now held or was thereafter to hold the same as community property or as his separate estate.

It follows from the foregoing that as to that portion of the conclusions of law and judgment of the trial court which purport to determine the status of the personal properties referred to therein and to find and decree that the same and the whole thereof are separate property of the defendant herein, the said judgment is reversed, and as to all other portions thereof the judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

206 Cal. 733

ERNSTING et al. v. UNITED STAGES, Inc., et al. (L. A. 8983.)★

Supreme Court of California. March 26, 1929.

Rehearing Denied April 25, 1929.

1. Judgment 🔑725(3)—Judgment determining ownership of auto stage franchise in injunction suit held to bar subsequent suit between parties for more amplified relief based solely upon franchise ownership.

Judgment, in suit by corporation to determine priority of its claim to auto stage franchise and exclusive right to operate thereunder, so as to relieve it from requirement of certificate of convenience and necessity under St. 1917, p. 330, and for the use of name "Auto Stages" and for injunctive relief, in which defendants likewise pleaded ownership of franchises, *held* to bar subsequent proceedings between same parties, where no appeal was taken from former judgment, and where relief sought in subsequent action, though wider and more amplified, depended solely on question of ownership of franchise, which was previously determined.

2. Judgment 🔑720—Judgment not appealed from is binding on parties as to all issues properly involved and disposed of thereby.

Where no appeal is taken, judgment, even if erroneous, is nevertheless final and effective as to all issues properly involved therein and disposed of thereby, and parties having failed to seek review by appeal are foreclosed from taking further proceedings on such issues.

3. Judgment 🔑732—Judgment determining plaintiff's ownership of auto stage franchise held conclusive determination against defendants of their claims of ownership not specifically disposed of.

Court, on rendition of judgment for plaintiff in injunction suit involving ownership and exercise of auto stage franchise, decided claims of ownership asserted in cross-complaints, though claims were not specifically disposed of, and judgment was bar to subsequent proceedings by defendants involving same issue.

4. Judgment 🔑725(1)—That prior judgment determining ownership of auto stage franchise rested solely upon order of railroad commission did not entitle parties to relitigate issue.

That judgment, in prior action determining ownership of auto stage franchise as between claimants, rested solely upon order of railroad

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★Rehearing denied.

commission, did not entitle parties to prior proceedings to have issue of ownership thereof again litigated.

5. Judgment ⚷649—Character of evidence supporting a judgment or reasons assigned for rendering it are immaterial as regards estoppel thereby.

In determining whether prior judgment operates as estoppel, the provisions of the judgment control, and not the character of the evidence introduced to support it, and the reasons assigned by the trial court for its findings and judgment are not proper matters for consideration.

6. Judgment ⚷678(7)—Individuals pleading right to do business as association were bound by judgment, in subsequent suit by same parties acting as association.

Where parties in former action involving ownership of auto stage franchise pleaded their right to do business as association, they could not avoid estoppel of former judgment by claiming that in former proceedings they were acting individually, whereas in present action they were acting as association.

In Bank.

Appeal from Superior Court, Imperial County; Frank P. Collier, Judge.

Action by Frederick Ernsting and others, doing business under the name "United Stages," an unincorporated association, against the United Stages, Inc., and others, for an injunction. Judgment for defendants, and plaintiffs appeal. Affirmed.

Robert G. Hill, of El Centro, for appellants.

MacDonald & Thompson and H. W. Kidd, all of Los Angeles, for respondents.

PRESTON, J. The judgment in this case is affirmed. This results from our firm belief that the plea of res adjudicata interposed by the defendants must be sustained. The basis for this conclusion will now be briefly set forth:

This is a second appeal. On the former hearing the efficacy of the fourth amended complaint against general demurrer was under review, and it was held that a cause of action against such an attack was stated. Ernsting et al. v. United Stages, Inc., 194 Cal. 171, 228 P. 4. Litigation of various types has engaged the opposing parties hereto for several years. The present action was instituted on the 3d day of June, 1920. Rival claims to the ownership of and the right to operate under auto stage franchises along certain public highways in Imperial and San Diego counties constitute the subject of the litigation. To be more specific, the actual issue between the respective parties was originally this: Which set of them was in good faith on May 1, 1917, operating auto stages over these routes to such an extent and in such a manner as to exempt them from the requirement of a certificate of public convenience and necessity under the "Auto Stage and Truck Transportation Act" (Stats. 1917, chap. 213, p. 330)?

The claim of appellants here is that defendant Thomas Morgan, while acting as their agent, did in fact act in violation of his trust and in the interest of himself and the other defendants in securing from the railroad commission of the state of California operative rights for said franchises; that what he did as such agent, instead of redounding to the benefit of defendants, should be held to have been done for the interest and benefit of appellants. An extended review of the facts set forth in the complaint is unnecessary, as such review was had in the former action, to which reference is hereby made. The record shows that the claim of priority to these franchises was the subject of a special inquiry by the railroad commission of the state of California, which said body on the 1st day of June, 1923, made its findings and order enjoining and restraining appellants from further operating stages along and upon any of said highways and holding that any rights that the appellants might have had respecting said franchises had been abandoned prior to the said 1st day of May 1917. The commission took occasion however, to say that the claim of appellants to any portion of the value of the business should be administered in the civil courts.

A review of this order was sought in this court by appellants and with the result that it was in all respects sustained. Notwithstanding this ruling, certain of the appellants here resumed the operation of auto stages on certain of the highways and between certain termini to which they had been forbidden by the said order of the railroad commission, whereupon the United Stages, Inc., a corporation (respondent here), filed pending the first appeal in the present action, a complaint against appellants here, being cause No. 8597, in the county of Imperial. In said action United Stages, Inc., set up the priority of its claim to said auto stage franchises and their value; the order of the railroad commission in its favor respecting the ownership thereof; the exclusive right to operate thereunder; the exclusive right to the use of the name United Stages; the unlawful use of said name by defendants in violation of the terms of said order of the commission; the operation of certain stage lines in violation of the terms of said order; injuries suffered from such illegal acts, ending with a prayer for injunctive relief and for damages.

To this complaint each of the appellants here, acting as individuals, filed a separate answer and cross-complaint in identical language, differing only as to the particular route or highway to which rights were claimed, each of which claims was to a part of the system claimed by the United Stages, Inc. Said answers and cross-complaints set forth the facts relating to the controversy in all respects substantially as in the complaint in the action before us. The ownership of said franchises was pleaded; their ownership by United Stages, Inc., was denied, and ownership of a certain part of the system was alleged to be in each of said cross-complainants; the right to use of the name "United Stages" was put in issue; the alleged perfidy and bad faith of the defendant Morgan and the facts charging him as a trustee were also set up; and prayer was made for an injunction retraining said United Stages, Inc., from operating auto stages on said public highways, together with damages in large amounts for the use of said franchises and for costs and for "all proper relief."

The affirmative allegations of the said respective cross-complaints were put in issue by appropriate denials in answers thereto. The action came on for trial before Hon. John W. Shenk, now a member of this court, then a judge of the superior court of the state of California in and for the county of Los Angeles, on December 3, 1923. The cause was tried on its merits. The proceedings before the railroad commission were introduced. Certain testimony was offered and rejected. Findings of fact and conclusions of law were made upon which a judgment was entered, which said judgment was to the effect that United Stages, Inc., plaintiff there, was entitled to the relief prayed for as against five of the seven plaintiffs here, and to the effect that said defendants there (plaintiffs here) were enjoined perpetually from using or aiding and abetting the use of the name "United Stages"; that said defendants there take nothing by reason of their respective cross-complaints. The cross-complaints of defendants J. O. Moore, W. H. Updegraff, and J. O. McClung were not specifically disposed of by said judgment. Said judgment became final.

Following this, by proper amendments to the answer in the present action, said proceedings and judgment were set up and pleaded as res adjudicata of the issues tendered by the appellants in their complaint herein. This cause came on for trial on the 26th day of January, 1925, before Hon. Frank C. Collier, whereupon the judgment roll in the action above set forth was introduced in evidence and held sufficient to constitute a plea of res adjudicata and judgment thereupon followed for the defendants.

[1, 2] From this brief narrative of the complicated facts in this case it is evident that the action of the court below was correct. The causes of action and the parties are the same. The case was heard on the merits. The sole foundation upon which cause No. 8597 rested was the ownership of these franchises. The same ownership is the sole issue tendered by the complaint herein. If appellants were the owners of said franchises when said first cause of action arose, they were entitled not only to the relief there sought, but also to the relief prayed for in the present action and if dissatisfied with the pronouncements of the court in said first action, it was their duty to see that a review of that judgment was had upon appeal. Failing to do this, the judgment, even were it erroneous, is nevertheless final and effective as to all issues properly involved therein and thereby disposed of.

The only difference between the two causes of action that we can discern is that in the present action wider and more amplified relief is prayed for, but such relief, as above stated, depends solely upon the issues of ownership of said franchises, which said question was determined adversely to appellants here in the previous action. Appellants apparently have a misconception of the binding effect of the issues disposed of by the former hearing. It seems to be their contention that inasmuch as they did not ask for relief of the specific kind here prayed for, they may have another hearing on the merits for the purpose of seeking such relief. This is not the holding of this court. In the recent case of Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387, that question was before the court and was there disposed of as herein stated. See, also, Creditors' Adjustment Co. v. Newman, 185 Cal. 513, 197 P. 334; Bingham v. Kearney, 136 Cal. 175, 177, 68 P. 597, and Quirk v. Rooney, 130 Cal. 505, 62 P. 825.

[3] Appellants also insist that inasmuch as the prior judgment did not deal with the claims of defendants Moore, Updegraff, and McClung, it is not res adjudicata as to them. However, said defendants filed their cross-complaints and tendered the issue, and while the court did not specifically dispose of their claims, by its silence it nevertheless decided said claims against them. Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am. St. Rep. 66; Soule v. Soule, 4 Cal. App. 97, 106, 87 P. 205; Calegaris v. Calegaris, 4 Cal. App. 264, 266, 87 P. 561.

[4, 5] The claim that appellants have never had their day in court cannot be sustained, for it was their duty at the previous hearing to tender each item of evidence tending to support their claims, and if the decision was unfavorable to seek review by appeal. Having failed to do so, they are now foreclosed from such action. They have had their day in court. Price v. Sixth District Agricultural Ass'n, supra. It follows that the contention that the judgment in said prior action rested solely upon the order of the railroad commission, and nothing else, cannot avail appellants at this time, as the provisions of the

judgment control, and not the character of the evidence introduced to support it. Nor are the reasons assigned by the trial court for the making of its findings and the rendition of its judgment proper matters for consideration. Appellants say that respondents are guilty of fraud and that res adjudicata cannot be invoked to sustain a fraud, citing Spencer v. Vigneaux, 20 Cal. 442, 449, and similar cases. This is, of course, a misconception also, for the fraud alluded to here is fraud in the procurement of the judgment pleaded such as would vitiate it; but fraud in the procurement of the former judgment is not shown or claimed.

[6] The claim that these parties are acting in an association in bringing this suit, whereas they were acting individually in the prior action, is without merit, for in the former action they pleaded their right to do business as the "United Stages," an association, and it was there in issue and determined adversely to them. Moreover, in reality the present suit is a suit by the individuals and not by the association.

Nothing in this opinion should be taken as the expression of a view that said order of the railroad commission is or is not in and of itself res adjudicata of the issues tendered by this action.

Hence the judgment first above announced.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.

Mr. Justice SHENK did not participate.

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206 Cal. 730

FARIA et al. v. BRANDON et al.
(S. F. 12804.)

Supreme Court of California. March 25, 1929.

Judgment 🔑725(3)—Injunction against execution sale of surplus over homestead exemption of realty, adjudged to have been conveyed to wife by judgment debtor to defraud creditors, held properly denied.

Where judgment in prior action between same parties and others adjudged that husband of one of plaintiffs and father of others, when he was insolvent, conveyed to wife without consideration the realty involved for purpose of hindering, delaying, and defrauding his creditors, and that any interest which other plaintiffs had in property was acquired by them without consideration through deed executed by their mother, court properly denied preliminary injunction against sale under execution on judgment against husband of surplus of said property not entitled to homestead exemption claimed by wife.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Adeline Faria and others against A. Brandon and another. From an order denying a preliminary injunction against the sale of realty under execution, plaintiffs appeal. Affirmed.

O. H. Speciale and Owen D. Richardson, both of San Jose, for appellants.

E. H. Christian, of Oakland, for respondents.

LANGDON, J. This is an appeal from an order denying plaintiffs relief in an action brought to secure a preliminary injunction against the sale by the sheriff of certain real property in Alameda county, California, under execution issued upon a judgment in favor of defendant Brandon and against one Frank F. Faria, the husband and father of the plaintiffs, and their predecessor in interest in the property. The judgment thus sought to be enforced was for $2,829.53. A declaration of homestead had been filed upon the property by Adeline Faria, and the judgment creditor, the defendant Brandon in the present action, had petitioned the court to appoint appraisers of the property claimed as a homestead, and to subject the surplus, if any, over the statutory amount, to execution upon his judgment. It was found by the appraisers that the property could be readily divided, the dwelling house, outhouses, and a portion of the land to the value of $5,000 being separable as a homestead for the claimant, and the balance of the land, of a value of approximately $14,000, being available to satisfy the claims of the judgment creditor.

Upon this hearing there was also introduced in evidence the judgment roll in a prior action between the parties hereto and some additional ones, in which the same creditor had sought to subject this same property to payment of a judgment against Frank Faria in the sum of $432, and in which action the court had found that the property was liable for the amount of the judgment against Frank Faria, as the property in question had been granted by him to his wife, Adeline Faria, without consideration, at a time when he was insolvent, and with the intent to hinder, delay, and defraud creditors. Upon the introduction of this judgment roll in the prior action, the trial court stated to counsel that the parties were the same in both actions, and it appears that no dissent was made by counsel. Thereupon the court refused to grant the injunction staying the execution.

We think the action of the trial court in this matter was entirely proper under the circumstances. Plaintiff Adeline Faria has been secured in her homestead right, and the surplus only of the property is subjected to the payment of the judgment against Frank Faria. It has been duly adjudged that Faria conveyed to his wife without consideration, and when he was insolvent, and for the purpose of hindering, delaying, and defrauding his creditors. The court has also found that any interest which the other plaintiffs herein have in the property was acquired by them without consideration through a deed executed by their mother, Adeline Faria.

It is stated by counsel for respondents that the question involved here is now moot, as the sale under execution has already taken place, and this statement is uncontradicted by the appellants. If this be true, it but furnishes an additional reason for the affirmance of the judgment and order appealed from.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; SHENK, J.; CURTIS, J.

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206 Cal. 723

RAGIN v. ZIMMERMAN. (L. A. 9854.)

Supreme Court of California. March 25, 1929.

1. Physicians and surgeons 🔑18(4) — Allegation that dentist's servant so negligently and unskillfully took X-ray picture that she caused burns described held sufficient allegation of general damages.

In action against dentist for damages from X-ray burns, allegation of complaint that defendant's servant "so carelessly, negligently, and unskillfully conducted herself (as servant) in performing the operation of taking the X-ray picture that she caused the said plaintiff to become violently electrified, shocked, burned, bruised, and wounded, in that said plaintiff sustained first and second degree burns," describing extent of burns, *held* sufficient allegation of general damages.

2. Words and phrases —"Second degree burns" leave permanent scars; "first degree burns" leave no permanent marks.

"Second degree burns" are such as leave permanent scars, while "first degree burns" leave no permanent marks.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Second Degree Burns; First Degree Burns.]

3. Appeal and error 🔑1071(3)—Where evidence was ample to support judgment for personal injuries, it was not disturbed on appeal, though finding as to certain face injury was not sustained by evidence.

Where evidence that plaintiff suffered second degree burns on other parts of her body, and the shock, pain and mental suffering as described by her and found by court were alone amply sufficient to support judgment for her even if she received no second degree burns on her face as found by court, judgment was not disturbed by appellate court.

4. Physicians and surgeons 🔑18(8)—Evidence held to sustain finding that negligence of dentist's employee in operating machine caused X-ray burns.

In action against dentist for X-ray burns, evidence *held* to sustain finding that defendant's servant so carelessly, negligently, and unskillfully conducted herself in operating the X-ray machine as to cause the injuries complained of.

5. Physicians and surgeons 🔑16—Dentist held liable for negligence of employee in operating X-ray machine under doctrine of respondeat superior.

The doctrine of respondeat superior rendered dentist civilly responsible for the negligence of his employee in operating X-ray machine causing X-ray burns and injuries to patient.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Dorothy Ragin against A. Zimmerman. From a judgment for plaintiff, defendant appeals. Affirmed.

Perry F. Backus, of Los Angeles, for appellant.

Samuel A. Rosenthal, of Los Angeles, for respondent.

SEAWELL, J. Respondent herein, a young woman stenographer, brought this action in the superior court of the county of Los Angeles to recover damages on account of electric burns, shock, and physical and mental pain inflicted upon her by and through the negligent and careless operation of an X-ray machine by the dental nurse, who was also the X-ray operator, employed by appellant, in an attempt to take a radiograph of respondent's chin. Appellant was a regularly licensed and practicing dentist in the city of Los Angeles, and in connection with the practice of dentistry conducted an X-ray laboratory in which X-ray photographs were taken as a means of determining the condition of the alveolar process and other related parts of the dentigerous anatomy.

Said cause was tried by the court, a jury having been expressly waived. Upon the submission of the case the trial court gave judgment for plaintiff in the sum of $1,250, which gross sum included the specific sums of $25 for medical attention and medicines, $15 as damages to wearing apparel caused by X-ray burns, and $100 on account of respondent's being unable to pursue her usual employment for a period of four weeks. The court further found that respondent would be subject to future expenditures for medical treatment by reason of the injuries inflicted upon her, the exact amount of which could not then be ascertained.

The verified complaint alleged that plaintiff employed the defendant to advise her with respect to an abscess on the right side of her chin due to an infected condition of her teeth, and that defendant placed her in charge of a servant in his employ, with directions that said employee take an X-ray photograph of the affected area; that in attempting to do so said employee so carelessly and negligently conducted herself and operated said X-ray machine that plaintiff became violently electrified, shocked, and burned so as to cause her much pain and suffering, by reason of which she was rendered less efficient in the performance of the duties of a stenographer. The injuries specifically enumerated by plaintiff were first and second degree burns on the left side of her face, first and second degree burns on the left side of her chest and breast, and burns on the thigh and on the ring finger of the right hand and on the index finger of the left hand at the first joints of said enumerated fingers. It is alleged that said burns have left scars that have caused plaintiff great mental pain and anguish. The physical pain caused by shock is also described, but as the amount of damages awarded is small, it becomes unnecessary to repeat the allegations of the complaint or the evidence adduced at the trial to rebut any claim that the judgment was the result of passion or prejudice.

[1] The complaint was demurred to upon several special grounds. The deficiency of the complaint specially stressed by defendant is: That the following allegation does not contain facts sufficient to constitute a statement of general damages, viz., "* * * that said servant so carelessly, negligently, and unskillfully conducted herself (as servant) in performing the operation of taking the X-ray picture that she caused the said plaintiff to become violently electrified, shocked, burned, bruised, and wounded, in that said plaintiff sustained first and second degree burns, * * *" describing the extent of said burns. That the foregoing language is a sufficient allegation of general damages there can be no doubt. It is also equally certain that it is sufficient in cases of this class to plead that the thing done was negligently done. This question has been set at rest by a long line of decisions of this court. It was recently passed upon in Dunn v. Dufficy, 194 Cal. 383, 228 P. 1029, and further citations would be merely cumulative.

[2] By his verified answer defendant positively denied that the respondent "placed herself in any manner or at all under the care of this defendant as a physician, or otherwise than for the purpose of procuring an X-ray picture of plaintiff's teeth"; denies that the defendant advised plaintiff to have an X-ray plate made of her jaw; and alleges that she requested him to make such a plate. Defendant denied in positive terms that "the said or any burns had left marks or scars either visible or otherwise on plaintiff's anatomy at any place, or at all." The only physician who testified in the case described the burns plaintiff had received on the face and on one of her fingers as first degree burns, and those on her chest and right leg as second degree burns. Second degree burns are such as leave permanent scars, while first degree burns leave no permanent marks.

[3] In its findings the court found, contrary to the physician's testimony, that the plaintiff sustained first and second degree burns on the left side of her face. It is objected that this finding as to second degree burns on the face is not supported by the evidence. If it had been, the small award of damages would not have been adequate to the injury suffered. There was testimony, however, that plaintiff did suffer second degree burns on other parts of her body, and the shock, pain and mental suffering, as described by her and found upon by the court, was alone amply sufficient to support the judgment though she received no second degree burns on the face.

[4] Appellant has devoted a great part of his argument to combating the application of the doctrine of res ipsa loquitur to malpractice cases. There is nothing in the record to indicate that the court decided the case by the application of the doctrine of res ipsa loquitur or was influenced by that doctrine in rendering its decision. The trial court simply held, and there was evidence in the record to sustain its finding, that the operator of the X-ray machine so "carelessly, negligently and unskillfully conducted herself in performing the operation of taking the said X-ray picture that she caused the plaintiff to became violently electrified, shocked. * * *" Appellant, upon examining respondent's teeth, placed her in charge of the young lady who operated the X-ray machine, with directions that a radiograph be taken. She was then conducted by the operator to the X-ray machine room and placed in a recumbent position for the taking of the radiograph. The operator's version of what followed is that she instructed respondent to remain very quiet and forewarned her against becoming alarmed at the slight clicking noise which she would hear as soon as the X-ray mechanism was set in motion, and as she pulled the second switch respondent raised her knee so that it either came in contact with or was brought into very close proximity to the X-ray tube, which carries a high voltage of electric current, and that she next observed an electric spark flash from the lower part of the tube toward respondent's knee. Respondent then leaned forward and in an attempt to extricate herself from her peril wrapped herself around the tube, which extended at slight elevation over the body from the extremities to her face. It is admitted that when bodies are brought within certain given distances of said tubes electric sparks are arced, or jump from said tubes and produce burns and cause damage to bodies into which they are inducted. The operator admitted that she placed said highly charged electric tube not more than ten inches above the knees of respondent as she arranged her in the chair for the purpose of taking the picture.

Respondent, who had no technical knowledge as to the operation or mechanism of an

X-ray machine, denied that the operator cautioned her against raising her knees or forewarned her as to the slight clicking noise that would be produced upon turning the switch, and positively denied that she raised her knee or otherwise changed her position before she was shocked and burned by the electric flashes. A piece of her dress, which would rest normally upon her knee, was burned. Besides, she received burns on the left side of her face, chest, certain fingers of both hands, and on the thigh. The primary cause of the burns and shock is more consistently explicable on the theory that the electric sparks were arced from the tube to the face or upper portion of the body, thereby causing the respondent, either in pain or in fright, to move her lower limbs in an attempt to throw the tube a safe distance from her body or to carry herself from the zone of danger, than on the theory that the slight clicking sound, against which appellant claims respondent had been cautioned, so terrified her that she voluntarily elevated her knee to the extent of ten inches, thus bringing it in contact or near contact with the high voltage electric appliance. The claim of appellant that the first electric current to enter respondent's body was caused by her raising her knees approximately ten inches upon becoming startled at the slight clicking sound which followed the turning of the switch is not, in the light of the situation, consistent with human conduct and the trial court, no doubt, rejected appellant's version and gave credence to the respondent's account of her conduct up to the time that she received the first electric shock. If it be conceded, in the absence of any evidence sustaining such a concession, that the knee burn was the first received by respondent, that circumstance would not be sufficient to exculpate appellant of negligence. There is ground sufficient for holding that the tube was brought by the operator even closer to respondent's knee than she admitted bringing it. Appellant's witnesses admit that electric sparks would arc from the tube if it was brought within 3¾ inches of respondent's body. Indisputably sparks *did arc*, and respondent testified that she did not move her body in any way as she sat in position for the operator to take the radiograph. It therefore follows that the electric burns which respondent received were the result of defendant's negligence.

Appellant has cited a number of cases to the effect that the doctrine of res ipsa loquitur is not applicable to malpractice cases brought against physicians, surgeons and dentists for errors of judgment committed in the treatment of disease. Such cases have no application whatsoever to the facts of the instant case. Appellant here was not engaged in employing an X-ray as a treatment for disease. He thus stoutly repudiates its use as a curative means in his answer: "* * * Denies that plaintiff placed herself in any manner or at all under the care of this defendant as a physician, or otherwise, *than for the purpose of procuring an X-ray picture of plaintiff's teeth.*" (Italics supplied.) His contention now is that the res ipsa loquitur doctrine, as applied to physicians, should be extended to include X-ray operators. We are satisfied that the negligence of appellant, as found by the trial court, is supported by the case as presented, and recourse to the doctrine of res ipsa loquitur is not necessary. If it were necessary, however, to invoke it, we would not hesitate to apply it to the facts described by the evidence in the instant case. See discussion of application of rule to electrical devices, 10 Cal. Jur. 199, 200. It may well be said here, as was said in Phœnix Assur. Co. v. Texas Holding Co., 81 Cal. App. 61, 252 P. 1082, in applying the doctrine of res ipsa loquitur to the facts of a case not so typically illustrative of the reason of the rule as the instant case: "We think this doctrine may be urged with more than plausibility. Everything in the present case which in any way contributed to the accident was under the management of the defendant; * * * and that in the ordinary course of things the accident would not have happened if those having the management had used proper care"—citing the cases of Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, O'Connor v. Mennie, 169 Cal. 217, 146 P. 674, and Van Horn v. Pac. Ref., etc., Co., 27 Cal. App. 105, 148 P. 951.

In Evans v. Clapp (Mo. App.) 231 S. W .79, the doctrine was applied in an action to recover for the negligent use of X-ray machines in taking radiographs, in the following language: "It is manifest * * * that it cannot be said the jury could not reasonably find that plaintiff received an X-ray burn at the hands of the defendants, and that it was negligently administered. It is a dangerous agency, exceedingly capable of producing serious injury unless administered with care and caution. State v. Lester, 127 Minn. 282, 149 N. W. 297, L. R. A. 1915D, 201. As hereinbefore stated, the X-ray was not applied in this case for purposes of treatment, but merely to ascertain the cause of plaintiff's headaches, and this was disclosed at the first examination. There is no room, therefore, for the application of any theory of mere honest mistake in the careful application of a treatment intended to be applied in the accomplishment of a result similar to the one produced but not to the extent thereof. On the contrary, the X-ray was to be used only to discover a condition which was at once shown, and the many other exposures were not made in the interest of the patient but for other purposes. Examinations, when carefully and properly made, do not produce burns; hence when a burn is produced, this fact is of itself some evidence from which the jury may find that the degree of care and skill ordinarily exercised by persons of like profession and using such agencies was not exercised in that particular case. George v. Shannon, 92 Kan. 801, 808, 142 P. 967, Ann. Cas. 1916B, 338; Shockley v. Tucker, 127 Iowa, 456, 103 N. W. 360. Of course the rules governing the duty and liability of physicians and surgeons in the performance of professional services are applicable to them in the use and manipulation of an X-ray machine. 21 R. C. L. 386." Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073, Ann. Cas. 1918E, 256, and cases therein cited, hold to the same effect.

[5] The doctrine of respondeat superior clearly renders the appellant civilly responsible for the negligence of his employee, the operator of the X-ray machine.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

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97 Cal. App. 552

KENYON v. JOHNSON, County Auditor.
(Civ. 3796.)

District Court of Appeal, Third District, California. March 14, 1929.

1. Justices of the peace 🔑15—Stockton township held to exist as distinct identity irrespective of city of Stockton, as regards right of justice of peace of Stockton township to recover salary (Const. 1849, art. 11, §§ 4, 9, and art. 6, § 9, as amended in 1862; Const. 1879, art. 11, § 4, and art. 6, § 11, amended in 1911; Code Civ. Proc. § 103; Pol. Code, § 4015).

In view of Const. 1849 establishing county and town governments, article 11, §§ 4 and 9, article 6, § 9, amended in 1862, Const. 1879, art. 11, § 4, and art. 6, § 11, as amended 1911, Code Civ. Proc. § 103, and Pol. Code, § 4015, recognizing townships as distinct identities, Stockton township exists as a distinct identity, irrespective of the existence of the city of Stockton, as regards right of justice of peace of Stockton township to recover salary provided by such office.

2. Justices of the peace 🔑2—Constitution held not to manifest intention to abolish townships, justices' courts, or justices' courts of townships (Const. art. 11, § 8½; Const. art. 11, § 8).

Const. art. 11, § 8½, so far as the office of justice of the peace is concerned, relates only to such office of a city organized and chartered under Const. art. 11, § 8, and does not manifest an intent to abolish townships, justices' courts, or justices' courts of townships.

Application for writ of mandate by Cyril Kenyon, directed to Fred H. Johnson, as Auditor of the County of San Joaquin. Writ granted.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for petitioner.

Guard C. Darrah, Dist. Atty., and Tom H. Louttit, Asst. Dist. Atty., both of Stockton, for respondent.

PLUMMER, J. This cause is before us upon the application of the above-named petitioner for a writ of mandate praying that the respondent, Fred H. Johnson, as auditor of the county of San Joaquin, be commanded and directed to issue and deliver to the petitioner a warrant upon the county treasurer of the county of San Joaquin for the sum of $300 in full compensation due said petitioner for his salary as justice of the peace of Stockton township in the county of San Joaquin, for the month of February, 1929.

To this petition the respondent has filed a general demurrer. The record before us shows that Stockton township now is, and for a long time prior to the beginning of this action has been, a subdivision of the county of San Joaquin regularly organized, designated, and delineated as a part and parcel of the territorial township divisions of said county, and is now existing under the legislative and constitutional provisions of this state. The record also shows that Stockton township, as so organized, existing and delineated, and circumscribed as a part of the territorial area of the county of San Joaquin, lies wholly within the territorial limits of the city of Stockton, a city regularly chartered under the provisions of section 8 of article 11 of the Constitution. The record further shows that the petitioner is the duly appointed, qualified, and acting justice of the peace of Stockton township, and was such during the entire period of the month of February, 1929, and that his salary was fixed by law in the sum of $300 per month, payable monthly, on the 1st day of each and every month, and that on the 1st day of March, 1929, the respondent, as auditor of the county of San Joaquin, declined and refused to issue a warrant to said petitioner as and for payment of his salary for the month of February, 1929. The basis of the auditor's refusal is that under the provisions of section 8½ of article 11 of the Constitution as now amended, there is no justice of the peace of Stockton township, as said township, as herein stated, lies wholly within the territorial limits of the city of Stockton. Is the auditor's refusal well founded? The answer to this question is to be found, not in whether there is what is called a municipal court created by the charter of the city of Stockton, but whether, under the constitutional and general laws of the state, there exists such an entity as Stockton township, and such officer as a justice of the peace thereof.

[1] From the very beginning of the history of California as a state, there has existed such an entity or agency of government as townships. The Constitution of 1849 specified that the Legislature should establish a system of "county and town governments." This language appears in section 4 of article 11, and section 9 of the same article provides that each county, town, city, and incorporated village shall make provision, etc. And section 9 of article 6, as amended in 1862, authorized the Legislature to determine the number of justices to be elected in each city and township of the state and fix their powers and duties. It will be noticed that the framers of the Constitution of 1849 used the words "town and township" interchangeably, following, undoubtedly, the custom of many of the eastern states where townships consisting of only six miles square of territory are called "towns," meaning, as commonly used, "townships." The Constitution of 1879 drops the word "town" and uses only the word "township" when a certain subdivision of counties is intended. Section 11 of article 6 of that Constitution (1879), as originally adopted, reads: "The legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities and towns," etc. As amended in 1911 that section now reads: "The legislature shall determine the number of each of the inferior courts in incorporated cities and towns, and in townships, counties, or cities and counties, according to the population thereof." The specific name of the court or of the officer as justice of the peace is transmuted into the term "inferior courts," but the legislative provision for a court for a township is maintained and continued operative. Section 4 of article 11, relative to the subject under discussion, reads: "The legislature shall establish a system of county governments, which shall be uniform throughout the State; and by general laws shall provide for township organizations," etc. While it would be permissible under the Constitution to provide for a system of township government, the Legislature has gone no further than to provide for the election of justices of the peace and constables as township officers. Section 103 of the Code of Civil Procedure provides that there shall be at least one justice's court in each township of the state, for which one justice of the peace shall be elected by the qualified voters of the township. This section further provides for the election of justices of the peace in the cities of the state, according to their classification, and that there shall be such officer in every city of the second and three-fourths class, which classification applies to the city of Stockton. In construing this section of the Code, and section 8½ of article 11 of the Constitution, it would appear that the auditor has held the city of Stockton and the township of Stockton identical, and that as section 8½ of article 11 of the Constitution has been construed to eliminate that portion of section 103 of the Code of Civil Procedure providing for the election of a justice of the peace in a city of the class to which Stockton belongs, there is no such officer as justice of the peace of the township of Stockton. The fallacy of this reasoning lies in the assumption that the city of Stockton and the township of Stockton are one and the same. As we have shown by the constitutional provisions to which we have referred, townships are segregated, separated, and delineated subdivisions of counties, for specific purposes. These subdivisions have no relation whatever to incorporated or chartered cities; they exist in and of themselves, to all intents and purposes as distinctly as though there were no cities whatsoever; and the subdivision or part of the governmental territory of the state of California known as Stockton township, in the county of San Joaquin, stands alone and upon its own basis, irrespective of the existence of the city of Stockton, of the classification referred to in section 103 of the Code of Civil Procedure. As stated in 38 Cyc. 599, the word "township" is used in two senses; "in one sense it is used to denote a territory six miles square surveyed and platted by the government surveyors, divided into thirty-six sections, while in another sense it is employed to describe a subdivision of the county, created by the state legislature and vested with certain powers of local government." As stated, in some of the states in this latter sense the word "township" as used is synonymous with the word "town," even though it refers to and describes only six miles square of territory, but as shown by the references to the Constitution of this state, it is now referred to simply as a "township." The cases cited in the note which we have quoted from Cyc. illustrate the history and existence of the entity known as a township, separate and apart from incorporated and chartered cities. In 24 Cal. Jur. 607, we find the following in relation to townships: "A township is a subdivision of a county and, in many states, possesses certain powers of local government. Some courts construe the word 'township' as synonymous with 'towns,' but this view has never been adopted in California. Here 'township' is nothing more than a geographical subdivision of a county principally for the purpose of electing Justices of the Peace and constables." This court, in the case of Platnauer v. Board of Supervisors, 65 Cal. App. 666, 225 P. 12, has recog-

nized the distinction of townships as separate identities from cities, although the territorial limits of the two identities may be coincident. It was there held that the offices of a justice of the peace of the city of Sacramento and a justice of the peace of the township of Sacramento were separate and distinct, even though the city of Sacramento and the township of Sacramento embraced the same territory.

Section 4015 of the Political Code likewise recognizes townships as distinct identities. That section reads: "The Board of Supervisors of each County, as public convenience may require, shall divide their respective counties into townships for the purpose of electing Justices of the Peace and Constables," etc. We do not find, nor has our attention been called to, any legislative enactments eliminating the office of justice of the peace of townships. The only change that has been made with reference to the existence of the office is by the respective amendments to the Constitution by which a township justice is now a legislative matter instead of a constitutional position.

[2] Only one further inquiry remains: Has section 8½ of article 11 of the Constitution, as amended, abolished the office of justice of the peace of Stockton township? An examination of that section discloses that, so far as the office of justice of the peace is concerned, it relates only, and can relate only, as to that office, in so far as it affects a justice of the peace of a city organized and chartered under section 8 of article 11 of the Constitution. Subdivision 1 of section 8½ of article 11 authorizes cities, in the adoption of charters, to provide for the constitution, regulation, government, and jurisdiction of police courts, etc.; likewise, for the establishment, constitution, regulation, government, and jurisdiction of municipal courts and judges thereof. And then, further, in the same subdivision, it is provided that "in any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the Superior Court," etc. No reference is made to justices' courts of townships, nor is there any language used in the section from which the inference could be drawn that there was any intent in the adoption of section 8½ of article 11, as now amended, to abolish townships, justices' courts, or justices' courts of townships. The reference and the power granted in the establishment of courts, whether called police courts or municipal courts under this section, is to inferior courts existing within, as, and of city courts, not courts existing by virtue of townships created pursuant to the Constitution and legislative enactments to which we have referred. The limitation in the Constitution as amended, if at all, affects only that portion of section 103 of the Code of Civil Procedure which provides for the creation of justices of the peace in and for cities. In this behalf our attention has been called to the case of Robertson v. Langford (Cal. App.) 273 P. 150. An examination of the Robertson Case discloses that it deals only with the office of justice of the peace of the city of San Jose. It does not purpose to deal with the office of the justice of the peace of San Jose township. It may be here stated that the Blue Book of the State of California sets forth the existence of two justices of the peace of San Jose township, and so far as the Robertson Case is concerned, there is nothing said therein which in anywise tends to question the existence of said court. If it be admitted that the establishment of a court by the city of Stockton, under the provisions of section 8½ of article 11 of the Constitution, the office of justice of the peace for such city is eliminated, as would necessarily follow if the case of Robertson v. Langford, supra, is applicable, the conclusion that the office of justice of the peace of Stockton township is also abolished is unwarranted for the simple reason that the office of justice of the peace of Stockton township is an office of a distinct and separate identity from the city of Stockton. The case of Robertson v. Langford, and the authorities therein cited, establish that the office of justice of the peace is not abolished. The constitutional provision, when given its widest latitude, only abolishes the office of justice of the peace of cities having adopted charters and established a court as provided for under section 8½ of article 11 of the Constitution. The municipal court referred to in section 8½ of article 11 of the Constitution is not the municipal court referred to and authorized to be established by the amendment to the Constitution adopted in 1925, and relates only to courts created by city charters.

It necessarily follows from what we have said that the office of justice of the peace of Stockton township must be held to be a valid and subsisting office, and that the petitioner is the legally qualified and acting incumbent thereof and is entitled to the salary provided by law, payable monthly, and that the auditor was unwarranted in refusing to draw and deliver to petitioner a warrant therefor. Respondent's demurrer is overruled.

The respondent is hereby ordered to draw and deliver a warrant in favor of the petitioner for the sum of $300 as and for his salary as justice of the peace of Stockton township, for the month of February, 1929, and a peremptory writ of mandate commanding him so to do is hereby granted.

We concur: FINCH, P. J.; THOMPSON, J.

96 Cal. App. 753

SCHAINMAN v. ALL PERSONS, etc.

SCHAINMAN v. HUNTER et al.

(Civ. 6495.)

District Court of Appeal, First District, Division 2, California. March 15, 1929.

Taxation 🔑769—Where taxes before date of purchase were paid, tax deed passed title, and error in recitals regarding the matter could be corrected.

Taxation statutes do not specifically require recital in tax deed that all taxes levied and assessed to date of purchase were paid, but statutes do require that such taxes must be paid, and, where such taxes were paid, tax deed was sufficient to pass title, and error in recitals made by tax collector regarding payment of taxes before purchase could be corrected at any time, to make recitals conform to facts.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 275 P. 225.

Frederic Appelman, of San Francisco, for appellants.

Clarence A. Linn, of San Francisco, for respondents.

PER CURIAM. The petition for rehearing is denied. The appellants complain because we did not, in the opinion heretofore filed, rule on the question as to the validity of the original tax deed. They now state that at the time of the trial they stipulated that the matter of an accounting for rents, issues, and profits of the property in suit could be heard at any time after judgment of the trial court, or after the filing of the remittitur following the judgment on appeal, and that it is necessary for that purpose to have an adjudication of the validity of that deed.

Our opinion followed the opinion in Morton v. Sloan (Cal. App.) 275 P. 223, which was filed on the same day as the opinion herein, and we assumed that it was sufficient to refer to the discussion of the validity of the original tax deed in the Morton opinion as the facts were practically identical. As pointed out in the Morton opinion, the taxation statutes do not specifically require a recital in the tax deed that all taxes levied and assessed to the date of purchase have been paid. These statutes do require that such taxes must be paid, and, as the fact of payment is conceded in this case, there can be no question but that the original tax deed was sufficient to pass title, and that the error in the recitals made by the tax collector was one which could be corrected at any time to make the recitals conform to the facts. If the stipulation relating to an accounting depends upon the original tax deed being void, then no accounting need be had, because such deed was sufficient to pass title to the respondent as of its date.

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97 Cal. App. 588

FITZPATRICK v. SONOMA COUNTY et al.

(Civ. 5910.)

District Court of Appeal, First District, Division 1, California. March 16, 1929.

1. Counties 🔑215—County sued as defendant may not have case transferred to neutral county under statute where it does not appear that plaintiff resides in any county in state (Code Civ. Proc. § 394).

County sued as defendant is precluded from asking transfer of suit to neutral county under Code Civ. Proc. § 394, where it does not appear from record that plaintiff is resident of county in which suit was brought or of any other county in state.

2. Counties 🔑215—One suing county has no arbitrary right to select county in which trial should be had (Code Civ. Proc. § 394).

One suing county has no right, under Code Civ. Proc. § 394, to commence and proceed to trial in particular county, where no reason exists for selection of that county; statute being valid under Const. art. 4, § 25.

3. Courts 🔑39—Court must in first instance determine whether it has jurisdiction (Code Civ. Proc. § 430).

Court in any case must in first instance determine question of its jurisdiction, under Code Civ. Proc. § 430.

4. Evidence 🔑40—Courts take judicial notice of extent and boundaries of territory over which they exercise jurisdiction.

Every court, by virtue of its organization, takes judicial notice of extent and boundaries of territory over which it can exercise jurisdiction, as well as subject-matter over which jurisdiction has been conferred.

5. Venue 🔑5(5)—Constitutional provision as to local actions must be strictly construed, and does not apply to actions for injuries to real estate (Const. art. 6, § 5).

Const. art. 6, § 5, providing that all actions for recovery of possession or quieting title to, or enforcement of liens upon, real estate shall be commenced in county where land is situated, must be strictly construed, and cannot be enlarged to include actions for injuries to real estate.

6. Counties 🔑215—One suing county may not, by instituting suit in neutral county, take case from court having proper original jurisdiction (Code Civ. Proc. §§ 392, 394).

Right to have trial outside of county which is itself a litigant and outside of county in which other litigant resides, under Code Civ. Proc. §

394, does not give plaintiff in suit against county right to deprive court of proper original jurisdiction delegated to it under Code Civ. Proc. § 392, but counties in which suit may be brought must have jurisdiction.

7. Counties ⚷215—In action against county and county supervisors for damages for injury to real property located in county, defendants held entitled to have venue changed from neutral county to defendant county (St. 1923, p. 675; Code Civ. Proc. §§ 392, 393, subd. 2, and §§ 394, 395).

In action against county under Gen. Laws, Act 5619, § 2 (St. 1923, p. 675), and supervisors of county individually for damages for injury to real property situated in county, all defendants *held* entitled to change of venue from outside county in which suit was instituted to defendant county itself, under Code Civ. Proc. §§ 392, 393, subd. 2, and section 395; provisions of section 394 relative to venue in suits in which county is litigant being inapplicable.

Appeal from Superior Court, City and County of San Francisco; Percy S. King, Judge.

Action by Josephine E. Fitzpatrick against Sonoma County and others for damages for injury to real property and for the abatement of a nuisance. From an order denying a motion for change of venue, defendants appeal. Reversed.

Carl Barnard, Dist. Atty., of Santa Rosa, and E. J. Dole, Asst. Dist. Atty., of Petaluma, for appellants.

Otto G. Kuklinski, of San Francisco, for respondent.

WARD, Justice pro tem. This action was commenced in the city and county of San Francisco. The cause of action is damage by injury to real property situated in the county of Sonoma, and the abatement of a nuisance therein. This is an appeal from an order denying a motion for change of venue, made "upon the ground that the real property affected by said action is situated in the County of Sonoma, and for that reason said cause is proper to be tried in said county, and upon the further ground that all of the defendants, other than the County of Sonoma, are residents and live within said County of Sonoma and that they are entitled to have said trial therein."

Section 394, Code of Civil Procedure, upon which respondent relies, provides as follows: "An action or proceeding against a county, or city and county, may be commenced and tried in such county, or city and county, unless such action or proceeding is brought by a county, or city and county, in which case it may be tried in any county, or city and county, not a party thereto. Whenever an action or proceeding is brought by a county, city and county, or city, against a resident of another county, city and county, or city, or a corporation doing business in the latter, the action or proceeding must be, on motion of either party, transferred for trial to a county, or city and county, other than the plaintiff, if the plaintiff is a county, or city and county, and other than that in which the plaintiff is situated, if the plaintiff is a city, and other than that in which the defendant resides or is doing business or is situated. Whenever an action or proceeding is brought against a county, city and county, or city, in any county, or city and county, other than the defendant, if the defendant is a county or city and county, or, if the defendant is a city, other than that in which the defendant is situated, the action or proceeding must be, on motion of the said defendant, transferred for trial to a county, or city and county, other than that in which the plaintiff, or any of the plaintiffs, resides, or is doing business, or is situated, and other than the plaintiff county, or city and county, or county in which such plaintiff city is situated, and other than the defendant county, or city and county or county in which such defendant city is situated. In any action or proceeding, the parties thereto may, by stipulation in writing, or made in open court, and entered in the minutes, agree upon any county, or city and county, for the place of trial thereof. This section shall apply to actions or proceedings now pending or hereafter brought."

[1] When extricated from its mass of cumbersome phraseology, and particularly eliminating, when necessary, the words "proceeding," "city and county," "city," corporation," etc., and retaining the language applicable to the instant case, the section provides: "An action * * * against a county * * * may be commenced and tried in such county * * * unless such action * * * is brought by a county * * * in which case it may be tried in any county * * * not a party thereto. Whenever an action * * * is brought by a county * * * against a resident of another county * * * doing business in the latter, the action * * * must be, on motion of either party, transferred for trial to a county * * * other than the plaintiff * * * and other than that in which the defendant resides or is doing business or is situated. Whenever an action * * * is brought against a county * * * in any county * * * other than the defendant * * * county * * * the action * * * must be, on motion of the said defendant, transferred for trial to a county * * * other than that in which the plaintiff * * * resides, or is doing business, or is situated, * * * and other than the defendant county. * * *" The framers of this section evidently endeavored to cover any case wherein a county, etc., was the plaintiff, wherein a county, etc., was the defendant, or where the plaintiff was a coun-

ty, etc., and likewise where the defendant was a county, etc. Under section 394, Code of Civil Procedure, a plaintiff, other than a county, etc., is permitted to commence and proceed to trial in an action or proceeding against a county, etc., in such defendant county. If a county, etc., brings an action against a resident of another county, etc., either plaintiff or defendant has the right to demand that the cause be transferred to a neutral county. If a plaintiff other than a county, etc., institutes an action against a county, etc., in another county, the action or proceeding may be transferred to a neutral county, but *only upon motion of the defendant.* In this case, under section 394, Code of Civil Procedure, plaintiff could have filed the complaint in Sonoma county, but she selected the city and county of San Francisco. Defendant Sonoma county is precluded from asking a transfer to a neutral county, as it does not appear from the record that plaintiff is a resident of the city and county of San Francisco or of Sonoma county or of any other county in the state. It does appear that she is the owner of a ranch situated in the county of Sonoma.

The constitutionality of section 394, Code of Civil Procedure, was upheld in Mono Power Co. v. Los Angeles, 33 Cal. App. 675–677, 166 P. 387. Subsequently the act was amended, as it appears herein, to give the right to a plaintiff, if such plaintiff was a county, city and county, or city, or a corporation doing business in the latter, to move for a change of place of trial, and again it was claimed that the section was violative of article 4, § 25, of the Constitution, but the court said, in City of Stockton v. Ellingwood, 78 Cal. App. 121, 248 P. 272: "It cannot be held that there is no reasonable and substantial basis for such legislative determination or that a like bias would probably exist against an individual plaintiff in an action commenced by him in a county other than that of his residence against a municipality situated therein or against the county itself. As a rule there is no general public opinion at all respecting the merits of an action brought by an individual against a county or a municipality therein. There being a reasonable basis of distinction between the two classes of cases, the provision for a change of venue in the one class and not in the other cannot be deemed a special law within the constitutional inhibition."

[2] In City of Stockton v. Wilson, 79 Cal. App. 424, 249 P. 836, it was held that "from the terms of section 394, viewed in the light of other sections relating to venue, it seems clear that its provisions were intended to apply to actions in proceedings commenced in a plaintiff county, the county in which a plaintiff city is situated, or the county of a defendant's residence." That was a case in which the city of Stockton brought suit in the county of San Joaquin in eminent domain against individual defendants, residents of San Francisco county, and filed the complaint in Calaveras county, the situs of the land. The court held Calaveras to be a proper place for trial. In the same case it was held: "* * * It is not to be presumed that the Legislature intended by section 394 to give either party the right to a transfer in cases where no reason exists therefor." By the same method of reasoning, we conclude that a plaintiff has not the right to commence and proceed to trial in an action in a county where no reason exists for the selection of that particular county.

[3-5] The first question which must be determined by a court in any case is that of jurisdiction. Section 430, Code Civ. Proc. Every court, by virtue of its organization, takes judicial knowledge of the extent and boundaries of the territory within which it can exercise jurisdiction as well as the subject-matter over which jurisdiction has been conferred upon it. In the case of Rogers v. Cady, 104 Cal. 288, 38 P. 81, 43 Am. St. Rep. 100, it was held that "matters of which a court takes judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; and the failure or refusal of a court to take such notice does not prevent the appellate court from giving proper effect thereto." Section 5 of article 6 of the Constitution of California provides "that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be *commenced* (italics ours) in the county in which the real estate, or any part thereof, affected by such action, * * * is situated." It is silent as to where actions for damage for injuries to real property shall be commenced. This being a constitutional provision, it must be stsrictly construed, and its scope must not be enlarged to include injuries. The Codes are also silent as to where such actions *shall* be commenced, and so are our statutes. We must needs, therefore, go back to the common law, with the result that we find such actions brought only in their local jurisdictions. To overcome this, when the injury is also a trespass, as in the case at bar, some states have made a special provision that, in the case of a trespasser leaving the locus of his act, suit may be commenced against him at any place where he may be found. We have no such provision in California. A distinction must be made between where a suit may legally be commenced, and where, by the special powers given it by the court, it may be tried.

Section 392, Code of Civil Procedure, provides, in part: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code: 1. For the recovery of real property * * * and for injuries to real property." The power of what court? The power of the court in which the action has been legally commenced. Sonoma county is the situs of the real property alleged to be injured, and it is there the action must be tried, subject to the power of the court of that county to change the place of trial. Courts must always be jealous of their powers and rights. It is intolerable that the court of the county in which the real property is situated, in an action that is local and not transitory, should be deprived of its right and power to change the place of trial by the act of a plaintiff alone in bringing an action in a county of her own choice. The complaint alleged that the injury occurred in Sonoma county. A reading of section 392, Code of Civil Procedure, shows the underlying intention that the action should be brought in the county where the property is situated, subject to the power of the court in such county to change it.

[6] Section 394, Code of Civil Procedure, affects only those cases properly brought in other counties, permitting fair play between the litigants by giving the option to the defendant county to have its cause tried away from the county of the residence of the plaintiff, with its local sentiments, and it gives the plaintiff the same right of trial outside of the county defendant. But those cases brought in other counties must, as a primary basis, be jurisdictionally properly within those counties. It certainly was never designed to permit a plaintiff by any act of his to deprive a court of proper original jurisdiction of power delegated to it.

[7] So far we have been considering this case as though the county of Sonoma was the sole defendant, and alone to be given consideration. This, however, is not the case. There are five other individual defendants, and the complaint alleges acts of commission and omission against each of them and prays for a judgment "against said defendants and each of them" in the sum of $2,000. The individual defendants are therefore vitally interested parties. The complaint refers to these individual defendants as "the duly elected, qualified and acting supervisors of said Sonoma County." Section 393, Code of Civil Procedure, provides: "Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial: * * * 2. Against a public officer. * * *" Need anything more be said than that, if the defendants, as supervisors of Sonoma county, had been sued alone, without the addition of "Sonoma County" as a defendant, this motion for a change of venue would have been granted?

These five defendants are also vitally interested personally under section 395. If the municipal corporation was not a party they would unquestionably be entitled to have the motion for change of venue made by them granted, Sonoma county being their place of residence. Section 395, Code of Civil Procedure, provides, in part: "In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action, or if it be an action for injury to person, or property, * * * in the county where the injury occurs. * * *" The place of the alleged injury to property in this case was Sonoma county. That is a substantial right, particularly in an action for damages for trespass; a trial by jury, unless waived, is also a right, and every man has, if he desires, a right of trial by his peers and neighbors, provided the wrong, civil or criminal, is committed within his own locale.

Under section 2 of Act 5619, General Laws of California, Statutes of 1923, p. 675, counties are liable for injuries to property resulting from such acts of omission or commission as are set out in the complaint herein, if proven. There can be no reasonable doubt that, if proven, the county of Sonoma could and would respond in damages, but, notwithstanding that, the plaintiff has voluntarily elected to join with it those other certain individual defendants, and to ask individual judgments against each of them. Is it possible that a plaintiff, by voluntarily joining them with a defendant municipal corporation, and bringing the action in a county other than the county of their residence, and the county of the situs of their acts complained of officially and individually, can thereby deprive them of their statutory right to be heard in the county of their residence and alleged official and individual reprehensibility? It would be establishing a very unwise precedent to put a party plaintiff in a position where, on the one hand, he could control the place of trial, overreaching the power of the court of the situs of the cause of action, and, at the same time, destroy a statutory right of each defendant and harass and annoy him with perhaps vexatious litigation in a stranger county.

Our attention has not been called to any case directly in point involving a municipal corporation when joined with individual defendants. We are therefore constrained to reason by analogy. A nonresident corporation is by law permitted to be sued in any county in the state, but, when joined with individual defendants, it has been held that individual defendants have a right to a change of venue. "The right * * * to sue them * * * could exist only in a case where they were the only defendants (section 395, Code Civ. Proc.), and hence it appears that there are two other defendants, * * * both of whom are residents of the state." See Ludington Exploration Co. v. La Fortuna, etc., 4 Cal. App. 369, 88 P. 290. In Wood Curtis & Co. v. Herman Mining Co., 139 Cal. 713, 73 P. 588, it was held that, when all the defendants were nonresidents of the county in which the action is brought, any of the defendants residing in another county are entitled to a change of the place of trial, notwithstanding the opposition of other defendants.

In this case the individual defendants are entitled to a change of venue to Sonoma county. Section 394, Code of Civil Procedure, does not provide that a plaintiff may commence the action in a neutral county or that a plaintiff may select its own forum. Concluding that the provisions of section 394, Code of Civil Procedure, do not apply as we find the record in this case, it is necessary to consider the other sections pertaining to venue, and, from what has been said heretofore, all defendants are entitled to a change of venue to Sonoma county.

The order appealed from must be reversed. It is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

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97 Cal. App. 696

KASHOW et al. v. PLANT et al. (Civ. 6597.)

District Court of Appeal, First District, Division 2, California. March 20, 1929.

1. Appeal and error ⚷1075—Claims expressly abandoned in appellants' briefs present moot questions unnecessary to consider.

Questions presented by claims, which appellants state in their opening and closing briefs that they abandon, are moot, and need not be considered.

2. Navigable waters ⚷36(7)—Evidence held to support trial court's finding, in action to quiet title to submerged land, that defendants had no right of way over it.

In action to quiet title to submerged land, defendants' testimony that they claimed no interest in land, but only a right to use wharf, which they used in common with many others as landing place and to reach their boats from shore owned by them, *held* to support trial court's finding that they had no right of way over submerged land, in absence of evidence that such use was hostile or adverse to plaintiffs, rather than in subordination to their title.

3. Navigable waters ⚷36(7)—Defendants in action to quiet title to submerged land had burden of proving all elements of alleged prescriptive title to right of way over wharf.

In action to quiet title to submerged land adjoining defendants' land, burden was on defendants to prove all elements of alleged prescriptive title to right of way over wharf used by them in common with many others in going to and from their boats.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Thorn Kashow and others against Sydney L. Plant and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Henry B. Lister, of San Francisco, for appellants.

Johnson & Shaw, of Oakland, and R. W. Palmer, of San Francisco, for respondents.

NORTON, Justice pro tem. This is an action by the plaintiffs to quiet their title to a strip of submerged land under the waters of San Francisco bay in the town of Tiburon, Marin county. It is a portion of a larger tract of submerged tide lands and is a narrow parcel, 75 feet long and 17 feet wide, upon which is located a wharf, 67½ feet in length and 8 feet in width, extending into the waters of the bay from the shore to a point beyond the line of low tide.

The defendants are the owners of the upland adjoining the land which is the subject of this controversy.

In their answer to the complaint the defendants admit that the title to the strip is in respondents, and set forth that they have acquired by prescription the following easements and riparian right in the land described in the complaint, viz: The right of fishery, a right of way over said land from the bay of San Francisco to their lands, and the right of having the waters of the bay flow over the strip in question to defendants' lands.

A motion for new trial was made and denied, and the appeal is from the judgment.

[1, 2] In their opening and closing briefs the appellants state that they abandon their claim as to the right of fishery and to have the waters of the bay to continue to flow over defendants' land to their land. These questions therefore have become moot and need not be considered. The trial court found that the appellants had no right of way over the strip in question, and this finding is supported by the evidence. Only two of the defendants were witnesses at the trial and they both testified that they claimed no interest in the land, but a right to use the wharf.

[3] The evidence shows that the land is a submerged strip of land and that the only use that the defendants could make of it was in connection with the wharf. They used the wharf in common with many others as a landing place for their boats and to reach their boats from the shore and to pass over the wharf for that purpose, but there is no evidence to show that this use of the wharf was hostile or adverse to the respondents and not in subordination to respondents' title, and the burden of proving all the elements of a prescriptive title was upon the appel-

lants. Allen v. Allen, 159 Cal. 197, 113 P. 160; Reynolds v. Williard, 80 Cal. 605, 22 P. 262.

The judgment is ordered affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

97 Cal. App. 703

BOYLE v. BOYLE. (Civ. 6649.)

District Court of Appeal, First District, Division 2, California. March 20, 1929.

1. **Appeal and error ⚷931(1)—Findings of trial court must, if possible, be reconciled so as to support judgment.**

Findings of trial court must on appeal be reconciled so as to support judgment if that can be done.

2. **Appeal and error ⚷1071(1)—Findings showing fee-simple title and acquisition thereof by mistake, in action to quiet title, being in irreconcilable conflict, judgment must be reversed.**

In action to quiet title, where general finding, that estate of which plaintiff was administrator had title in fee simple to property involved, was in irreconcilable conflict with finding to the effect that decedent obtained decree quieting title to same property against defendant under McEnerney Act (St. 1906, Ex. Sess. p. 78), by mistake and with no intention of barring defendant's estate in remainder, judgment must be reversed.

3. **Records ⚷18(10)—Mistake is ground for equitable relief against decree quieting title under McEnerney Act.**

Person kept out of court by mistake of one quieting title under McEnerney Act (St. 1906, Ex. Sess. p. 78) is entitled to equitable relief against decree.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by John E. Boyle, as administrator of the estate of Hannah Boyle, deceased, against Annie T. Boyle, wherein defendant filed cross-complaint. Judgment for plaintiff, and defendant appeals. Reversed.

Roland C. Becsey and Paul A. McCarthy, both of San Francisco, for appellant.

Thomas T. Califro, of San Francisco, for respondent.

KOFORD, P. J. Defendant appeals from a decree in favor of plaintiff as administrator quieting the title of Hannah Boyle, deceased, to a piece of property in the city and county of San Francisco. The appeal is upon the judgment roll alone.

The complaint alleged that the deceased at the time of her death, January 18, 1920, was the owner in fee simple of the property described. It also alleged that on the 9th day of November, 1911, said decedent in her lifetime obtained a decree quieting title against all persons under the provisions of what is commonly known as the McEnerney Act. St. 1906 (Ex. Sess.) p. 78. It also alleged that defendant claimed some right in the property, but that said claim was without foundation. The defendant filed an answer and also a cross-complaint. The findings of the court found nearly all of the cross-complaint to be true, but some of the allegations of the cross-complaint were omitted from the findings—that is, they were neither found to be true or untrue.

It is the claim of the appellant that, notwithstanding the general findings and conclusion of the court that the estate of Hannah Boyle, deceased, was the owner in fee simple of the property described, the other findings of the court responding to the allegations of the cross-complaint are such that judgment should have been given for the defendant.

The cross-complaint pleaded that Hannah Boyle obtained the McEnerney quiet title decree without in any manner notifying the appellant; that she did this by mistake and in ignorance of the legal effect of such a decree upon the title of appellant to said property.

We take the facts from the findings of the court. On June 2, 1905, Hannah Boyle, a widow, signed, acknowledged, and delivered to appellant, who was her only unmarried daughter and who lived with her during her whole lifetime until the death of her said mother, a deed of gift to said property, reserving unto herself a life estate in the same. Following the fire of 1906, which destroyed the public records of the city and county of San Francisco, the decedent obtained the McEnerney decree quieting title, November 9, 1911. The remainder of the findings necessary to be considered are as follows:

"That said Hannah Boyle did all of the things in connection with said suit under and with the advice of competent legal counsel; that said deed to defendant in remainder had not then been recorded, and said Hannah Boyle knew that said deed had not been recorded; that in her affidavit filed in said action said Hannah Boyle did not name this defendant as having any interest in said real property adverse to plaintiff and did not in said affidavit disclose the existence of said deed of gift to this defendant, but the omission of said Hannah Boyle so to do was not fraudulent; that neither at the time of the commencement of said action by said Hannah Boyle to establish and quiet the title to said property, nor prior thereto, nor subsequent thereto during the pendency of said action, nor for more than one year thereafter, did this defendant know of said action or of the pendency thereof, nor of the entry of any decree establishing said title in said Hannah Boyle; that said Hannah Boyle repeatedly, both before and after the entry of said decree establishing the title to said property, acknowledged to this defendant and to others that said property belonged to this defendant, subject to the life estate of said Hannah Boyle, and repeatedly, both before and after the entry of said decree, requested and exhorted this defendant to record the said deed of gift.

"That during the whole of this defendant's lifetime she resided with said Hannah Boyle, in the City and County of San Francisco, said state, and, as the only unmarried daughter of said Hannah Boyle, this defendant and said Hannah Boyle, her mother, during all of the lifetime of this defendant had intimate and confidential relations with each other, and that at all times after the date of the delivery of said deed from said Hannah Boyle to this defendant, to-wit, the 2nd day of June, 1905, this defendant reposed great confidence in her said mother, the said Hannah Boyle, and therefore refrained from recording said deed of gift during the life of said Hannah Boyle, knowing fully that said Hannah Boyle would not do anything to affect the rights granted to and acquired by this defendant by and through the said deed."

There is no finding of the court with respect to laches or the statute of limitations.

It will be seen from the foregoing that, although the mother and daughter resided together in the same house upon intimate and confidential relations with each other, that the mother obtained the decree quieting title without any knowledge upon the part of her daughter, but that the omission of the deceased to notify her daughter or in any manner to make her a party to the action was not fraudulent. Those allegations in the cross-complaint, which are not found upon in any way whatever by the court, are to the effect that the decedent did not understand the effect of the decree upon the unrecorded deed of gift which she had executed to her daughter.

[1, 2] The findings of the court must be reconciled so as to support the judgment if that can be done. Respondent stands strictly upon the McEnerney decree, claiming that thereby, as found by the court, the appellant is estopped from asserting her title under her deed. He has not suggested any theory upon which the findings can be reconciled, nor attempted to point out how these probative facts could be true without it also being true that Hannah Boyle obtained the decree against her daughter by mistake. We have been unable to think of any such theory to reconcile the findings. Hannah Boyle must have been laboring under the mistaken belief that her decree would not affect her daughter's title or that her daughter's title would not come into being until after her death or until the deed was recorded. It is a definite fact in this case that during all the proceedings of the McEnerney suit the daughter was the owner of the property subject only to the life estate of her mother, yet the latter obtained the decree against her daughter without notice and without making her a party, which decree if allowed to stand would have the effect of making the mother the owner in fee, thereby divesting all title from the daughter. This all happened without fraud and while the two were living together upon intimate and confidential relations. There is no rational inference to be drawn from the findings which explains these facts except that of mistake.

[3] The cross-complaint was a direct attack upon the McEnerney decree. Follette v. Pacific L. & P. Corp., 189 Cal. 193, 208 P. 295, 23 A. L. R. 965. If appellant had been kept away from court by fraud of her mother so that she never had her day in court, she would be entitled to equitable relief against the decree for extrinsic fraud. U. S. v. Throckmorton, 98 U. S. 65, 25 L. Ed. 93; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Holmes v. O'Brien, 28 Cal. App. 264, 151 P. 1151. Mistake is just as potent as fraud as a ground for such equitable relief against a judgment where that mistake has prevented a defendant from having his day in court. Martin v. Parsons, 49 Cal. 100; Bacon v. Bacon, 150 Cal. 477, 89 P. 317.

We conclude, therefore, that the findings are irreconcilably in conflict. The judgment is therefore reversed.

We concur: NOURSE, J.; STURTEVANT, J.

97 Cal. App. 564

CARTER v. GREEN et al., Councilmen of City of Albany. (Civ. 6778.)★

District Court of Appeal, First District, Division 1, California. March 15, 1929.

Rehearing Denied April 13, 1929.

1. Municipal corporations 🔑34—Affidavits of those circulating petition for consolidation of cities are not required to be attached to petition (St. 1909, p. 282; St. 1913, p. 577).

Affidavits of those circulating petition for consolidation of cities are not required to be attached to petition, either under Consolidation Act of 1909 (St. 1909, p. 282), or Act of 1913 (St. 1913, p. 577).

2. Mandamus 🔑164(3)—General denial did not raise issue as to whether election petition for consolidation of cities was signed by requisite number of electors (Municipal Consolidation Act of 1913, § 2).

General denial was insufficient to raise issue as to whether election petition for consolidation of cities under Municipal Consolidation Act (St. 1913, p. 577) § 2, was in fact signed by one-fourth of the qualified electors of municipality, as alleged in the verified petition.

3. Mandamus 🔑74(2)—Duty of calling election for consolidation of cities after prerequisite facts are established may be compelled by mandamus (Municipal Consolidation Act of 1913, § 2).

Where prerequisite facts for calling of election to determine whether cities should be consolidated in accordance with Municipal Consolidation Act (St. 1913, p. 577) § 2, exist and are established by sufficient proof, the duty is mandatory, and its performance may be compelled.

4. Municipal corporations 🔑34—Proceedings for election to determine consolidation of cities are not rendered void merely because dates of signing by electors were not affixed by them (Municipal Consolidation Act of 1913, § 2).

Where officer whose duty it is to determine sufficiency of petition for special election to determine whether cities should be consolidated in accordance with Municipal Consolidation Act (St. 1913, p. 577) § 2, has found the same to be signed by requisite number of qualified electors, the fact that dates of signing were not affixed by them but by another will not render void the proceedings based thereon.

5. Municipal corporations 🔑34—Petition for special election to determine consolidation of cities, wherein large number of signers did not affix date of signing, was insufficient (Municipal Consolidation Act of 1913, § 2).

Petition for calling of special election pursuant to Municipal Consolidation Act (St. 1913, p. 577) § 2, for consolidation of cities, wherein a large number of signers did not affix dates of signing, *held* not in substantial compliance with requirements of statute so as to require calling of election.

Original proceeding in mandamus by G. V. Carter against Lisle S. Green and others, as Councilmen of the City of Albany. Writ denied.

Clark, Nichols & Eltse, of Berkeley, for petitioner.

Lovett K. Fraser, of San Francisco, for respondents.

PER CURIAM. A proceeding in mandamus to compel respondents above named to call a special election in the city of Albany for the purpose of determining whether that city shall be consolidated with the city of Berkeley. The two cities are contiguous, the city of Berkeley having the greater population and the larger number of electors.

Section 2 of the Municipal Consolidation Act of 1913 (Stats. 1913, p. 577) provides as follows: "Whenever a petition, signed by not less than one-fourth in number of the qualified electors of any municipal corporation, as shown by the registration of electors of the county in which such municipal corporation is situated, is filed with the legislative body thereof, asking that such municipal corporation and any other municipal corporation contiguous thereto, designated in such petition, and having a greater population, be consolidated, such legislative body must, without delay, call a special election and submit to the electors of such municipal corporation the question whether such municipal corporations shall be consolidated. * * *" It is admitted that on October 1, 1928, there was filed and presented to respondents at their regular meeting a petition, purporting to be signed by 1,557 qualified electors of the municipality, requesting respondents to call a special election and submit to the electors the above question. While the statute requires no action by the city clerk nor any certificate by him as to its sufficiency (Hirons v. Clare, 38 Cal. App. 608, 177 P. 291; People v. Town of Ontario, 148 Cal. 625, 84 P. 207), respondents, as they might do (Wolfskill v. City Council, etc., 178 Cal. 610, 174 P. 45), referred the petition to him for the purpose of ascertaining the number of qualified electors who had signed the same. It is admitted that the number of such signers necessary to call the election was 1,135. The clerk, in a communication addressed to respondents, stated that he had examined the signatures attached to the petition, and found that 42 names thereon did not appear on the great register; that 7 signatures did not compare with those on the pages of the register; that 11 names were duplicated, and that 1,211 signers did not affix the date of signing. Whether the names of the signers last mentioned appeared on the registration records was not stated. He also certified that no affidavits by the persons who circulated the petition were attached thereto; and, further, that it did

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★Rehearing denied.

not appear therefrom under what act of the Legislature petitioner wished the election called. Respondents thereupon rejected the petition and refused to call the election.

[1] Neither the Consolidation Act of 1909 (Stats. 1909, p. 282) nor the Act of 1913 (Stats. 1913, p. 577) requires the affidavits of those who circulate the petition to be attached, and the petition filed with respondents sufficiently shows that petitioner was proceeding under the latter act.

[2-5] The verified petition in the present proceeding alleged that the election petition was in fact signed by over one-fourth of the qualified electors of the municipality. This allegation was met by a general denial by respondents, which was insufficient to put the matter in issue (Hirons v. Clare, supra); but this court notwithstanding caused the petition to be referred to the superior court of Alameda county for determination, and, according to its findings, the petition was signed by more than one-fourth of such electors within two weeks preceding its presentation to the board. It is not claimed by petitioner that the signatures of 1,211 signers referred to in the clerk's statement were dated by them. It, however, appears that dates were affixed thereto, but by whom is not shown. In passing upon the sufficiency of such a petition with respect to the number of qualified electors who have signed the same the statute expressly limits the source of information "to the registration of electors of the county in which such municipal corporation is situated" (Stats. 1913, p. 578, § 2); and in determining the question the council acts in a ministerial capacity (Wolfskill v. City Council, supra). Here, as in other cases where the duty is ministerial, the obligation to call the election depended upon the determination of prerequisite facts; but where such facts exist and are established by sufficient proof the duty is mandatory and its performance may be compelled. Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874; Puterbaugh v. Wadham, 162 Cal. 611, 123 P. 804; Stockton R. R. Co. v. Stockton, 51 Cal. 328; People v. Supervisors, 45 Cal. 395; Hirons v. Clare, supra. Respondents contend, however, that section 1083a of the Political Code, which provides that, "Wherever, by the constitution or laws of this state, any initiative, referendum, recall or nominating petition or paper, or any petition or paper, is required to be signed by qualified electors, * * * such signer shall at the time of so signing such petition or paper affix thereto the date of such signing," not having been complied with by a number of the signers equal to one-fourth of the qualified electors of the municipality, the petition was properly rejected. The purpose of the statute was to guard against signatures by persons who are not qualified electors at the time of signing the petition (Chester v. Hall, 55 Cal. App. 611, 619, 204 P. 237), and it has been held that noncompliance therewith is a justification for refusal by the proper officer to certify as sufficient the names of the signers as to whose signatures the dates of signing are not affixed (Boggs v. Jordan (Cal. Sup.) 267 P. 696; Chambers v. Glenn-Colusa Irrigation Dist., 57 Cal. App. 155, 206 P. 773). But, as was in effect held in the above cases, where the officer whose duty it is to determine the sufficiency of the petition from the registration records found the same to have been signed by the requisite number of qualified electors, the fact that the dates of signing were not affixed by them but by another will not render void the proceedings based thereon. This was not equivalent, however, to holding the above provision to be merely directory, or that such officer would be bound to act notwithstanding the signers had failed to comply with the statute; for, as the court said in Chambers v. Glenn-Colusa Irrigation Dist., supra: "The requirement is, of course, plain and unequivocal, within the power of the Legislature to prescribe, and there is no good reason for holding it to be otherwise than mandatory."

It is contended that it inferentially appears from certain letters written by the clerk to the attorneys for the petitioner, and which were set forth in his petition to this court, that the former did in fact ascertain from the registration records that the election petition was signed by the requisite number of qualified electors, and that having done so the board was not justified in refusing to act thereon. But whatever may have been the fact known to the clerk, so far as shown, he did not so certify to the board. The question here presented is, what did the petition with the statement made by the clerk as to its sufficiency show to respondents; and we are to determine whether the writ should issue by a consideration of the situation as presented to them. Chambers v. Glenn-Colusa Irrigation Dist., supra.

In view of the foregoing we feel bound to hold that the petition did not substantially comply with the requirements of the statute, and that it was consequently not the duty of the respondents to act thereon.

The writ is denied.

97 Cal. App. 628

POMPER et al. v. BEHNKE et al.★

(Civ. 3720-3722.)

District Court of Appeal, Third District, California. March 18, 1929.

Rehearing Denied April 17, 1929.

1. Appeal and error 🔑113(1)—Order denying motion for new and different judgment is appealable.

An appeal lies from an order denying a motion to enter a new and different judgment.

2. Appeal and error 🔑348(1)—Failure to serve notice of new trial or motion to vacate on defendant left unaffected by denial thereof did not defeat jurisdiction of appellate court (Code Civ. Proc. § 663a).

Where position of defendant brought in as a party under order of the trial court and against whom final judgment was rendered was left unaffected by denial of motion for new trial if he were in fact in any sense an adverse party without contemplation of Code Civ. Proc. § 663a, the failure to serve notice of new trial or motion to vacate on such defendant did not defeat jurisdiction of appellate court.

3. Pleading 🔑34(4)—Language of pleading must be construed strictly against pleader.

Court must construe the language of a pleading most strongly against the pleader.

4. Contracts 🔑88—Presumption of consideration for written instrument may be overthrown by evidence to contrary (Civ. Code, §§ 1614, 1615, 3442).

Presumption of consideration for a written instrument in accordance with Civ. Code, § 1614, is a disputable one, and may be overthrown by evidence to the contrary, though party seeking to avoid instrument has burden of showing want of consideration under section 1615, nor can any transfer or charge be adjudged fraudulent, under section 3442, solely on ground that it was not made for valuable consideration.

5. Evidence 🔑383(7)—Statement that certain sum has been paid as consideration for deed may be accepted as prima facie evidence of its truth.

Statement in deed that a certain sum has been paid as consideration is an admission or acknowledgment of grantor, and may be accepted as prima facie evidence of its truth.

6. Gifts 🔑49(4)—Inadequacy of nominal consideration for deed held to warrant inference that it was transfer by way of gift.

Inadequacy of nominal consideration for deed compared with value of property *held* to warrant an inference, not that transaction was fraudulent, but that it was a transfer by way of gift.

7. Marriage 🔑50(4)—Hearsay statement that person had said he and another were married was insufficient proof of marriage (Civ. Code, § 68 et seq.).

Hearsay statement that witness had heard party say that he and another were married was insufficient, of itself, as proof of marriage under the Marriage Law as it existed in 1896 after amendment in 1895 to Civ. Code, § 68 et seq.

8. Husband and wife 🔑262(1)—Presumption is that lands purchased during marriage were community property.

Where lands were purchased during marriage relationship, presumption is that they were community property.

9. Husband and wife 🔑264—Presumption that lands purchased during marriage were community property can be overthrown only by clear, certain, and convincing evidence.

Presumption that lands purchased during marriage relationship were community property can be overthrown only by evidence of a clear, certain, and convincing character establishing the contrary.

10. Husband and wife 🔑262(2)—One claiming separate character of property purchased during marriage has burden of overcoming presumption that it was community property.

One claiming separate character of property purchased during marriage relationship has burden of introducing evidence of clear and convincing character sufficient to overthrow presumption that it constituted community property.

11. Deeds 🔑194(2)—Court properly ruled that there had been due delivery of deed found with grantee's personal effects after her death.

Where deed was found with personal effects of grantee after her death, the court properly ruled that there had been due delivery thereof to grantee.

12. Deeds 🔑82—Deed was effective as transfer from grantor to grantee without recordation.

Recordation was not necessary to make deed effective as a transfer from grantor to grantee.

13. Husband and wife 🔑265—Gift of community property by husband without wife's consent was not void but voidable at election of wife (Civ. Code, § 172 as amended in 1891).

Under Civ. Code, § 172, as amended in 1891, relating to right of husband to make a gift of community property or convey the same without consideration, a gift of community property by husband without the wife's consent was not void but voidable only at election of wife; the property vesting in donee subject to right on part of wife to have it revoked.

14. Husband and wife 🔑267(1)—Wife, in case of transfer of community property by husband without her consent, could recover only one-half of property so conveyed (Civ. Code, § 172, as amended in 1891).

Where husband transferred community property without consent of wife in violation of Civ. Code, § 172, as amended in 1891, the wife could recover only one-half of property conveyed by husband.

★Rehearing denied.

15. Appeal and error 🔑1058(1)—Exclusion of corroborative evidence, though technically erroneous, held harmless.

Exclusion of evidence which was merely corroborative or cumulative of other evidence, though technically erroneous, where no ground of objection was stated, *held* harmless.

16. Quieting title 🔑10(1)—One failing to show title or possession or right to possession could not complain that some one else asserted interest therein.

One claiming property, having failed to show title or possession or right to an undivided one-half thereof, was not in position to complain that some one else, even though without title, asserted an interest in property, and defendant may effectually resist a decree against himself by showing simply that plaintiff is without title.

17. Deeds 🔑15—Neither recital of consideration nor consideration in fact is necessary to support voluntary deed.

Neither a recital of consideration nor a consideration in fact is necessary to support a deed as a valid conveyance of land, if executed voluntarily with knowledge of its contents and with intent to convey.

18. Deeds 🔑17(2)—Mere inadequacy of consideration is not sufficient grounds for setting aside deed.

Mere inadequacy of consideration is never of itself sufficient ground for setting aside a deed.

19. Deeds 🔑207, 208(6)—One denying valid transfer has burden of proving by preponderance of evidence that there was no conveyance or acceptance.

One denying valid transfer to holder of realty conveyance has burden of proving that there was no conveyance or acceptance by preponderance of evidence.

20. Quieting title 🔑42—Plaintiff, prevailing to extent of recovering undivided one-half of real property described in complaint and one-half of rents, was entitled to costs.

Where plaintiff, in suit to quiet title, prevailed to extent that she was entitled to judgment quieting title to undivided one-half of real property described in complaint and to one-half of sum found by receiver and referee for rent, she was entitled to judgment for costs.

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by Emelia Pomper, also known as Emelie Auguste Pomper, and others, against Alfred A. Behnke and others. From an interlocutory judgment in favor of plaintiff and judgment denying defendant's motion to retax costs, and a final judgment in favor of plaintiff against certain defendants, and an order denying defendant's motion for another and different judgment, defendants separately appeal; the three appeals being consolidated and considered and determined together. Affirmed in part, and in part reversed with directions.

John F. Poole and H. E. Gleason, both of Los Angeles, for appellants.

Issaac Pacht and Clore Warne, both of Los Angeles, for respondents.

McDANIEL, Justice pro tem. There are three appeals pending herein, numbered, respectively, as above indicated. Civil No. 3720, L. A. No. 9382, is an appeal from an interlocutory judgment in favor of plaintiff. Civil No. 3721, L. A. No. 9383, is an appeal from a judgment denying the motion of defendants to retax costs. Civil No. 3722, L. A. No. 9999, is an appeal from a final judgment made and entered in favor of plaintiff against certain defendants and from an order denying defendants' motion for another and different judgment. By stipulation of respective counsel, and by order of the Supreme Court, the three appeals have been consolidated, together with the respective records thereof, which are here on bills of exceptions, and are to be considered and determined as upon the last-named appeal.

This is a suit to quiet title. Its history shows that it was commenced on September 29, 1920, by one Emelia Pomper to quiet her title to a certain piece of real property described in the pleadings and judgment herein as residence property on Flower street in the city of Los Angeles, Cal. The defendant in the action was one Behnke. On motion for new trial, same was granted, which resulted in a judgment in favor of the plaintiff. Another motion for a new trial was made and granted, and thereupon the case was taken before the Supreme Court on certiorari to review the action of the lower court in granting the said motion. After affirmance of the said order granting the new trial, the case was tried for the third time by the superior court, judgment rendered, and appeal taken as above indicated.

The facts are as follows: The plaintiff Emelia Auguste Pomper and Frederick Emil Pomper (also known as Fritz Pomper) were married in Germany, September 5, 1881, and lived together as husband and wife until August, 1891, during which time there were born their five children, of whom two have died, leaving three daughters surviving, named Anna Wanda Loeffler, Anna Auguste Herold, and Freda Camila Rudolph, now named as plaintiffs and respondents herein. They are all of adult age and married. The names given above are their present surnames. In the year 1891 the said Fritz Pomper left his home in Germany and came to America. Either at the same time, or within two or three years later, the said Emelia Lenk also came to America and began to live with Fritz Pomper in the city of Chicago, whence they removed to the city of Los Angeles, Cal. They continued to reside together until the death of Fritz Pomper in June, 1918. In the year 1905 Fritz Pomper purchased the property in question from one Eichholz, paying down the sum of $500 and executing a note and mortgage in the principal sum of $4,500 as and for the balance of the full purchase price of $5,000 agreed to be paid for said property; the said note and mortgage were also signed by Emelia Lenk, who used the name, in so signing, of "Emelia Pomper"; and the balance of the purchase price thereafter was paid during the time that Fritz Pomper and Emelia Lenk Pomper were living together. On September 8, 1908, Fritz Pomper executed a deed to Emelie Pomper (Emelia Lenk Pomper of Los Angeles), which was, in form, a grant deed describing the property in question, which was found after the death of Emelie Pomper with her effects contained in her trunk, which may have been, prior to his death, the trunk of both Fritz and Emelia Lenk. (It may be noted, parenthetically, that throughout all the documentary evidence, pleadings, and judgment, the name of "Emelia Lenk" of Los Angeles, also known as "Emelia Pomper" of Los Angeles, and the name of "Emelia Pomper" of Germany, have been spelled in various ways. For convenience hereafter the two names, respectively, will be spelled in a uniform manner.) The consideration named in said deed was the sum of $10. The said deed was recorded November 10, 1920, by one of the defendants, Adelina Heinze. On September 20, 1915, Fritz Pomper executed a deed of gift of said property to Emelia Pomper, which was recorded on September 21, 1915, in the records of Los Angeles county, Cal. Emelia Lenk Pomper died September 7, 1919, and at the time of her death resided with defendant Heinze. In August, as before noted, the respondent Emelia Pomper commenced this suit, and later, by amendments, the other parties plaintiff were added. The appellants, in their bill of exceptions, specified certain rulings of the court, in the admission or rejection of testimony and evidence, as error. Error is also predicated upon the refusal of the court, after judgment rendered, to enter a new and different judgment.

[1, 2] At the outset respondent raises the objection that the order denying a motion for a new and different judgment last referred to is not appealable. It is well settled, however, in this state that an appeal lies from an order denying motion to enter a new and different judgment. Gittelson v. Gandolfo (Cal. App.) 259 P. 340; Condon v. Donohue, 160 Cal. 749, 118 P. 113. Respondent also argues that this court has no jurisdiction of the appeals, wherein he contends, "no notice of a new trial or motion to vacate" was served on Frank Bryson, administrator of the estate of Fritz Pomper, deceased, a defendant brought in as a party under order of the trial court. With respect to this objection as to jurisdiction, we believe it to be without merit. The notice of appeal in this case appears to have been within due time after denial of the motion for new trial. The trial court's final judgment was against the said defendant Bryson. The motion for new trial was denied. Bryson's position was left unaffected if he were, in fact, in any sense an adverse party within the contemplation of section 663a of the Code of Civil Procedure.

As will more fully appear hereafter, the public administrator, as the administrator of the estate of Fritz Pomper, did not interpose any special defense, nor, after judgment, take any appeal from any order, and no averments may be found in the pleadings seeking any other relief than to quiet any title that might by law vest in him as such administrator.

The notice of intention to move for a new trial in this proceeding was addressed only to plaintiffs, and served on them alone, and filed within the specified time. This may have been upon an erroneous theory, possibly, that Bryson was not an adverse party. Nevertheless, upon the authority of the Estate of Nutt, 180 Cal. 419, 181 P. 661, the appeal was filed within the statutory time after the denial of the motion for a new trial, after due hearing.

[3] The following statement of appellants' position on this appeal may be taken as a basis for the discussion of the facts and the law applicable to this case, which will follow: (a) Appellants contend that error appears by the record here, as follows: I. That the evidence is wholly insufficient to sustain the basic and essential findings: a. That the real property, the subject-matter of this action, was community property of Fritz Pomper and the respondent Emelia Pomper. b. That the deed of 1908, Fritz Pomper to Emelia Pomper, was without consideration and that it was recorded subsequent to filing of lis pendens in this action. c. That the conveyances under which appellants claim were made with intent to defraud respondent. II. That the court erred in refusing to permit evidence showing consideration to Emelia Pomper of Los Angeles for deed to appellants. III. That even if said property was community property, Fritz Pomper made a valid conveyance to one-half thereof, and that therefore order to enter another and different judgment was proper. IV. No estate or interest is shown in respondent children. V. That the item of costs sought to be stricken from the cost bill was not properly taxed against appellants. Under stipulation, all the claimants herein would deraign their title through the deed above named executed by Eichholz and his wife, Emma Eichholz, granting the prop-

erty in dispute to Fritz Pomper of Los Angeles. Throughout their carefully prepared brief, appellants seem to base their arguments that the plaintiff Emelia Pomper of Germany has no right, title, or interest to even a community property right to the property, upon the fact that the evidence discloses, at least from the year 1896 to the date of his death, Fritz Pomper and Emelia Lenk lived together in the same house. If the evidence herein disclosed that a marriage between Fritz Pomper and Emelia Pomper of Los Angeles had been solemnized in any manner, or at all, as required by the law of California, the case on this appeal would present an aspect different than that which it now presents; but it is not claimed in the pleadings nor in the argument that there is any evidence in the case that any marriage ceremony ever had taken place between those two persons. It is, of course, claimed that they lived together as husband and wife, and upon that fact alone, together with the many years during which the two resided together, appellants base their argument that the property having been acquired as the fruits of their joint industry, by analogy at least, must be considered a sort of a community property as between themselves, and that the first Emelia Pomper, although never divorced from Fritz Pomper, had in no wise contributed to the acquiring of said property, and therefore had no community interest therein. The argument, as stated, has been ingenious and elaborate. He cites, in support of same, Tibbetts v. Fore, 70 Cal. 242, 244, 11 P. 648; Ord v. De La Guerra, 18 Cal. 67, 74; Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A. L. R. 1386; Coats v. Coats, 160 Cal. 671, 675, 118 P. 441 [36 L. R. A. (N. S.) 844]; Brenchley v. Brenchley, 96 Wash. 223, 164 P. 913, L. R. A. 1917E, 968; Barkley v. Dumke, 99 Tex. 150, 87 S. W. 1147—which are cases where the second wife of a void or voidable marriage is seeking to establish her right to an equitable share of the property acquired while the marriage subsisted, and they do not deal with conflicting equities between a first wife, still the legal wife of the husband, and the alleged rights to an interest in the property of the so-called putative wife. It is deemed unnecessary to discuss each of the citations and arguments made by appellants in much detail or at great length, for the reason that we believe they have themselves, by their pleadings, cut the grounds from under their own argument. In paragraph 1 of the second defense in their answer to the amended complaint defendants affirmatively allege the marriage of Fritz Pomper and Emelia Pomper of Germany, and the continuance of the marriage relationship between those two to the date of Fritz Pomper's death in June, 1918. The paragraph referred to is as follows: "That these defendants are informed that plaintiff at all times mentioned in the complaint was and still is a resident of Gloesa, Chemnitz, Germany, and that she and one Frederick Emil Pomper, sometimes known as Fritz Pomper and sometimes known as Fred E. Pomper, intermarried at Gloesa, Chemnitz, Germany, on September 25, 1881, and remained husband and wife until the death of the said Fritz Pomper in Los Angeles, California, on or about the 10th day of June, 1918." Construing the language, as we must, most strongly against the pleader, it must be regarded as an admission of the unbroken marriage relationship between Fritz Pomper and Emelia Pomper of Germany from its inception in 1881 to June 10, 1918. To make this admission doubly strong appellants in their reply brief herein, in their recapitulation of the case, after mentioning the date when Fritz Pomper acquired the property by purchase in 1905, state: "At that time, and at all times thereafter, until his death, June 10, 1918, Fritz Pomper and the respondent Emelia Pomper (of Germany), were husband and wife." This point will be further noticed later.

(b, c) Appellants assail the court's findings numbered VII, VIII, IX, XI, XIV, and XV as not supported by the evidence. In substance finding VII is that defendants make claim to the property by reason of the deed dated September 8, 1908, of Fritz Pomper to Emelia Pomper of Los Angeles; that there was not any valuable, or adequate, or any sufficient consideration for said deed; that a nominal consideration of $10 was recited; that the deed was not filed for record until subsequent to the commencement of this action and the filing of lis pendens herein, when recorded by defendant Heinze without right or authority.

Finding VIII is that defendants have no right whatever in or to the property in question.

Finding IX is that the property was community property of Fritz Pomper and his wife Emelia Pomper (of Germany), having been acquired during coverture, at the price of $5,500, paid by Fritz Pomper from his wages and earnings.

Finding XI is that Emelia Lenk (Emelia Pomper of Los Angeles) knew at all times of the existence of the true wife and her children, the children, also, of Fritz Pomper.

[4-6] In looking at appellants' criticism of finding VII, we keep in mind the Code sections: "A written instrument is presumptive evidence of a consideration." Civ. Code, § 1614. "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Civ. Code, § 1615. "* * * Nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." Civ. Code, § 3442. The presumption as to a valuable consideration, however, is a disputable one and may be overthrown by evidence to the contrary. Proof was adduced at the trial that the property in question had a reasonable value of $5,000. Being but the sum of $10, it is apparent on the face of the transaction that the named consideration was an inadequate and not a valuable one. "The statement in the deed that a certain sum has been paid as the consideration is an admission or acknowledgment of the grantor that such is the fact, and such statement may be accepted as prima facie evidence of its truth." 2 Devlin on Deeds (2d Ed.) § 817. Paraphrasing a statement of the late Justice Hart of this court, in an opinion written by him, viz., Kinsell v. Thomas, 18 Cal. App. 683, at page 692, 124 P. 220, 224, it may be said here: "There is no evidence in the record rebutting the inference that the amount recited in the deed as the consideration for the conveyance to Emelia Pomper of Los Angeles in 1908, viz., the sum of $10 was the sum actually paid by her to Fritz Pomper for the realty." The inadequacy of the nominal consideration, compared with the value of the property, warrants an inference, not that the transaction was fraudulent, but that it was a transfer by way of gift. That inference is strengthened by the execution of the second deed by the same grantor to the same grantee in 1915, purporting to convey the same real property. The deed of 1915 is one of gift to Emelia Pomper, designated therein as his wife, for and in consideration of love and affection. In finding III the trial court finds this was a purported deed of gift executed by Fritz Pomper to Emelia Lenk, also known as Emelia Pomper.

[7-12] Appellants urge the view that the property was not community property of Fritz Pomper and Emelia Pomper of Germany, but rather was community property of Fritz and Emelia Lenk, also known as Emelia Pomper of Los Angeles. It is said on page 31 of their opening brief that, "It appears that there was the ceremony of marriage between the parties in 1896, and that thereafter they continued to live as man and wife." That statement is not supported by the record. It may be noted that notwithstanding the admissions in the pleadings and the arguments to the contrary, there was offered in evidence a certain paper purporting to be a marriage certificate issued by some person as a justice of the peace, but upon proper objection to the offer, because there was no identification of signatures nor proof of authenticity, the document was not admitted in evidence. The only other showing in this respect in the record is a statement of Mrs. Heinze (now deceased) that she had heard Fritz Pomper say that he and Emelia Lenk were married in Chicago in 1896. Of course, that hearsay statement alone is not sufficient proof of marriage under the marriage law of California as it existed in 1896 after amendment in 1895 to section 68 et seq., Civil Code. Appellants' argument on this point is not sound; the marriage of Fritz Pomper and Emelia Pomper of Germany being a subsisting marriage when Fritz acquired the property, it stood of record in his name. From the case of In re Boody's Estate, 113 Cal. 682, 45 P. 858, we quote from page 686 (45 P. 859): "The purchase of the lands having been made during marriage, the presumption is that it was community property, and this presumption could be overthrown only by evidence of a clear, certain, and convincing character establishing the contrary; and the burden of this showing rested with the parties claiming the separate character of the property. In the absence of such proof the presumption as to the community character of the property was absolute and conclusive." When the deed of 1908 of Fritz Pomper to Emelia Pomper of Los Angeles was admitted in evidence, the court properly ruled there had been due delivery thereof to the grantee, as it was found when she died, with her personal effects. Recordation was not necessary to make it effective as a transfer from grantor to grantee.

The finding as to a lis pendens and the recordation thereof by respondent prior to the recordation of the deed of 1908 is immaterial. The gift deed of 1915, if of any effect. merely confirmed the prior deed of 1908, and was recorded long before this litigation was commenced and lis pendens recorded.

[13, 14] We come now to appellants' point III. It having hereinbefore been shown that the property was community property of respondent and her husband Fritz, when he executed the deed of 1908 as a gift and without having received for it any valuable consideration, the transaction will be regarded in the light of the law of community property, as it was in the year 1908. Section 172, Civil Code, at that time, with respect to transactions like those herein involved, stood as amended in 1891. It provided that a husband could not make a gift of community property or convey the same without consideration unless the wife, in writing, consent thereto (5 Cal. Jur. 341), citing Spreckels v. Spreckels, 116 Cal. 343, 48 P. 228, 36 L. R. A. 497, 53 Am. St. Rep. 170, and many others. "Though the husband is forbidden by the statute to give away any part of the community property without the wife's consent in writing, yet a gift made by him in contravention of the statute is not a nullity. On the contrary, the property vests in the donee, subject to the right on the part of the wife to have it revoked. Moreover, since the gift is voidable only at the election of the wife, it binds the husband and his successors. Accordingly, the wife may recover in case of transfer in violation of the amended section, only one-half of the property conveyed by the husband." 5 Cal. Jur. 642; Dargie v. Patterson, 176 Cal. 714, 169 P. 360.

[15] In arguing their point II, appellants contend that the court erred in rejecting certain testimony, which is set forth as follows: "Gustav F. Heinze, recalled on behalf of defendants in surrebuttal, being first duly sworn, testified as follows: Direct examination by Mr. Pacht: On or about the 20th day of September, 1915, Mrs. Emelia Pomper of Los Angeles resided at 213 North Flower. During the last year and a half of Mrs. Pomper's life she lived with us, me and my wife. We took care of her. She was approximately 45 or 48 years old at the time of her death. Q. Did she know what her condition of physical health was about a year and a half prior to the time of her death? To which question plaintiff objected. Which objection was sustained. Whereupon defendants offered to prove by said witness that said Mrs. Pomper was taken care of by Mrs. Heinze for a year and a half prior to her death; that she boarded with her; all tending to the effect of consideration of said deed. Plaintiff objected to the introduction thereof, which objection was sustained." It will be noticed from the above quotation that no grounds of objection were stated by counsel, and yet they were sustained. Technically, this was erroneous. The question itself suggests many objections that might have been interposed, all of which would be good; but upon the matter of the offer made by defendants and appellants to prove that Emelia Lenk Pomper was taken care of by Mrs. Heinze for a year and a half prior to the former's death, and that she boarded with Mrs. Heinze, that is probably admissible as having some bearing upon the consideration of the deed executed by Emelia Lenk Pomper to Heinzes by the mesne conveyance to the Behnkes. However, we are of the opinion that the deed of Emelia Lenk to Alfred A. Behnke and wife, followed by the mesne conveyance of Behnke and wife to Heinze and wife, as under the Code sections heretofore cited, is presumed to have been for a valuable consideration. The evidence, if it had any bearing upon the consideration, was merely corroborative, perhaps merely cumulative upon that subject, and its exclusion would be harmless.

[16-19] Plaintiffs, in their complaint, anticipating the defense founded upon the execution of these deeds by Emelia Lenk, alleged that said Emelia Lenk deceased, was weak-minded and incompetent and under the absolute domination and control of said Fritz Pomper up to the time of his death in 1918; that said Emelia Lenk could not read or write the English language, and could comprehend very little, if any, German reading or writing; that the defendants Gustav Heinze, Alfred A. Behnke, Eleanor Behnke, and especially the defendant Lena Heinze, who is of a strong will and strong personality, subsequent to the death of Fritz Pomper, took possession of and dominated and controlled the said Emelia Lenk and imprisoned her and hedged her so about that no one could get in touch with her; that while having the said Emelia Lenk under their control and mastery, they forced and compelled said Emelia Lenk, without knowledge on her part and against her will, and through fraud and misrepresentations, to sign an alleged conveyance to Alfred A. Behnke, which conveyance was recorded in Book 6837, page 21, of deeds, records of Los Angeles county, on the 8th day of March, 1919, which deed was purported to be of date September 18, 1918; that at the time of said signing said Emelia Lenk, sometimes known as Emelia Pomper, did not know that she was signing a purported conveyance of any property or anything, but was informed and was led to believe, and was coerced into believing, that said instrument was a will by which she left all her property to her three sisters in Germany; that there was no consideration for said deed and the consideration mentioned therein is false; that said purported conveyance was taken in the name of said Behnke on behalf of Lena Heinze, who was endeavoring by said means to obtain said property for her own use and benefit without giving any consideration therefor, by the said misrepresentations to and coercion of said weak-minded Emelia Lenk, also known as Emelia Pomper; that any conveyance made by said Behnke to defendant Heinze was for the purpose of perfecting the aforesaid scheme and purposes of defendant Heinze. We have searched the record, without success, for any evidence supporting the averments as to fraudulent misrepresentations, domination or control, imprisonment, mastery, or coercion of said Emelia Lenk. It is true there is evidence that she was ignorant of the English language and not well educated even in her native German language. It is shown that when she received from her companion, friend, and supposed husband Fritz Pomper, the deed of 1908, she did not have the prudence or knowledge to cause the instrument to be duly recorded, but there is nothing in the testimony of any of the witnesses in the case to indicate any undue influence exercised upon or against her to execute the deed to Behnke, and the witness Alfred Behnke's testimony indicates that she knew that the property was to be, by himself and his wife, again conveyed to Mr. and Mrs. Heinze. He said that no money was paid himself as a consideration for the deed, while the deed itself recites a consideration of $4,000, but Behnke stated that he merely acted as a dummy in the transaction because there had been a prearranged understanding and agreement with reference to the execution of said instrument, between Emelia Lenk and Mrs. Heinze. Quoting from his testimony: "Q. By Mr. Poole: You say you were supposed to take it over to protect her interest. To protect her interest in what? A. Well, she was—it was a prearranged affair between Mrs. Heinze and

Mrs. Pomper that I was supposed to take this property over in my name to safeguard her interest so she would not give it away or sell it or dispose of it for little or nothing." The trial court, with reference to this deed, made its finding that it was executed without consideration. Even if this were true, in so far as she held a valid legal title to Fritz Pomper's one-half of the community property of himself and his wife, he had a right to make a gift of the property, and the plaintiff Emelia Pomper is not in a position to quiet the title of the defendants because, as to one-half of the property, she had and held no interest whatsoever. In other words, the plaintiff, having failed to show title or possession or right of possession to an undivided one-half of the property, is not in position to complain that some one else, even though without title, asserts an interest in the property. "A defendant in such an action may always effectually resist a decree against himself, by showing simply that the plaintiff is without title." Williams v. City of San Pedro, 153 Cal. 44, 94 P. 234, and cases cited therein, all cited in Rockey v. Vieux, 179 Cal. 683, 178 P. 712. Neither a recital of the consideration, nor a consideration in fact, is necessary to support a deed as a valid conveyance of land if executed, voluntarily, with knowledge of its contents and with intent to convey. Tillaux v. Tillaux, 115 Cal. 663, 47 P. 691; Lieman v. Golly, 178 Cal. 544, 174 P. 33. Mere inadequacy of consideration is never of itself sufficient ground for setting aside a deed. Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471; 9 Cal. Jur. 140, § 41, and notes. "One denying a valid transfer to a holder of a realty conveyance has burden to prove no conveyance or acceptance by a preponderance of evidence." Hodoian v. Garabedian, 79 Cal. App. 762, 251 P. 227.

We hold, as to appellants' point III, that if the property in question was the community property of Fritz Pomper and his real wife, Emelia Pomper, that Fritz Pomper conveyed a valid title only to an undivided one-half, and that the trial court erred in refusing to enter another and different decree. As we have shown, the law of this state upholds appellants' position in this regard. Directly in point is the case of Dargie v. Patterson, supra.

In considering appellants' point IV, we are convinced that the final judgment of the trial court that the children of said respondent Emelia Pomper and Fritz Pomper are now, with their mother, the owners in fee, and entitled to the possession of the described real property, was and is erroneous, and in fact is without any evidence to support it. All the transactions involved in this litigation occurred before the amendment to Civil Code section 1401 as it now stands.

[20] As to appellants' point V, we are satisfied that the trial court's refusal to retax costs, as requested, was proper. The ultimate judgment that should have been rendered in this case, in our opinion, was correctly rendered in so far as it adjudged that the plaintiff Emelia Pomper was entitled to judgment quieting her title to an undivided one-half of the real property described in the complaint, and also entitled to one-half of the sum found by the receiver and referee, for rents. It follows therefore that, having prevailed to that extent at least, plaintiff would be entitled to judgment for costs. Witherill v. Brehm, 74 Cal. App. 286, 289, 240 P. 529.

It is ordered that the judgment in civil action No. 3721 is affirmed. Judgment in civil action No. 3722, including consolidated civil action No. 3720, is reversed, with directions to the trial court to enter judgment that the plaintiff Emelia Pomper of Germany is the owner of an undivided one-half interest in the real property involved in this litigation, and that the defendant Gustav Heinze is the owner of the other undivided one-half thereof. The rents which have accrued during the pendency of this litigation should, by the terms of the new and modified judgment herein, be equally divided between the said plaintiff Emelia Pomper and said defendant Gustav Heinze. The other defendants, Eleanor Behnke and Alfred A. Behnke, should be dismissed hence. The plaintiffs Anna Wanda Loeffler, Anna Auguste Herold, and Freda Camila Rudolph take nothing by their action. The appellants in civil action No. 3722 are entitled to their costs on appeal.

We concur: FINCH, P. J.; THOMPSON, J.

FRIOUX v. JOHNSON, County Auditor.★

(Civ. 3795.)

District Court of Appeal, Third District, California. March 19, 1929.

Rehearing Granted April 17, 1929.

1. Constitutional law ⇔56—Jurisdiction of police court established under original provisions of city charter continues unaltered, if court was in fact municipal court (Stockton City Charter, art. 21, §§ 1, 2, 4, and § 3 as amended by St. 1927, p. 2151; Const. art. 11, §§ 8, 8½).

Jurisdiction of police court at time of establishment under original provisions of Stockton City Charter (St. 1923, p. 1321) art. 21, §§ 1, 2, 4, continued irrespective of subsequent charter amendment to section 3 by St. 1927, p. 2151, if police court was municipal court within meaning of Const. art. 11, §§ 8 and 8½, under which municipal courts cannot be deprived of jurisdiction given inferior courts.

★Rehearing granted 279 P. 455.

2. Justices of the peace 🔑2—Police court of city given concurrent jurisdiction with justice court in civil and criminal proceedings constituted "municipal court" which precluded existence of justice court (Stockton City Charter, art. 21, §§ 1, 2, 3, 4; Const. art. 11, §§ 8, 8½, subd. 1; Code Civ. Proc. § 103).

Police court of city of Stockton, created under Charter (St. 1923, p. 1321) art. 21, §§ 1–4, pursuant to Const. art. 11, § 8, and given jurisdiction concurrently with justice court in all civil and criminal proceedings which might be tried in justice court, *held* municipal court within meaning of term as used in Const. art. 11, § 8½, subd. 1, providing that in cities where municipal court has been established there shall be no other inferior court, and under such circumstances there could be no justice court in city, notwithstanding Code Civ. Proc. § 103, and one claiming to be justice of peace had no right to have warrant drawn in his favor for compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Municipal Courts.]

3. Constitutional law 🔑56—Charter provision giving police court of city jurisdiction concurrent with that of justice court held valid (Stockton City Charter, art. 21, § 3).

Stockton City Charter (St. 1923, p. 1321) art. 21, § 3, providing that police court of city should have jurisdiction concurrently with justice court in civil and criminal actions and proceedings arising within limits of city which might be tried in justice court, *held* not beyond power of Legislature on account of provision making jurisdiction concurrent.

4. Courts 🔑43—Legislature, where unrestricted by constitutional limitations, may confer concurrent jurisdiction upon different courts.

Where there are no constitutional restrictions limiting power of Legislature, concurrent jurisdiction may be conferred upon different courts by statute.

Original proceeding by George E. Frioux for writ of mandate to be directed to Fred H. Johnson, as Auditor of San Joaquin County, to require him to deliver a warrant to petitioner for salary as justice of the peace. Writ denied.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for petitioner.

Guard C. Darrah, Dist. Atty., and Tom H. Louttit, Asst. Dist. Atty., both of Stockton, for respondent.

PLUMMER, J. This cause is before us upon the original application of the petitioner for a peremptory writ of mandate commanding and directing the respondent, as auditor of the county of San Joaquin, to issue and deliver to the petitioner a warrant for the sum of $200, as and for the compensation alleged to be due the petitioner on account of salary as a justice of the peace of the city of Stockton, county of San Joaquin, for the month of February, 1929.

The respondent demurred to the petition, alleging generally, that facts sufficient to constitute a cause of action are not set forth therein.

The record before us shows that the city of Stockton is a municipal corporation of the two and three-fourths class, and is incorporated as such under a freeholder's charter adopted by the voters of the city of Stockton and ratified and approved by the Legislature of the state of California in the year 1923 (Stats. 1923, p. 1321), and that said charter went into effect on July 1st of that year.

The petition then sets forth that at a general election held in said county of San Joaquin on the 2d day of November, 1926, he was elected to the office of justice of the peace of the city of Stockton; that the board of supervisors of said county thereafter caused an official certificate of election to said office to be issued to the petitioner; that the petitioner duly qualified as such justice of the peace by taking the oath of office and filing a bond as prescribed by law; that petitioner thereupon entered upon the discharge of his duties as such justice of the peace, and has continued to discharge the same ever since the 3d day of January, 1927, to and including the month of February, 1929; that the annual salary attached to said office is the sum of $2,400, payable in equal monthly installments of the sum of $200; that on the 1st day of March, 1929, the respondent declined and refused to issue a warrant to said petitioner in payment of his salary for the month of February, 1929, alleged to be due him, as hereinbefore stated.

The right of the petitioner to a warrant herein depends upon whether there is such an office as justice of the peace of the city of Stockton. The petitioner's claim is based upon the provisions of section 103 of the Code of Civil Procedure, wherein it is provided that in cities of the class to which Stockton belongs, there shall be one justice of the peace. If this provision is operative in the city of Stockton, the petitioner's claim is valid; if inoperative, the petitioner is not entitled to any salary by reason of any allegations contained in his petition.

Sections 1, 2, 3, and 4 of article 21 of the Charter of the City of Stockton, adopted and approved as herein stated, contains the following provisions relative to the establishment of a police court:

"Sec. 1. There is hereby created a police court in and for the City of Stockton, which is vested with all judicial powers granted by law to police courts of chartered municipalities, and which shall be presided over by the police judge.

"Sec. 2. The police judge must be qualified to practice in all the courts of the state of

California, and must have been so qualified for at least two years next preceding the day of his election.

"Sec. 3. Said police court shall have jurisdiction concurrently, with the justices' courts of all actions and proceedings, civil and criminal, arising within the corporate limits of the city, and which might be tried in such justices' courts; and shall have exclusive jurisdiction of all actions for the recovery of any fine, penalty, or forfeiture prescribed for the breach of any ordinance of the city, of all actions founded upon any obligation or liability created by any ordinance, and of all prosecutions for any violation of any ordinance. The rules of practice and mode of proceeding in said police court shall be the same as are or may be prescribed by law for justices' courts in like cases; and appeals may be taken to the superior court of San Joaquin County, from all judgments of said police court, in like manner and with like effect as in cases of appeals from justices' courts.

"Sec. 4. The police judge shall be judge of the police court, and shall have the powers and perform the duties of a magistrate. He may administer and certify oaths and affirmations, and may take and certify acknowledgments."

In 1927 the Legislature approved certain amendments to the charter of the city of Stockton, whereby section 3 of article 21 of the charter was purported to be amended to read as follows:

"Sec. 3. Said police court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment or by both such fine and imprisonment committed within the corporate limits of the city. It shall also have exclusive jurisdiction of all actions for the recovery of any fines, penalties or forfeitures prescribed for the breach of any ordinance of the city, of all actions founded upon any obligation or liability created by any ordinance and of all prosecutions for any violation of any ordinance. Said police court shall have jurisdiction, in all civil cases, concurrently with the justices' court of all actions and proceedings arising within the corporate limits of the city and which might be tried in such justices' court. The rules of practice and mode of proceeding in said police court shall be the same as are or may be prescribed by law for justices' courts in like cases; and appeals may be taken to the superior court of San Joaquin County, from all judgments of said police court, in like manner and with like effect as in cases of appeals from justices' courts." Stats. 1927, p. 2151.

The city of Stockton is a municipal corporation regularly chartered under the provisions of section 8 of article 11 of the Constitution, and section 8½ of article 11 is therefore applicable. That section reads, so far as pertinent here, as follows:

"Sec. 8½. It shall be competent, in all charters framed under the authority given by section eight of this article, to provide, in addition to those provisions allowable by this Constitution, and by the laws of the state as follows: 1. For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches; and for the establishment, constitution, regulation, government and jurisdiction of municipal courts and judges thereof, with such civil, criminal and magisterial jurisdiction as by law may be conferred upon inferior courts and judges thereof; and for the manner in which, the times at which and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches; provided, such municipal courts shall never be deprived of the jurisdiction given inferior courts created by general law.

"In any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the superior court; and pending actions, trials, and all pending business of inferior courts within the territory of such city or city and county, upon the establishment of any such municipal court, shall be and become pending in such municipal court, and all records of such inferior courts shall thereupon be and become the records of such municipal court."

The amendment to section 3 of article 21 of the charter of the city of Stockton, as above set forth, purports to eliminate or take from the jurisdiction of the court criminal cases. In the original section the jurisdiction is given in these words: "Said police court shall have jurisdiction concurrently, with the justices' courts of all actions and proceedings, civil and criminal," etc. In the amended section jurisdiction is given in these words: "Said police court shall have jurisdiction, in all civil cases, concurrently with the justices' court of all actions," etc. The attempted limitation, if at all, is upon the exercise of jurisdiction in certain unspecified criminal cases.

[1] Whether the amendment to the charter of the city of Stockton adopted in 1927, as above stated, does in fact attempt a limitation or change of the jurisdiction granted the court referred to by the provisions of the charter adopted in 1923, is wholly immaterial in so far as the issues before us are involved. By the terms of section 8½ of article 11 of the Constitution, the jurisdiction of the court established under the original provisions of the charter of the city of Stockton must be held to be the jurisdiction of that court as it now exists, in so far as the charter granted

to such court jurisdiction theretofore exercised by inferior courts, if the court as originally established partakes of the nature and comes within the terms of the section of the Constitution where it speaks of municipal courts. In this particular the Constitution reads: "Such municipal court shall never be deprived of the jurisdiction given inferior courts created by general law." The court itself may be abolished, but the jurisdiction given inferior courts by general law remains vested as long as the court exists.

[2] With this preliminary basis to reason from, we have only to determine whether the court originally established by the charter of the city of Stockton was endowed with the jurisdiction bringing it within the definition of a municipal court as defined in paragraph 1 of section 8½ of the Constitution, as the second paragraph of that section reads: "In any city or any city and county, when such municipal court has been established, there shall be no other court inferior to the superior court," etc. While the section of the Constitution uses the words "police court" and "municipal court," it is helpful to examine the general meaning of the words "municipal court." In 42 Corpus Juris, 1414, we find the following: "In the judicial organization of several states, courts are established under this name, whose territorial authority is confined to the city or community in which they are created. Such courts shall have a criminal jurisdiction corresponding to that of a police court, and in some cases possess civil jurisdiction in small causes." And in Uridias v. Morrill, 22 Cal. 474, it is said: "The term 'municipal courts' has a legal meaning and signification, and clearly includes Mayors' and Recorders' Courts, as those were well known and universally recognized as being of that character." And as further illustration of the meaning of the words "municipal courts," we refer to the case of Mathie v. McIntosh, 40 Wis. 120, where it is said: "The charter of the city of Wausau provides for a police justice, whose term of office is two years, and who has the power and jurisdiction of a justice of the peace, and exclusive jurisdiction of all cases arising under the city charter and ordinances," etc., was held to be a municipal court. In the case of In re Baxter, 3 Cal. App. 716, 86 P. 998, the District Court of Appeal of the Second District adopts an opinion by Judge Bledsoe, approving the definition of a municipal court, as supported by the cases just cited.

From what we have said it is clear that the general definition of a municipal court includes, as well, a court ordinarily named a police court, as where the words "municipal court" are used in describing the court to which reference is made, or upon which certain jurisdiction is conferred. A careful reading of subdivision 1 of section 8½ of article 11 of the Constitution would lead to the conclusion that the distinction between the two courts there referred to is really one of power and not of name, and if upon the court named as a police court, jurisdiction, civil, criminal, and magisterial is conferred as by law may be conferred upon inferior courts, then and in that case a municipal court, to all intents and purposes, is established within the meaning of the Constitution, irrespective of name or designation.

[3, 4] By the sections of article 21 of the charter of the city of Stockton, establishing a police court, civil and criminal jurisdiction is bestowed upon the court thereby established, to all intents and purposes as fully and completely as though the words "municipal court" had been used instead of "police court," which brings the name of the court so established within the meaning of the words "municipal court" as used in section 8½ of article 11 of the Constitution, and gives it the position, standing, and exclusive existence, within the city of Stockton, contemplated by the section of the Constitution; unless there are some words in the charter, as originally adopted, limiting the full application of the section of the Constitution. The petitioner contends that this limitation appears in the use of the word "concurrently," where section 3 referred to reads: "Said police court shall have jurisdiction concurrently," etc. It is argued that this word renders the section unconstitutional. In support of this contention the petitioner cites the case of Robert v. Police Court, 148 Cal. 131, 82 P. 838, where it was held that that portion of the freeholders' charter of the city of San Francisco reading "concurrent jurisdiction with the Superior Court" was void. In that case an attempt was made to give the police court concurrent jurisdiction with the superior court over certain offenses. The decision in that case, however, is not applicable here, for the simple reason that the concurrent jurisdiction there referred to was an attempt to trench upon the jurisdiction of the superior court. While the decision is based upon cases having to do with section 5 of article 6 of the Constitution, it might also have been based upon section 11 of article 6, where, in speaking of inferior courts, it is further said: "Provided, such powers shall not in any case trench upon the jurisdiction of the several courts of record," except in certain cases there mentioned. The use of the word "concurrent" in the San Francisco charter, just referred to, was not found by the court in the Robert Case to be the vital defect, but it was in the attempt made to trench upon and limit the jurisdiction of the superior court. Where there are no constitutional restrictions limiting the power of the Legislature, concurrent jurisdiction may be conferred upon different courts, and such has been held to be the law in this state.

In the Matter of Yee Kim Mah, 31 Cal.

App. 196, 159 P. 1060, this court, speaking through Mr. Justice Hart, had occasion to examine the meaning of the word "concurrent" as applied to the jurisdiction of inferior courts existing and exercising jurisdiction within the limits of the city of Sacramento. The case is too lengthy to quote therefrom to any extent, but in substance the holding is that the words "concurrent jurisdiction" meant that either one of the inferior courts there referred to might exercise jurisdiction.

To the same effect is the case of Ex parte Dolan, 128 Cal. 460, 60 P. 1094, where the words "concurrent" and "exclusive" were considered in acts conferring jurisdiction. It was there held that jurisdiction existed in the two courts referred to, and the word "exclusive," purporting to give one court sole jurisdiction, should be read out of the charter.

In 15 Cal. Juris. 1130, the power to confer concurrent jurisdiction is thus set forth: "The legislature may confer upon a court jurisdiction concurrent with that of another court, where such act is a legitimate exercise of the power conferred upon the legislature, having regard also to such jurisdiction as may be conferred upon the latter court by the Constitution of the state, so if the jurisdiction conferred upon the court by the Constitution is not exclusive, concurrent jurisdiction may be conferred upon another court. If, however, the jurisdiction so conferred is exclusive, an act of the Legislature conferring the same jurisdiction upon another court will be unconstitutional." The word "concurrent," as defined in 12 C. J. 393, is as follows: "Coincident or contemporaneous; acting in conjunction; running together; running with; cooperative; accompanying, etc.; having the same authority; operating upon the same objects; coextensive, and the like." The word is further described, when referring to jurisdiction, as authorizing different tribunals to deal with the same subject-matter.

In line with the foregoing citations and definitions, the conclusion appears to us unavoidable that the word "concurrently," as it appears in section 3 of article 21 of the Charter of the City of Stockton, was intended to and does give to the court organized by the sections of the charter to which we have referred, equal and like jurisdiction to that which justices' courts could and were entitled to exercise under general law, and, being so entitled to exercise such jurisdiction under the terms of the second paragraph of subdivision 1 of section 8½ of article 11 of the Constitution, no room was left for the creation or the attempted creation of such a court known as the justices' court of the city of Stockton, and the provisions of section 103 of the Code of Civil Procedure, as to cities of the classification of the city of Stockton, become, and at all times since the adoption and ratification of the charter of the city of Stockton were, inoperative and ineffective as a basis for such court. In other words, under the charter and the Constitution the jurisdiction of the court created under the charter was all-absorbing, and there was nothing left for such a court, as was attempted to be created in the case at bar, to act upon. The civil jurisdiction thus conferred upon the court by the city charter is defined by section 106 of the Code of Civil Procedure.

Though relied upon by the petitioner, we find nothing in the case of Platnauer v. Board of Supervisors, 65 Cal. App. 666, 225 P. 12, which supports the contention that there is any basis in law to support a court known as the justices' court in and for the city of Stockton. In the Platnauer Case this court, in referring to the charter of the city of Sacramento, pointed out that the charter conferred no civil jurisdiction upon the court established by such charter, and in so doing used these words: "The Sacramento charter makes no provision for a municipal court." This sentence must be read and construed in connection with the failure of the charter of the city of Sacramento to clothe the court created by the charter with the necessary jurisdiction prescribed in the concluding sentence of subdivision 1 of section 8½ of article 11 of the Constitution. In general language, and as shown by the authorities which we have here cited, the court created by the charter of the city of Sacramento was and is a municipal court, but it was not endowed with the jurisdiction which precluded the establishment of another inferior court, to be and operate and exercise judicial functions as and for the same territory and identity known as the city of Sacramento.

The foregoing review, we think, brings this case and all the attendant circumstances clearly within the principles discussed and applied in the case of Robertson v. Langford (Cal. App.) 273 P. 150, and in view of that case, which it is not necessary to consider at length herein, there is no escape from holding that there is no room under the Constitution and the charter of the city of Stockton for such a court as is alleged to exist by the petitioner herein, and that the attempted bringing into existence of such a court by the alleged election of the petitioner as a justice of the peace thereof at the general election held in the year 1926, and the taking of an oath of office, and the assumption of jurisdiction as a justice of the peace of the city of Stockton by the petitioner, had and has no legal basis whatsoever, and therefore the petitioner is not entitled to an order of this court directing the respondent, as the auditor of the county of San Joaquin, to draw a warrant in his favor in the sum of $200, or any other sum, as and for his compensation alleged to have been earned by him as a justice of the peace of the city of Stockton.

The demurrer of the respondent is sustained, and the application of the petitioner for a peremptory writ of mandate is denied.

We concur: FINCH, P. J.; THOMPSON, J.

98 Cal. App. 30

BLUME v. BERRY et al. (Civ. 5166.)

District Court of Appeal, Second District, Division 2, California. March 28, 1929.

1. Attachment 🔑350—Judgment against sureties, on bond to pay full value of property released from attachment, could not stand without evidence as to value of property released.

Where bond signed by defendants for release of property taken under attachment did not require signers to pay judgment or any unsatisfied portion thereof, but required that they would pay to plaintiff full value of property released, *held* that, in absence of any evidence as to value of property released, judgment for plaintiff against said sureties could not stand.

2. Attachment 🔑350—Testimony, that demand was mailed to one of sureties on attachment bond in care of some one else, held inadmissible.

In action against sureties on attachment bond, testimony, that witness mailed demand to one of sureties in care of some one else, *held* inadmissible over objection on ground of lack of foundation and want of authority, where there was no evidence that said defendant authorized mailing of demand in such manner, that he received demand, or that place to which demand was sent was address of either defendant.

3. Appeal and error 🔑176—Defendants having stipulated for overruling demurrer to complaint, demurrer will not be considered by appellate court.

Where defendants stipulated that demurrer to complaint should be overruled, appellate court will not consider discussion in defendant-appellant's brief respecting demurrer.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by George H. Blume against Jesse Berry, also known as Jesse L. Berry, and another. From an adverse judgment, defendants appeal. Reversed.

L. E. Dadmun, of Los Angeles, for appellants.

James L. Hansen, of Huntington Beach, and John A. Harvey and Milburn G. Harvey, both of Santa Ana, for respondent.

STEPHENS, Justice pro tem. In an action entitled Blume v. Huntington Mutual Oil Company the defendants herein signed a bond for the release of certain property taken under attachment. The plaintiff recovered judgment in that action, and not having collected the full amount thereof from the judgment debtor, he brought suit against these defendants on the bond for the balance. At the conclusion of plaintiff's case defendants submitted a motion for nonsuit, which was denied. The defendants offered no evidence, and the judgment went against them. They appeal, assigning several reasons which they claim support their prayer for a reversal of the judgment.

[1] Inasmuch as we think the judgment must be reversed for an obvious error, we shall notice it first, and then refer but briefly to the other assignments. The error upon which we base the reversal is that the bond does not require that the signers shall pay the judgment or any unsatisfied portion thereof, but that they will "pay to the said plaintiff the full value of the property releases," and there is no evidence whatever of the value of the property released. It seems too plain for argument that, there being no evidence on the very basis of the obligation, the judgment cannot stand.

[2] A Miss Kurrle testified that she mailed a demand to defendant Berry in care of some one else, but there is no evidence that he ever authorized this, or that he ever actually received the demand. This testimony was objected to on the ground of lack of foundation, and that there never was any authority for mailing any notice or demand in care of any one. There was no evidence that the place to which the demand was sent was the address of either of the defendants. We think the objection should have been sustained.

A Mr. French, a deputy sheriff, made an oral demand upon defendant Berry, individually and as president of the Huntington Mutual Oil Company, for the amount of the judgment or the unpaid balance thereof, and for a redelivery of the attached property. The complaint and the findings are to the effect that the demand was for the "reconveyance," instead of the "redelivery," of the attached property. We think the meaning is clear that a redelivery was intended, and that the proof supported both the complaint and the finding.

Defendants contend that the judgment should be reversed, because the judgment entered in the case, out of which the attachment issued, was and is erroneous. This is a collateral attack on the judgment, and cannot be allowed.

Defendants argue that a number of the findings are unsupported by the evidence. We think the evidence does not support finding No. III, for there is no evidence of a leasehold interest in the property attached; nor Nos. IX and XI, for the only evidence supporting the dates contained therein was admitted erroneously; nor finding No. X, for the reason that there is no testimony as to the value of the attached property; nor finding No. XIII, for, from what has just been said.

it is obvious that all of the material allegations of the complaint are not true, and that all of the material allegations of the answer are untrue.

[3] A demurrer to the complaint was interposed in the case by the defendants and overruled by the court. Defendants devote a good part of their brief on appeal to the discussion of this demurrer, but, inasmuch as they stipulated that it should be overruled by the court, no good cause can be subserved by devoting any time thereto. We do think, however, that the complaint should be amended so as to allege the bond obligation more clearly, before a new trial is had.

Judgment reversed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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97 Cal. App. 725

HENRIQUES v. BANK OF COTTONWOOD.
(Civ. 3349.)

District Court of Appeal, Third District, California. March 22, 1929.

1. **Sheriffs and constables 🔑129—Attaching officer taking property found in possession of defendant or mortgagor is not liable in damages without notice of third party's claim (Code Civ. Proc. § 689).**

Where personal property is found in possession of defendant or in possession of mortgagor, presumption of ownership attaches, and sheriff or attaching officer is entitled to notice of third person's claim before he can be held liable in damages to such third person, under Code Civ. Proc. § 689.

2. **Chattel mortgages 🔑292(1)—Chattel mortgagee cannot take up cattle not embraced in mortgage and recover from third party owner expenses of caring for them.**

Mortgagee in chattel mortgage cannot take up cattle not embraced in such mortgage and belonging to third party and then recover from such third party expenses of taking up and caring for cattle, where third party notified mortgagee of his ownership and made oral demand for property, since owner of property is entitled to its recovery so long as its identity remains.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action to recover possession of cattle by Frank Henriques against the Bank of Cottonwood. Judgment for plaintiff, and defendant appeals. Affirmed.

Carter & Smith, of Redding, for appellant.

Chenoweth & Leininger, of Redding, for respondent.

PLUMMER, J. The plaintiff had judgment in an action brought to recover the possession of 26 head of cattle. From this judgment the defendant appeals.

As stated in respondent's brief: "The only point involved in this appeal is whether a mortgagee in a chattel mortgage may take up cattle not prescribed or embraced in the chattel mortgage and belonging to a third party, and then recover for the expenses of taking up and caring for such cattle, when the third party notifies the mortgagee of his ownership and makes oral demand for the same."

It appears from the record that the appellant, as the holder of a chattel mortgage executed in its favor by one William Henriques, gathered up 26 head of cattle belonging to the plaintiff, which cattle were not described in the chattel mortgage; that these cattle were gathered up on the range where they were running and ranging, and not in the visible possession of anyone; that after the cattle were gathered up, the appellant proceeded to pasture the same, and also to feed the said cattle a quantity of hay. For the expense of gathering up the cattle, pasturing and feeding, the appellant filed a cross-complaint and sought to recover from the plaintiff the sum of $500 on account of the expenses incurred in pasturing and feeding the cattle. The cattle were taken from the range in the late summer and early fall of the year 1924, and were kept by the appellant until on or about the 21st day of March, 1925, when, under a stipulation, the cattle were delivered to the possession of the plaintiff, to remain in his possession subject to the determination of whether the cattle did or did not belong to the plaintiff.

The court found, upon testimony amply sufficient to sustain the same, that during all the times mentioned in this proceeding the plaintiff was the owner of 25 head of cattle (by the term "cattle" we include all ages) branded "J8" on the left hip and marked with a swallow fork and upper bit in the right ear and under half crop in the left ear, and also a certain black cow branded "KK." As the plaintiff had possession of the cattle at the time of the entry of judgment, the judgment really confirmed the plaintiff's title. The findings also show that the cattle covered by the mortgage held by the appellant and executed to it by William Henriques were branded "J8" on the left hip and circle 6 on the right hip, those branded "J8" on left hip being marked with a swallow fork and upper bit in the right ear and under half crop in the left ear, and those branded circle 6 on the right hip being marked with a crop and upper half crop in the right ear and two splits in the left ear; that William Henriques was not the owner of said brand "J8" on the left hip; that on the 23d day of July, 1920, William Henriques made and executed a promissory note to the appellant, and as security therefor executed a chattel mortgage to the appellant, in which chattel mortgage the cattle were described as branded with the brand belonging to William Henriques which we have just mentioned. The court further found that the cattle mentioned and described in the chattel mortgage are not the cattle described in plaintiff's complaint, and that no cattle branded "J8" on the right hip were described or included in said chattel mortgage, and, also, that none of said cattle were given, and none of said cattle were intended to be included, in said chattel mortgage. The court further found that on or about the month of August, 1924, the defendant and appellant wrongfully took possession of the cattle belonging to the plaintiff herein, and wrongfully retained possession thereof until on or about the 21st day of March, 1925; that the cattle belonging to the plaintiff, and so wrongfully taken possession of by the appellant, were ranging and grazing on their usual summer range in western Shasta county, along with cattle which were owned by William R. Henriques.

The court further found that the defendant did not believe, and had no reason to believe, that any of the cattle described in the complaint, and found to belong to the plaintiff, were the property of the mortgagor William Henriques. The court also found that in the latter part of August, 1924, the plaintiff demanded possession of said cattle from the defendant, and that the defendant refused to deliver the same; that plaintiff thereafter, and on other occasions, made demand of defendant and of the receiver who had been appointed to take charge thereof, for the possession of said cattle, but that the defendant and the receiver appointed at its instance refused to deliver the same to the plaintiff until on or about the 21st day of March, 1925. The court further found that it was not true that after said cattle were gathered up the plaintiff sat idly by and permitted the defendant to expend large or any sums of money in gathering, feeding, or keeping said cattle, but that in the latter part of August, 1924, when the plaintiff learned that his cattle had been taken up by the defendant, plaintiff made demand that said cattle be released; that during all the time from August, 1924, until March 21, 1925, the plaintiff had an abundance of range and feed for said cattle; and that the cattle were taken up without the knowledge or consent of the plaintiff, and kept by the defendant against his will and without his consent. The court further found that it was not necessary for the defendant to expend any money in gathering, keeping, caring for and in the preservation of, or for keeping or caring for said cattle. In addition to the oral demand, the record shows that on or about the 18th day of March, 1925, the plaintiff made a written demand for the delivery of possession of said cattle to him, and that thereafter, on the 21st day of March, 1925, under stipulation, the possession of said cattle was delivered to the plaintiff. No damages for the detention of said cattle were allowed the plaintiff, by reason of the fact that the court found that the plaintiff had suffered no damage, and that all the cattle had been restored to him, save and except one cow that had died, apparently not through the neglect of any one connected with this cause.

Upon this appeal no serious contention is made that the finding of ownership of the cattle to be in the plaintiff is not amply sustained by the testimony, and therefore we do not need to lengthen this opinion by a consideration of the question of ownership.

[1, 2] The first point made by appellant is that there was no sufficient demand for the return of the property, made by the plaintiff, and a number of cases are cited wherein it was held that the demand made upon the sheriff was not sufficient to charge him with damages by reason of having taken possession of the property under a writ of attachment or under execution; that all these cases rest upon a peculiar circumstance which is absent from the case at bar. This is illustrated by the holding of the court in the principal case of Killey v. Scannell, 12 Cal. 73. It is there said: "Defendant [sheriff], having seized the property by virtue of his office and process, *while in the possession of the party defendant mentioned in the writ*, was entitled to notice and demand from plaintiff before he can be held liable to an action for the possession or value." This language is approved in the case of Fuller Desk Co. v. McDade, 113 Cal. 360, 45 P. 694, and likewise in a number of other cases cited in appellant's brief. By noting the italicized words in the quotation above set forth, it will be seen that the demand is necessary when the sheriff has taken possession of property which he finds in the possession of the person named as defendant in the action in which the writ was issued. It does not apply when the sheriff or any other party goes out and takes possession of property not found in the possession of the defendant, and especially when the taking of possession is under the terms of a chattel mortgage and the property is neither described in the chattel mortgage nor found in the possession of the person named as mortgagor therein. Under such circumstances the property is not taken possession of by reason of the property being described in the writ or mortgage or by reason of being found in the possession of the defendant or mortgagor. When personal property is found in the possession of a defendant or in the possession of a mortgagor, the presumption of ownership attaches, and the sheriff or attaching officer is entitled to notice of what is called the third party claim,

before he can be held liable in damages. Just as stated in 15 California Jurisprudence, 1061, "A sheriff who has seized property in the possession of a debtor is entitled to notice of a third party's claim, and in the absence thereof, may not be charged with damages for the seizure," etc., it would appear that section 689 of the Code of Civil Procedure was enacted for the benefit of the sheriff or other attaching officer. See notes to that section in Kerr's Cyc. Codes. In the case at bar the sheriff is not a party to the action. No damages are claimed against any attaching officer. No damages were awarded the plaintiff as against the defendant. The question of title only was involved, and while the court has found that demand was made for the return of the property, it is really a moot question in this case, for the simple reason that under the stipulation turning the property over to the plaintiff, the only questions reserved for determination were the title to the property and whether the appellant might recover on its cross-complaint for its alleged expenses incurred in pasturing and feeding the cattle.

The court's finding that the defendant and appellant wrongfully took charge of the property is clearly supported by the testimony, and this brings the case to the determination of the one question stated in respondent's brief which we have hereinbefore quoted, to wit: Can a party wrongfully taking possession of cattle recover for pasturing and feeding the same? The question would seem almost to answer itself, and that no compensation can be recovered under such circumstances. Were it otherwise, the door would be left wide open for any one having pasturage for sale to take up stock, pasture the same, and then recover from the owner of the stock compensation for such wrongful act. The appellant, however, cites a number of cases where personal property has been taken possession of in good faith and improvements made thereon, and the expenses so incurred allowed to be recovered as against the true owner, in actions prosecuted by the true owner for the recovery. The cases cited show that where a defendant has cut and removed timber from land and manufactured it into lumber, the defendant in an action brought for the recovery of the lumber is entitled to be reimbursed for his services, and for money expended in good faith in manufacturing the timber into lumber. The case of Keystone Lumber Co. v. Kolman, 103 Wis. 300, 79 N. W. 224, also reported in 94 Wis. 465, 69 N. W. 165, 34 L. R. A. 821, 59 Am. St. Rep. 905, likewise the case of Acree v. Bufford, 80 Miss. 565, 31 So. 898, illustrate the application of the rule where the defendant was entitled to recover where the property has been changed in form and rendered more valuable. In the case at bar the property has not been changed in form, nor has anything been added thereto. If it has increased in value it is by reason of growth or perhaps change in market value, but not by reason of any necessary act of the appellant. The court found that the acts of the appellant were not necessary for the preservation of the property. Again, the appellant cannot take advantage of the plea of good faith. The record shows, and the court found, that the plaintiff at all times after the taking possession of the property by the appellant, was claiming the same, notified the appellant that he was the owner thereof, and demanded a return of the property. The only excuse that appears in the record is the argument that the oral demand made by the plaintiff was not sufficient in law. If it be admitted that a demand for return of the property was necessary to enable the plaintiff to recover damages, it does not follow, where no damages were awarded the plaintiff, that the appellant is entitled to recover for pasturage and feed, in face of the fact that it at all times knew that the ownership of the property was claimed by the plaintiff. We do not need to discuss the law as argued by the respondent that so long as the identity of the property remains the owner of the property is entitled to its recovery. That principle is too well founded to necessitate citation of authorities.

The record further shows that at the time of the trial of the action a stipulation was entered into between the plaintiff and the defendant that, regardless of the pleadings, the judgment of the court should determine the ownership and right of possession of the property.

Finding no cause for reversal, the judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

97 Cal. App. 740

HAND et al. v. EL DORADO IRR. DIST. et al. (Civ. 3679).

District Court of Appeal, Third District, California. March 22, 1929.

1. Waters and water courses 🔑158(2)—Water rights acquired by contract are governed by agreement solely, and cannot be enlarged, or changed without mutual consent.

Water rights acquired by contract are governed by terms of agreement solely, and may not be enlarged or changed except by mutual consent.

2. Waters and water courses 🔑226—Contract for water for mining purposes during winter months held not to justify mandate to exclude land from irrigation district (Irrigation District Act, § 78).

Landowners' contract for 50 miners' inches of water from sources independent of irrigation district system from December 1 to June 1, to be used for mining purposes only, *held* not to justify mandate to exclude land from district under Irrigation District Act, § 78 (St. 1897, p. 279), on ground that such supply might first be employed for mining purposes and then stored for irrigation purposes during summer months.

3. Waters and water courses 🔑226—Irrigation District Act does not contemplate exclusion of land from district merely because owner has plan to acquire independent means of irrigation (Irrigation District Act § 78).

Irrigation District Act, § 78 (St. 1897, p. 279), which should be reasonably construed, does not contemplate exclusion of land from irrigation district merely because owner has a plan for acquiring a future independent means of irrigation.

4. Waters and water courses 🔑226—Testimony as to ample water from several springs on land to irrigate from 60 to 80 acres held insufficient to warrant interference with order refusing to exclude land from district (Irrigation District Act § 78).

Landowner's testimony that "quite a head of water," ample to irrigate "from 60 to 80 acres" of land, comes from "several springs" thereon, *held* too indefinite as to quantity of water accessible or location of land supplied therewith to warrant interference by writ of mandate with order of irrigation district board of directors refusing to exclude 517 acres of land from district, under Irrigation District Act, § 78 (St. 1897, p. 279).

5. Waters and water courses 🔑226—Decision, affirming judgment on findings of capacity of irrigation ditch and landowner's right to half of water therein, held not to warrant interference with order refusing to exclude land from district (Irrigation District Act, § 78).

Supreme Court decision, affirming judgment based on findings that capacity of ditch on certain land was 63 inches of water "at the present time," without indicating season referred to, and that owner was entitled to divert and use half of such quantity, *held* not to justify interference with irrigation district's board's discretion in refusing to exclude land from district under Irrigation District Act, § 78 (St. 1897, p. 279), in view of preliminary recitation of fact that ditch carried 12 inches of water during irrigation season.

6. Waters and water courses 🔑226—Owner, seeking to exclude land from irrigation district, must prove that it will not be benefited or has other ample water supply available (Irrigation District Act, § 78).

Burden is on owner, seeking to exclude land from irrigation district under Irrigation District Act, § 78 (St. 1897, p. 279), to show by fair preponderance of evidence that it will not be benefited by proposed system or that it has other ample water supply available.

7. Waters and water courses 🔑226—Whether land will be benefited by irrigation system is essentially fact question (Irrigation District Act, § 78).

Question whether portion of land, sought to be excluded from irrigation district under Irrigation District Act, § 78 (St. 1897, p. 279), will be benefited by proposed irrigation system, is essentially one of fact.

8. Waters and water courses 🔑226—Evidence that portion of tract lies above irrigation district's highest available water supply held not to warrant mandate to exclude it from district (Irrigation District Act, § 78).

Evidence that 287 acres of 517-acre tract, sought to be excluded from irrigation district under Irrigation District Act, § 78 (St. 1897, p. 279), lies above district's highest available water supply, *held* not to warrant writ of mandate requiring exclusion thereof, in absence of showing as to whether district can or proposes to construct other ditches, reservoirs, or pumping systems to irrigate such portion, or any description whereby board or court may segregate such portion from entire tract.

9. Waters and water courses 🔑226—Entire tract, substantial portion of which is properly included in irrigation district, must be included, unless portion not benefited can be reasonably defined and segregated (Irrigation District Act, § 78).

If substantial portion of tract, sought to be excluded from irrigation district under Irrigation District Act, § 78 (St. 1897, p. 279), is properly included therein, entire tract must be included, unless portion not benefited can be reasonably defined and segregated from rest of tract.

10. Waters and water courses 🔑226—Irrigation district board's functions respecting exclusion of land from district are quasi judicial (Irrigation District Act, § 78).

Legislature having delegated to irrigation district board of directors power to hear and determine merits of application by landowners within district to exclude certain property therefrom by Irrigation District Act, § 78 (St. 1897, p. 279), inquiry is local to district, and board's functions are quasi judicial.

11. Mandamus ⚷73(1)—Reasonable exercise of irrigation district's board's discretion to exclude land from district will not be interfered with by mandate, unless conclusions are unsupported by substantial evidence or discretion was abused (Irrigation District Act, § 78).

A reasonable exercise of discretion, conferred on irrigation district board of directors by Irrigation District Act, § 78 (St. 1897, p. 279), to hear and determine application for exclusion of land from district, will not be interfered with by writ of mandate, except in absence of substantial evidence to support its conclusions or for abuse of such discretion.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Petition by Charles E. Hand and another for a writ of mandate to the El Dorado Irrigation District and the trustees thereof. From a judgment denying the petition, petitioners appeal. Affirmed.

Charles L. Gilmore, of Sacramento, for appellants.

Thomas Maul, of Placerville, for respondents.

THOMPSON, J. This is an appeal from a judgment of the superior court of El Dorado county denying a petition for a writ of mandate to require the exclusion of 517 acres of land from the El Dorado irrigation district on the ground that the tract would not be benefited by the proposed district irrigation system for the reason that the petitioners already had access to an adequate independent supply of water for all useful and necessary irrigation purposes.

April 7, 1925, the El Dorado irrigation district was duly organized, including within its territory petitioners' 517-acre tract of land. Subsequently the petitioners filed with the board of directors of said district their application to exclude this entire tract from the district on the grounds above mentioned. This petition was duly noticed, heard, and denied. From the order of the board of directors refusing to exclude this tract of land from the irrigation district, the petitioners sued out a writ of mandate in the superior court. Upon hearing in that court, the proceedings which were taken before the board were introduced in evidence and additional testimony was adduced. The superior court denied the writ, adopted findings, and entered judgment against the petitioners. From this judgment an appeal was taken.

The appellants assert that the evidence taken before both the board and the superior court conclusively establishes the fact that they previously had access to an ample supply of water from sources other than those controlled by the proposed system of the irrigation district for all useful and necessary purposes, and that their lands would not be benefited by being included within the district, and should therefore have been excluded under the provisions of section 78 of the California Irrigation District Act of 1897, p. 254, and subsequent amendments thereto; that in any event, it appeared without conflict that 287 acres of that tract were partly timber land and was all situated above the highest available water supply of said district and could in no way receive a benefit from said irrigation system; and that this portion of the tract at least should have been excluded from the district. Section 78 of the California Irrigation Act provides, in part: "If, upon the hearing of any such petition, * * * or if the evidence fail to sustain said petition, or if the board deem it not for the best interest of the district that the lands, or some portion thereof, mentioned in the petition, should be excluded from the district, the board shall order that said petition be denied as to such lands; but if the said board deem it for the best interests of the district that the lands mentioned in the petition, or some portion thereof, be excluded from the district, * * * then it shall be the duty of the board to, * * * make an order that the lands mentioned and described in the petition, or *some defined portion thereof*, be excluded from said district; provided, that [the lands so excluded must consist of property] * * * which cannot be irrigated from, or which are not susceptible to, * * * irrigation * * * from a common source, or by the same system of works with the other lands of said district, or from the source selected, chosen, or provided, or the system adopted for the irrigation of the lands in said district, *or which are already irrigated, or entitled to be irrigated, from another source* or by another system of irrigation works."

The independent sources of water supply which the petitioners contend they possess, and which they assert were ample to irrigate their 517-acre tract of land, consists of: (1) Fifty miners' inches of water per day acquired by contract from the El Dorado Deep Gravel Mining Company accessible "from the first day of December to the first day of June each and every year * * * to be used * * * *for mining purposes only;* * * * When said party of the second part * * * has no use for said water for said mining purposes upon said lands, the same shall belong to said party of the first part and flow down in its canal;" (2) eight additional miners' inches of water derived from the same source, to be used the year round for any and all purposes; (3) an uncertain quantity of water to which appellants claim title as determined on appeal from a judgment in their favor (Hand v. Cleese, 202 Cal. 36, 258 P. 1090); and, (4) an indefinite amount of water which flows from certain springs situated on the premises in question.

[1-3] The respondent concedes that appellants have access to eight miners' inches of water, independent of the irrigation district system, subject to use for any purpose, at all times, on any portion of the premises. But the evidence shows this quantity of water was adequate to irrigate not more than 25 acres of land. Mr. Wildman testified that it was sufficient to irrigate only 15 acres of land. The respondents also concede that appellants have access to 50 additional miners' inches of water, from sources independent of the irrigation district system, from December 1st to June 1st of each year, to be used for mining purposes only. The contract for this quantity of water clearly so limits the use of this source of supply. It would appear, however, that this last-mentioned water supply would be of litle benefit to appellants for agricultural purposes for the reason that its use was limited strictly to mining purposes. Even for this purpose its use was restricted to the winter and spring months, during which irrigation was unnecessary. Mr. Wildman testified that: "Irrigation season is from the middle of May to the middle of September." Water rights which are acquired by contract are governed by the terms of the agreement solely, and may not be enlarged or changed except by mutual consent. 26 Cal. Jur. 238, § 444; Southside Imp. Co. v. Burson, 147 Cal. 401, 81 P. 1107. Appellant's contention that this 50-inch supply of water might first be employed for mining purposes and then stored for use for irrigation during the summer months is unreasonable. There is no evidence of the existence or prospect of any mining enterprise connected with said premises for which they could utilize this water. There is no evidence of the existence of reservoirs or apparatus suitable for storing water or of an intention on the part of appellants to construct such receptacles. The possibility of such future use is contrary to the clear meaning of the contract and is highly speculative and remote. Section 78 of the California Irrigation District Act does not contemplate the exclusion of land merely because the owner may have a plan for acquiring a future independent means of irrigation. Lands may be excluded "which are *already* irrigated, or [now] entitled to be irrigated, from another source." The act should, of course, have a reasonable construction. If the owner possessed water rights which he was entitled to resort to for irrigation purposes, and the evidence showed that he proposed to construct a storage plant or other apparatus within a reasonable period of time with which to utilize the water, that might be sufficient evidence upon which to support an order of the board excluding the lands. But the record in the present case with respect to the appellants' right to the use of the 50-inch supply of water for mining purposes certainly will not justify an interference by mandate with the board's discretion in refusing to exclude the land.

[4] While there is some testimony of the existence of springs from which some land may be irrigated, there is no satisfactory evidence of either the quantity of water which may be so supplied, or the particular locality or area of the land which the appellants claim these springs will irrigate. Mr. Hand testified: "There are several springs * * * quite a head of water comes out down below the barn on the frontage. * * * We have always figured that there is ample water there to irrigate the property in the front. * * * I don't know the exact acreage. It runs from 60 to 80 acres. * * * (These springs) are located in several places on the land." This is too indefinite as to the quantity of water which is accessible or the location of the land so claimed to have been supplied with water to warrant an interference with the order of the board.

[5] The appellants strongly rely upon the case of Hand v. Cleese, 202 Cal. 36, 258 P. 1090, affirming a judgment in their favor by the terms of which they claim title to 31½ miner's inches of water flowing from "Johnson's North Canyon" through a ditch upon their lands. Assuming it be a fact, without deciding the question, that the decision in the case of Hand v. Cleese is controlling in this proceeding, it still leaves in grave doubt the question as to the quantity of water secured to these appellants thereby. In what appears to be a recital of the findings of the trial court, which may be assumed to have been approved, since the judgment was affirmed, it is said: "The capacity of said ditch as constructed by the said Johnson was in excess of 100 inches of water measured under a four-inch pressure. The capacity of said ditch *at the present time* is 63 inches of water measured as aforesaid." Obviously, a ditch may have a capacity or capability of holding 63 or 100 inches of water and still be empty. It will be observed that the trial court finally found that "the capacity of said ditch *at the present time* is 63 inches of water." There is no way of determining what season "the present time" referred to. It may have been the flood time of winter, or it may have been the period of time during the drought of summer. All that we find regarding the actual quantity of water to be found in this ditch is in the preliminary recitation of facts, wherein it is said: "Said ditch * * * now used to convey a portion of the waters flowing in said Johnson's North Canyon, said canyon (not the ditch) * * * having therein and flowing at the head of said ditch a stream of natural water varying in quantity according to the season of the year from 12 inches, miner's measurement, during the summer and fall to a larger quantity at other seasons of

the year." It will thus appear that the maximum quantity which this ditch actually carried in the irrigation season was 12 inches of water. Nowhere in the court's findings or in the opinion of the court is a definite quantity of water found to have actually existed in this "Johnson's ditch." However, the court does find that the plaintiff in that case, who was one of the appellants in this case, is entitled to "divert and use" one-half of 63 inches of water "flowing therein at the head or intake of said Johnson's ditch." This language hardly furnishes satisfactory evidence that the ditch actually contained 31½ inches of water during the irrigation season, to which the appellants were entitled to resort. Even though it might warrant this inference, it cannot be said that this amount of water, plus the additional 8 inches heretofore referred to, is ample upon which this court may be warranted in interfering with the discretion of the board in refusing to exclude the entire tract of land.

[6-9] Finally, the appellants contend that even though the board may have been justified in including within the district a portion of the irrigable land of this tract, the undisputed evidence discloses the fact that more than one-half of the 517-acre tract, or 287 acres thereof, is nonirrigable land, for the reason that it lies above the highest available water supply of the irrigation district. In seeking to exclude land from an irrigation district, the burden is upon the petitioner to show by a fair preponderance of the evidence that his land will not be benefited by the proposed irrigation system, or that it has other ample water supply which is available. The question as to whether a portion of the land will be benefited by an irrigation system is essentially one of fact. Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. E. 369. In the present case there is no showing as to whether the irrigation district is able, or whether it proposes, to construct other ditches, reservoirs, or a pumping system by means of which this upper portion of the tract may be irrigated. But assuming that the 287 acres are not susceptible of irrigation, neither the petition nor the evidence furnishes any description or method by which a court is able to segregate or distinguish this upper portion from the entire tract. It is apparent that if the upper 287 acres of land is not in fact benefited by the irrigation district and can reasonably be segregated from the tract sought to be excluded, in justice this should be done. But the record furnishes no description by which the board or a court can do this. Section 78 of the California Irrigation Act specifically provides that upon a proper showing the board may exclude "the lands, or some portion thereof mentioned in the petition." Again, it is provided in that section that the board under such circumstances "shall [exclude] the lands mentioned and described in the petition, or some *defined* portion thereof." This language infers, and reason prompts the conclusion, that if a substantial proportion of the tract sought to be excluded is properly included in the district, the entire tract must be included unless the portion which is not benefited can be reasonably defined and segregated from the tract. Shull v. Merced Irrigation District (Cal. App.) 265 P. 965, determines this very question adversely to the appellants in this case.

[10, 11] Where the Legislature has delegated to a board of directors of an irrigation district the power to hear and determine the merits of an application on the part of landowners within the district to exclude certain property, the inquiry is in its nature local to the district, and the functions of the board in such matters are quasi judicial. Imperial Water Co. v. Supervisors, 162 Cal. 17, 120 P. 780; Suckow v. Alderson, 182 Cal. 247, 250, 187 P. 965. A reasonable exercise of the discretion which is conferred upon the board except in an absence of substantial evidence to support its conclusions, or for an abuse of such discretion, will not be interfered with by mandate. 16 Cal. Jur. 814, § 31; 26 Cal. Jur. 360, § 573; Harelson v. South San Joaquin Irr. Dist., 20 Cal. App. 324, 334, 128 P. 1010; Inglin v. Hoppin, 156 Cal. 483, 105 P. 582. In Shull v. Merced Irr. Dist., supra, it is said: "The plaintiff has apparently taken the position that this court has the same right to pass upon the evidence introduced before the board of directors * * * as the law vests in the board. * * * The law is well established that a writ of mandate cannot be made to serve the purpose of a writ of error. In this proceeding we have only to consider the questions of law, not questions of fact." 16 Cal. Jur. 822, § 35.

In 26 Cal. Jur. 360 it is said: "The inclusion of lands within an irrigation district constitutes a determination by the board of supervisors that such lands will be benefited by the proposed irrigation. Since the question of benefits is one of fact, a finding with reference thereto, if supported by competent evidence, is conclusive, though erroneous. * * * However, if a finding is based upon no evidence, or is contrary to all the evidence before the board, it is subject to review."

In the present case, since it cannot be said as a matter of law that the appellants' land is not benefited by the irrigation system, and since the evidence as to whether it was previously adequately supplied with water is conflicting as to a part of the tract, and as to the remainder there is no description which will enable this court to segregate it with any degree of accuracy, it becomes necessary to affirm the judgment.

The judgment is, accordingly, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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GREENE v. RIORDAN. (Civ. 6598.)★

District Court of Appeal, First District, Division 2, California. March 11, 1929.

Rehearing Denied April 10, 1929. Hearing Denied by Supreme Court May 9, 1929.

1. Vendor and purchaser 🔑54—Vendor's failure to deposit title to certain land to obligate purchaser to reconvey portion of land conveyed vested title thereto in purchaser.

Where vendor agreed to execute deed concurrently with agreement to sell land and to deliver it when purchaser made down payment, and agreement also provided that, if vendor furnished deed to certain parcel of land within 30 days, purchaser was to reconvey all of certain portion of land purchased, when vendor failed to deposit deed, title in property originally conveyed vested in purchaser, so that judgment quieting purchaser's title was not erroneous.

2. Mortgages 🔑32(1)—Agreement, that, if vendor furnished title to certain parcel, purchaser would reconvey certain land, and, if vendor could not furnish title, purchaser could elect not to consummate agreement, held deed.

Where purchaser agreed to pay balance of purchase price within 60 days, and at time he actually offered to pay, if vendor was unable to convey clear title, purchaser had option of refusing to consummate agreement, of demanding return of down payment, and of suing for damages, and vendor by agreement, and not by deed, mortgaged interest in lots conveyed to secure repayment of down payment, court did not err in declaring purported deed a deed and not a mortgage, since, because purchaser never exercised option, agreement did not become effective as mortgage.

3. Vendor and purchaser 🔑22—Deed, describing property by metes and bounds and reference to recorded map, held not void, because sale agreement referred to unrecorded map (St. 1907, p. 290).

Deed, describing property fully by metes and bounds, as well as by reference to a recorded map, *held* not void, because agreement of sale was alleged to violate a statute of March 15, 1907 (St. 1907, p. 290), by its reference to an unrecorded map.

4. Appeal and error 🔑173(6)—That agreement to sell land was void cannot be first asserted on appeal.

It cannot be asserted on appeal to District Court of Appeal that agreement to sell land was void, where the point was not raised at trial of cause.

5. Vendor and purchaser 🔑44—Vendor, contending agreement of sale was void, because referring to unrecorded map, must show nonrecordation.

Vendor, suing to have an instrument in form a deed declared a mortgage, and for alleged balance due under contract of sale of real property, *held* to have burden of showing, as contended by him, that map referred to in agreement of sale was unrecorded, where he contended agreement was therefore void.

6. Vendor and purchaser 🔑79—Obligation of purchaser, agreeing to reconvey certain land, if vendor should deposit clear title to certain property, held limited to reconveyance.

Where purchaser of land agreed that, if vendor should convey him clear title to certain parcel of land, he would reconvey to vendor certain of the land conveyed, purchaser's obligation was limited to reconveyance upon deposit of title, and he was not obligated to pay purchase price on the condition of deposit.

7. Action 🔑6—Court, fully adjudicating controversies adversely to vendor, in suit to declare deed a mortgage, performed full duty (Code Civ. Proc. §§ 1060–1062).

Where controversies between parties to action were as to whether deed should be construed as a mortgage, and whether vendor was entitled to secure balance of purchase price from grantee, and both controversies were fully adjudicated adversely to plaintiff vendor, court was required to do no more, under Code Civ. Proc. § 1061, providing that court may refuse to exercise powers granted it in any case, under chapter containing section referred to, and sections 1060 and 1062, relating to authority of one to ask declaratory relief, where it is unnecessary under circumstances.

8. Appeal and error 🔑839(1)—Appellate court, in concluding parties to suit to declare deed a mortgage were in positions of vendor failing to tender deed and purchaser failing to timely pay price, could properly do no more.

District Court of Appeal, having concluded that parties to vendor's suit, to have deed declared a mortgage and to recover balance of money named as purchase price, were in same position as parties to ordinary contract of sale, where purchaser fails to tender balance of purchase price within time provided, and where seller fails to tender deed conveying clear title, did all it properly can do in determining rights of parties.

9. Vendor and purchaser 🔑78—Stipulation, that time is essence, is applicable only to purchaser's agreement to pay, for benefit of vendor who may rescind or enforce contract.

Stipulation in contract, that time be made essence of contract, is applicable only to agreement of purchaser to pay purchase money, and is intended for benefit of vendor alone, who may elect either to rescind or enforce contract.

10. Vendor and purchaser 🔑107—Purchaser cannot work rescission of contract, of which time is essence, by merely his default to pay.

Where it is stipulated that time be made essence of contract, purchaser cannot work a rescission by mere default on his part in payment of purchase money; stipulation being for benefit of vendor alone who may elect to rescind or enforce contract.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

★Rehearing denied. Hearing denied by Supreme Court.

Action by George W. Greene against John H. Riordan. Judgment adverse to plaintiff, and he appeals. Affirmed, with findings corrected as ordered.

Goldman, Nye & Spicer, of San Francisco, for appellant.

Louis V. Crowley, and Thomas J. Riordan, both of San Francisco, for respondent.

LUCAS, Justice pro tem. In this case there is pending before the court a motion to affirm the judgment of the lower court by reason of appellant's alleged failure in his duty to print in his brief or in the supplement thereto all portions of the record necessary to be considered by this court. The motion is denied, and the appeal will be heard on its merits.

Plaintiff, George W. Greene, sued on three counts: First, to have an instrument, in form a grant deed, declared a mortgage; second, for a judgment for $33,000, alleged balance due under a contract of sale of real property, and, third, for a judgment declaratory of the respective rights and duties of the parties under said contract. By way of cross-complaint, defendant, John H. Riordan, sought to quiet title to the lands described in plaintiff's first cause of action. In its judgment the trial court adjudged the instrument alleged to be a mortgage to be in fact a deed, quieted title of defendant to the lands described in said deed, and decreed that plaintiff take nothing by his action, but otherwise made no declaration of the rights of the parties.

From this judgment plaintiff appeals on four grounds, contending respectively that the judgment quieting Riordan's title is erroneous, that the finding and judgment that the deed is not a mortgage is erroneous, that the agreement of sale was void, and that the court erred in determining the rights of the parties thereunder. At the trial considerable oral evidence was received tending to show the intent of the parties, but, since such evidence was somewhat conflicting and the first three points raised by appellant can be disposed of by analyzing the rather involved agreement, together with the acts of the parties subsequent to its execution, such analysis will be given first consideration.

By agreement dated September 4, 1925, and signed shortly before noon on September 5, 1925, the said Greene agreed to sell, and the said Riordan agreed to buy, that portion of five San Francisco city blocks (1259 to 1263, both inclusive) lying north of a red line shown on a diagram attached to the agreement. The purchase price was $55,000, payable by Riordan as follows: $22,000 to the City Title Insurance Company for the account of Greene on or before September 5, 1925, at 12 o'clock noon; the balance of $33,000 to said title company for the account of Greene on or before 60 days after date of the agreement. The title company was forthwith (i. e., upon receipt of the $22,000) to pay the same to one Lizzie Lobree upon receipt from her of a deed reconveying (to Greene) all of blocks 1259 and 1260, excepting a portion or "strip" of block 1259 owned by one Carl Larsen.

Greene agreed to convey clear title to all of said property, and, if unable to do so, Riordan, when he was ready and offered to pay the balance of the purchase price, could elect not to consummate the agreement. In such event Greene promised to repay to Riordan the sum of $22,000, with interest from September 5, 1925, at the rate of 1 per cent. per month. To secure such repayment by Greene "upon such event," the agreement provided that Greene "hereby mortgages" (to Riordan) "all his interest in all of said blocks 1259 to 1263, both inclusive." Riordan retained any right which he might have for damages for Greene's failure to perform.

Greene further agreed that, should he fail to deposit with said title insurance company on or before September 5, 1925, at 11:30 a. m., a deed conveying to him clear title to the strip of land owned by said Carl Larsen in block 1259, he would grant to Riordan all of blocks 1259 and 1260, excepting the Larsen strip in block 1259, in consideration of the above-mentioned sum of $22,000 having been paid by Riordan at the time and in the manner above specified.

Greene also agreed to execute concurrently with this agreement a deed conveying said property (all of blocks 1259 and 1260, excepting the Larsen strip in 1259) to Riordan, and to deposit the same with said title insurance company, with instructions to record the same upon Riordan's request. It is to be noted that this includes not only that portion of blocks 1259 and 1260 lying north of the red line shown on the diagram above referred to, but that portion lying south of said red line as well.

In the event that Greene deposited with said title company on or before 30 days from date, i. e., 30 days from September 4, 1925, a deed conveying to him (Greene) clear title to all of the Larsen strip in block 1259, together with a deed conveying to Riordan clear title to all of the portion of blocks 1259 to 1263, both inclusive, lying north of the above-mentioned red line, then and in that event Riordan was to reconvey to Greene all of blocks 1259 and 1260 lying south of said red line. Time was made of the essence of the agreement.

Comparing the promises of the parties to *do*, as shown by the above agreement, with what they actually *did*, as shown by the evidence, we find:

1. Riordan promised to pay $22,000 to the title company for Greene's account on or before 12 o'clock noon on September 5, 1925. He kept his promise, and paid the money.

The title company followed instructions, paid this money to Lizzie Lobree and received from her the proper deed of reconveyance.

2. Greene agreed to execute concurrently with the agreement a deed conveying to Riordan all of blocks 1259 and 1260, excepting the Larsen strip, and to deposit said deed with the title company. He kept his promise by executing and so depositing such instrument. In accordance with their instructions, the title company, at Riordan's request, placed the deed of record.

3. Greene promised that, should he fail to deposit with the title company on or before September 5, 1925, at 11:30 a. m., a deed giving him title to the Larsen strip, he would grant to Riordan all of blocks 1259 and 1260, excepting said strip, in consideration of Riordan's above-mentioned payment of $22,000. He failed so to deposit the deed to the Larsen strip. In fact, the record shows that at the time he signed the agreement he knew he would be unable to do so. He now seeks to avoid his promise to grant Riordan blocks 1259 and 1260 in consideration of the said $22,000 payment, and to avoid the effect of the deed he executed in accordance with such promise, by claiming the deed executed and delivered, as stated in paragraph 2 above, to be a mortgage.

4. Riordan promised to reconvey to Greene all of blocks 1259 and 1260 lying south of the red line, if Greene should, within 30 days from September 4, 1925, deposit with the title company a deed to the Larsen strip, together with a deed conveying to Riordan all of blocks 1259 to 1263 lying north of the red line. Greene did not deposit with the title company either of these conveyances within the 30-day period. Riordan accordingly did not execute his deed of reconveyance. His promise to do so being conditional and the conditions being unfulfilled by Greene, his failure so to do does not constitute a broken promise on Riordan's part.

5. Riordan promised to pay the balance of the purchase price of that portion of the five blocks lying north of the red line, to wit, $33,000 on or before 60 days after September 4, 1925. He failed to do so.

6. Greene promised to convey to Riordan clear title to all of the five lots lying north of the red line at the time Riordan was ready and offered to pay the balance of the purchase price. Riordan was never ready, and never offered to pay said balance. Greene neither tendered nor deposited at any time a deed to the northerly part of said blocks, but did on the last day of the 60-day period deposit with the title company a deed to the Larsen strip, with instructions that it be delivered on conditions entirely foreign to anything contained in the original agreement. This deed he withdrew the following day.

[1] With these facts in mind the court is of the opinion that the judgment quieting Riordan's title to blocks 1259 and 1260 was not erroneous. The effect of the agreement and the execution and delivery of the concurrent deed, in consideration of the down payment of $22,000, was to vest the title to these two blocks in Riordan on September 5, 1925, when Greene failed to deposit a deed to the Larsen strip. The title having vested, Greene lost all rights therein other than the right to a reconveyance of the southerly portion of said blocks in the event a deed to the Larsen strip and a deed to the northerly portion of the five blocks were deposited by him within 30 days. The obligation of Riordan to reconvey was extinguished by Greene's failure to deposit said deeds within the 30-day period, and he was therefore entitled to quiet his title against Greene.

Nor was the position of the parties any different with respect to these two blocks during the time intervening between the expiration of the 30-day period and the end of the 60-day period given Riordan in which to pay the balance of the purchase price of the northerly portion of all five blocks. During such intervening time Riordan held his completed title to blocks 1259 and 1260, with the additional right to terminate the whole contract, should Greene's title fail at the time the balance of the purchase price was tendered. This was a privilege given exclusively to Riordan, but one which he was never able to exercise because of his failure to make such tender.

[2] We are also of the opinion that the trial court did not err in its finding and judgment that the purported deed was in fact a deed and not a mortgage. As pointed out above, Riordan promised to pay the balance of the purchase price of the northerly portion of the five blocks within 60 days. At the time he was ready and actually offered to pay such balance, should he find Greene unable to convey a clear title, he had the option of refusing to consummate the agreement, of demanding the return of his $22,000 with interest, and of suing Greene for damages. By the agreement (not by the deed) Greene mortgaged all of his interest in the five blocks (not merely blocks 1259 and 1260) to secure the repayment of the $22,000 and interest, in the event Riordan chose to exercise his option.

As to blocks 1259 and 1260, Greene had nothing to mortgage, for, concurrently with the execution of the agreement to mortgage the five blocks, he had executed and delivered a deed to blocks 1259 and 1260, the effect of which, as seen above, was to vest the fee thereto in Riordan, subject only to Greene's right (upon certain conditions which he failed to fulfill) to a reconveyance of the southerly portion thereof within the 30-day period. As to the remaining three blocks, the mortgage feature of the agreement was to become effective only in the event of Riordan exercising his option to terminate the contract and demanding the return of his money upon Greene's failure or inability to perform. Since Riordan never offered to pay, and never exercised his option to terminate, the agreement never became effective as a mortgage.

Appellant points out certain facts and circumstances in addition to the agreement itself upon which he relies as proof that the deed is a mortgage, namely, retention of possession of the property by Greene; payment of taxes by Greene; the disparity between the amount paid for blocks 1259 and 1260 and the value thereof (although the testimony as to value is conflicting); Greene's bad financial condition; and the fact that the $22,000 paid by Riordan went wholly to discharge an existing incumbrance. Such weight as might be given this testimony is more than offset by the testimony of Riordan and that of Greene's own attorneys (who advised him at all times during the negotiations preliminary to and at the time of the execution of the agreement) that the deed was never intended to be a mortgage.

[3-5] In the argument urged in support of the third ground of appeal, namely, that the agreement of sale was void, we find no merit. It is contended that the agreement was violative of the statute of March 15, 1907 (St. 1907, p. 290), in that the agreement of sale was made by reference to an unrecorded map. The deed to blocks 1259 and 1260, however, could not be void for this reason, because this deed describes the property fully by metes and bounds as well as by reference to a recorded map. Neither can it be successfully contended that the agreement for the sale of the balance of the property is void, because the point was not raised at the trial of the cause, and, even if applicable to a case of this kind where the purchaser himself prepared the agreement, the record is silent as to whether or not the map and diagram in question was actually recorded. The burden of showing nonrecordation is upon the plaintiff and appellant.

[6] In the final ground of appeal urged by appellant, it is contended that the court erred in determining the respective rights and duties of the parties under the agreement of sale and deed, first, by making erroneous findings, and, second, by failing to find at all on certain points.

As to alleged erroneous findings, appellant cites as error that portion of finding 9, wherein the court found that Riordan agreed to pay $55,000, on condition that Greene deposit with the title company within 30 days a deed to the Larsen strip, together with a deed to the lands agreed to be purchased. Appellant's contention in this regard the court believes to be sound. Riordan's obligation, upon Greene depositing with the title company within the 30-day period a deed to the Larsen strip, together with a deed to all of blocks 1259 to 1263 lying north of the red line, was limited to a reconveyance by him to Greene of all of blocks 1259 and 1260 lying south of the red line. Greene's failure to so deposit said deeds within the 30-day period relieved Riordan of his obligation to reconvey said southerly portion of said two blocks, but did not, in the opinion of the court, relieve Riordan of his obligation to pay the balance of the purchase price for the northerly portion of the five blocks upon receipt of a clear title thereto.

In conformity with this opinion it is ordered that all of finding 9, beginning with line 19 on page 36 of the filed transcript on appeal down to and including the word "and" in line 10 on page 37 thereof be, and the same hereby is, stricken from the record, and that after the word "performed" in line 16, page 37 of said transcript, there be inserted the words "except that it is true that defendant did not pay to plaintiff the sum of $33,000."

Likewise, in accordance with the views herein expressed, it is ordered that there be stricken from finding 10 all of lines 22, 23, 24, and line 25 ending with the figures "1259," as the same appear on page 38 of said filed transcript.

It is further ordered that the words "and the defendant would" be stricken from line 20, page 39 of said transcript, and that there be inserted in lieu thereof a period and the words "Defendant agreed."

It is further ordered that the words "and without any further or other obligation on the defendant in the premises" be stricken from lines 21 and 22 on page 40 of said transcript; and there is hereby ordered inserted in finding 8, after the word "defendant" in line 25, page 35 of said transcript, the following words: "Subject only to the right of a reconveyance of that portion of said blocks 1259 and 1260 lying south of the said red line upon plaintiff depositing within thirty days from September 4, 1925, with the said title company, a deed to the said Larsen strip, together with a deed conveying to defendant all of blocks 1259 to 1263, both inclusive, lying north of said red line."

[7] As to plaintiff's assertion, that the trial court failed to find at all upon certain points, it is contended that the court should have construed the agreement and deed, and should have determined whether or not the agreement was still subsisting and subject to performance; whether either appellant or respondent was in default; and what were the further rights and obligations of the parties at the time of the trial. Appellant's contention in this regard the court believes to be unsound.

The authority for asking for declaratory relief is to be found in sections 1060, 1061 and 1062 of the Code of Civil Procedure, which follow:

1060: "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, * * * may in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his *rights* and *duties* in the premises, including a determination of any *question* of *construction* or *validity* arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

1061: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

1062: "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts."

The main controversy between the parties to the contract of September 4, 1925, and the deed of September 5, 1925, was as to whether or not the deed to blocks 1259 and 1260 should be construed as a mortgage. This question was fully adjudicated by the trial court and determined adversely to appellant.

The next controversy between the parties was as to whether or not Greene was entitled to secure the sum of $33,000 from Riordan. This question was likewise fully adjudicated by the trial court, and determined adversely to appellant.

Having made such adjudication, and in so doing having placed a construction upon and determined the validity of the written instruments in question for the guidance of the parties, the trial court was, under section 1061, Code of Civil Procedure, above quoted, required to do no more. This court agrees with the trial court in its construction of the instrument of September 5, 1925, by holding it to be a deed rather than a mortgage, and, while differing to some extent from the trial court in its construction, has fully construed the agreement of sale of September 4, 1925.

[8] If the construction placed by this court upon said agreement of sale is, as we believe it to be, correct, so far as this court can determine from the record the parties thereto are in no different position from that occupied by parties to an ordinary contract of sale in which time is made of the essence, where the purchaser fails to tender the balance of the purchase price within the limit of time provided by the agreement, and where the seller fails at all times to tender a deed conveying clear title to the lands under contract.

Having so concluded, this court is of the opinion that it has done all that it properly can do in determining the rights and duties of the parties.

[9, 10] It would appear from an examination of the record, although but little attention was given to the subject of declaratory relief at the trial of the cause, that the agreement of sale was in effect, at least to some extent, at the time of trial. The stipulation in a contract, that time be made of the essence of the contract, has been held to be applicable only to the agreement on the part of the purchaser to pay the purchase money, and is intended for the benefit of the vendor alone, who may elect either to rescind or enforce the contract, and that the purchaser cannot work a rescission by mere default on his part in payment of the purchase money. See Newton v. Hull, 90 Cal. 487, 27 P. 429.

Whether or not the agreement of sale is still effective for any purpose depends largely upon the solution of the question as to whether or not the provision therein making time of the essence has been waived by the acts of the parties. The acts of the parties subsequent to the time of trial may have entirely altered their rights and duties. It would therefore avail nothing to remand the case to the trial court for a declaration of the present rights and duties of the parties. With the construction and validity of the agreement determined, and with the facts of the case peculiarly within their knowledge, the parties to this action are now in a position to secure through ordinary legal procedure not a mere declaration, but a final, exclusive, and presently enforceable determination of their rights and duties, should the facts warrant the court in determining that any exist.

With the findings corrected as hereinabove ordered, the judgment appealed from is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

97 Cal. App. 752

JOHNSON v. SMITH et al. (Civ. 6204.)★

District Court of Appeal, Second District, Division 1, California. March 25, 1929.

Rehearing Denied April 23, 1929. Hearing Denied by Supreme Court May 23, 1929.

1. Mechanics' liens ⟹139(3)—Failure of lien claim to specify kind of materials held not to invalidate lien, without finding intent to defraud or injury to innocent third party (Code Civ. Proc. §§ 1187, 1203).

Even if claim of lien for materials furnished was defective in containing no specification of the "kind" of materials, as required by Code Civ. Proc. § 1187, defect did not invalidate lien where, by trial court's findings, it did not appear that error was made with intent to defraud or that an innocent third party suffered by reason of such error, as required by section 1203 to invalidate lien.

2. Mechanics' liens ⟹48—That flooring furnished contractor was removed because defectively laid held not to affect materialman's right to lien.

That hardwood flooring sold by plaintiff to contractor constructing residence for defendants, because of the defective manner in which flooring was laid, was torn out and other flooring laid in its place by order of defendant's architect, *held* not to defeat plaintiff's right to mechanic's lien, since he was not responsible for defective installation.

Appeal from a judgment of the Superior Court of Los Angeles County, Victor R. McLucas, Judge, in an action to foreclose mechanic's lien. Affirmed.

Action by Arthur Johnson, conducting business as the Diamond Hardwood Company, against E. M. Smith and others. From an adverse judgment, defendants appeal. Affirmed.

Walter L. Mann, of Los Angeles, for appellants.

W. W. Wallace, of Los Angeles, for respondent.

HOUSER, Acting P. J. This is an appeal by the defendants from a judgment rendered against them in an action to foreclose a mechanic's lien.

[1] Appellants urge that the claim of lien was invalid because it failed to comply with the requirement of the statute that (among other things) it contain "a general statement of the kind of work done or materials furnished." Section 1187, Code Civ. Proc. An examination of the claim of lien upon which the action depended discloses the fact that it was for "materials furnished." By section 1203 of the Code of Civil Procedure it is provided that: "No mistake or errors in the statement of the demand, * * * shall invalidate the lien, unless the court finds that such mistake or error * * * was made with the intent to defraud, or the court shall find that an innocent third party, without notice, direct or constructive has since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner."

If it be conceded that the claim of lien for "materials furnished" was defective in that it contained no specification of the "kind" of materials, since by the findings of the trial court it does not appear that the error was made with "intent to defraud," or that an innocent third party suffered by reason of such error, it is clear that the defect is not of vital importance. Furthermore, notwithstanding the effect of some of the authorities to which appellants direct attention, it appears that, even before the enactment of section 1203 of the Code of Civil Procedure, in construing an earlier and somewhat similar lien statute, the rule had been announced in the case of McClain v. Hutton, 131 Cal. 132, 136, 63 P. 182, that "it was unnecessary to state specifically the kind of materials furnished or the prices of the several items"—citing authorities. See, also, Jewell v. McKay, 82 Cal. 144, 150, 23 P. 139; Brennan v. Swasey, 16 Cal. 141, 76 Am. Dec. 507; Selden v. Meeks, 17 Cal. 131; Heston v. Martin, 11 Cal. 41; Davis v. Livingston, 29 Cal. 283, 287. In the last-cited case it is said: "The second of the three notices is claimed to be defective for four distinct reasons, viz.: that it does not state of what the 'materials' named therein consisted. * * * None of these objections are well taken. The particular character of the materials need not be stated in the notice. The statute does not expressly require it, and the 'nature and extent of the claim' may be as well understood without the aid of such detail as with it"—citing cases. It follows that the error of which appellants complain cannot be sustained.

Appellants specify further error in effect that the findings of fact, which were all contrary to the position assumed by appellants at the trial in the lower court, were not supported by the evidence. It would serve no useful purpose to set forth the evidence upon which the findings to which objection is here made are predicated. Suffice it to say that, on consideration of such findings with relation to the evidence adduced at the trial, it satisfactorily appears that the findings are not properly subject to said criticism.

[2] The "materials furnished" by plaintiff consisted of hardwood flooring intended for a residence which was being constructed by a contractor for the defendants. The contract for furnishing such flooring and laying it in the building was sublet to a third person, who purchased the flooring from plaintiff. On account of the defective manner in which the flooring was laid, by order of the architect

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★Rehearing denied. Hearing denied by Supreme Court.

employed by the defendants, nearly all of it was torn out and other flooring laid in its place. Appellants contend that, because the "materials" furnished by plaintiff were not finally used by the defendants in the construction of the building for which such materials were originally purchased, plaintiff was not entitled to maintain a lien on the premises. By some of the authorities cited by the appellants the rule is announced that where a building under construction is completely destroyed by fire the right of lien does not attach to the premises. Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 81 P. 30, 106 Am. St. Rep. 75, 2 Ann. Cas. 811; Watson v. Alta Investment Co., 12 Cal. App. 560, 108 P. 48.

In the case of Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664, 666, 124 P. 230 [41 L. R. A. (N. S.) 296] in principle it was held that the removal from a building of materials furnished for and used in its alteration did not affect the right of lien for the value of such materials. In part the court said: "* * * However, we know of no statute or decision declaring that the removal of an alteration to a building after it is completed and used, destroys the lien which the statute gives to persons furnishing materials or labor for such alteration, even if such removal is made before the filing of the lien. If the materials are actually used in and the work is actually done upon the alteration, and the change made is of such a character that it comes within the terms of the statute giving a lien for alterations upon a building, and it is completed and put to use as altered, we are of the opinion that the lien cannot be defeated by a subsequent removal of that portion of the building comprising the alterations and the restoration of the building to its original state."

In the case of California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692, 708, 118 P. 103, 110, it was held that a lien was properly allowed for screen doors and windows which had been attached to the building, "and the fact that they were, for some one's convenience, taken down and piled up, would not destroy the right of lien acquired by the materialmen so furnishing them."

In the case of Hammond L. Co. v. Gordon, 84 Cal. App. 701, 258 P. 612, the facts were that the owner of certain real property leased the second floor of a building located thereon to one Squadrelli, who entered into a contract with defendant Gordon for the construction of certain balconies on the leased premises, which balconies were to be so constructed as to be "removable at any time." The plaintiff furnished certain materials of which the balconies were constructed, but had no knowledge of the fact that by agreement between Squadrelli and Gordon the balconies were to be "removable." The owner of the property had no part in ordering the materials of which the balconies were constructed, but did have knowledge of the fact that they were being built. However, no notice of nonresponsibility, as provided by section 1192 of the Code of Civil Procedure, was given by the owner. Although the balconies were so constructed that, as a matter of law, they constituted fixtures (section 660, Civ. Code), nevertheless "it appears as a matter of fact they were removed from the building." Held that the plaintiff was entitled to a foreclosure of a mechanic's lien on the property.

Authorities are not lacking to the effect that in order to become entitled to a lien, a materialman who furnishes material to a contractor to be used in the construction of a building is under no obligation to the owner of the premises to see that the contractor complies with the terms of his contract with the owner. 17 Cal. Jur. 20. The syllabus in the case of Howe v. Schmidt, 151 Cal. 436, 90 P. 1056, which is sustained by the text of the opinion (page 441 [90 P. 1058]), is that: "A materialman is not required to ascertain whether or not material ordered by a building contractor for use in a building conforms to the requirements of the agreement between the contractor and the owner. His contractual relations are solely with the contractor dealing with him and he simply furnishes material as directed by the party with whom he contracts. He is under no legal obligation to the owner to see that the contractor complies with his contract, and so far as his right to a lien is concerned, is warranted in assuming that the contractor is fulfilling his contract with the owner. This is true, in the absence of bad faith on his part, notwithstanding he may know that material ordered may not be in all respects as provided by the written contract on file."

The authorities cited by appellants are distinguishable from those cited by respondent, in that where a building under construction is destroyed by fire, so far as the owner of the premises is concerned, the act by which the materials furnished by the lien claimant are destroyed is involuntary; whereas, where the owner either personally or through his agent directs the removal from the building of attached materials or fixtures furnished by a lien claimant the act is plainly voluntary. In the instant case apparently the fault of the flooring lay entirely with the manner in which it was laid—not with the boards or material of which it was constructed. That part of the work was done, not by plaintiff or by his employees, but was done by the defendants or their agents or employees. The fact that by the act of the owner of the building the "materials furnished" may have been rendered useless should not defeat the rights of an innocent materialman, who had no knowledge or notice of defective or poor workmanship in the installation of the materials.

The judgment is affirmed.

We concur: CRAIL, Justice pro tem.; YORK, J.

97 Cal. App. 710

ARMSTRONG v. MAUPAS. (Civ. 6704.)

District Court of Appeal, First District, Division 1, California. March 21, 1929.

Limitation of actions ⚷146(3)—Defendant's letters to plaintiff held insufficient to constitute new promise, removing bar of limitations against claim for services (Code Civ. Proc. §§ 337, 339, 360).

In action for services, in which bar of Code Civ. Proc. §§ 337, 339, was interposed, letters signed by defendant and addressed to plaintiff *held* insufficient to constitute new promise, within section 360, where they contained nothing amounting to admission of existing debt, for which writer was liable or willing to pay.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action for services by Anna Armstrong against Marie Maupas. Judgment for defendant, and plaintiff appeals. Affirmed.

James W. Bell, of Los Angeles, for appellant.

George Beebe, of Los Angeles (J. Marion Wright and Bernard L. Herlihy, both of Los Angeles, of counsel), for respondent.

PER CURIAM. An action to recover the reasonable value of work and labor alleged to have been performed by the plaintiff for the defendant between May 15, 1905, and September 15, 1918. The action was commenced on October 28, 1925, the complaint alleging that on August 18, 1924, the defendant, in a writing signed by her, acknowledged the indebtedness. The defendant denied the allegations of the complaint, and pleaded as a bar to the action the provisions of sections 337 and 339 of the Code of Civil Procedure. After a trial the court ordered judgment for the defendant, and, findings having been waived, a judgment, from which the plaintiff appealed was entered.

It is conceded that the claim was barred by the statute, unless certain letters signed by the defendant and addressed to the plaintiff were sufficient within the provisions of section 360 of the Code of Civil Procedure to constitute a new promise. The letters were written in French, the translations being as follows:

"San Bernardino, August 18, 1924. Dear Sister. It is with pleasure that I received your letter, knowing that you are well, and I can say that I am the same. Dear sister, you asked me to pay you. Send me the account of what you have received and as to how you want to arrange it. You will answer me. Good bye. I will close. Hoping to have some news from you. Best regards from the part of Frank. Marie."

"San Bernardino, California, October 29, 1924. Dear Sister. I received your letter yesterday, knowing you are well excepting that you have a bad cold. That happens in order to advance matters. I gave the papers to fix up and I have not received them as yet, and will then call on you. I received the news from home, but a little sad, also that father is not able to get up on account of his age. That is all for the present, in the meantime receive my best wishes on the part of your sister. Marie. And the boy of Chester's, how is he?"

"Dear Sister. I see that you have received the check. It is the $40 for which Frank 'phoned me about coming for the month of April in 1921. Credited to the account that you have received it makes $1,836.02. You have criticized me on all sides. You have taken the old man for that. Very well. That is all. I leave. You have insulted me. You also say that you have sent me a card when the baby was born. I received none. I find it out by others."

With respect to the sufficiency of writings offered for the above purpose it was held in Concannon v. Smith, 134 Cal. 14, 66 P. 40, that while the statute does not prescribe any form in which the new promise shall be made the writing must show that the writer regards or treats the indebtedness as subsisting, the law implying therefrom a promise to pay; and in Searles v. Gonzalez, 191 Cal. 426, 216 P. 1003, 28 A. L. R. 78, that the writing must contain some reference to the debt which, either of itself or with the aid of competent evidence of extraneous facts in explanation, amounts to an admission of an existing indebtedness to the person to whom the writing is sent, for which the debtor is liable and which he is willing to pay. While part payment alone is insufficient as an acknowledgment within the above rule (Clunin v. First Federal Trust Co., 189 Cal. 248, 253, 207 P. 1009), such payment when accompanied by a writing signed by the debtor, which recognizes the debt as subsisting, is relevant on the question of the writer's willingness to pay. Here, however, the letters contained nothing amounting to an admission of an existing debt for which the writer was liable or willing to pay (Powell v. Petch, 166 Cal. 329, 136 P. 55); nor was the reference therein to the sum of $40 relevant on the question as it manifestly had no connection with the claim sued upon, but to an amount which according to the letter became due the plaintiff in 1921, long subsequent to the time when the services involved in the present action are alleged to have been rendered.

We are satisfied that the conclusions of the trial court were correct, and the judgment is accordingly affirmed.

97 Cal. App. 731

DANIEL et ux. v. ASBILL. (Civ. 3702.)★

District Court of Appeal, Third District, California. March 22, 1929.

Rehearing Denied April 22, 1929.

1. Jury 🔑131(4)—Counsel may ask jurors questions reasonably necessary to ascertain their freedom from bias or interest.

Counsel may ask jurors such questions as may be reasonably necessary to ascertain whether they are free from bias or interest that may affect their verdict.

2. Trial 🔑108½—Counsel may ask whether jurors are interested in liability insurance company, but not in manner necessarily conveying impression that defendant has such insurance.

To ascertain whether jurors are free from bias or interest that may affect their verdict in tort action, counsel may, in good faith, ask each whether he is interested as agent, stockholder, or creditor in specified casualty company or any company insuring against liability for negligence, but questions must be propounded in such manner as not necessarily to convey impression that defendant is so insured.

3. Appeal and error 🔑1060(4)—Attorney's framing of questions as to jurors' interests in insurance company, in manner conveying impression that defendant has liability insurance, is prejudicial, if verdict is excessive or defendant's liability doubtful.

If amount of verdict for plaintiff is large, as compared with nature of injuries sustained, or defendant's liability is a close question, misconduct of plaintiff's counsel in framing questions to jurors as to their interest in insurance company, in manner conveying impression that defendant is insured against liability for negligence, is prejudicial and ground for reversal.

4. Trial 🔑108½—Counsel's statement, that verdict for plaintiffs would affect jurors' interest, if stockholders in insurance company, was misconduct warranting reversal, if jury was influenced thereby.

Statements of plaintiffs' counsel to court during impanelment of jury, that verdict for plaintiffs would affect jurors' interests, if they were stockholders in named insurance company, was misconduct, constituting ground for reversal of judgment on verdict for plaintiffs, if jury was influenced thereby, though it was not error to ask them if they owned stock in such company.

5. Trial 🔑127—Cross-examination of physician, as to examination of plaintiff at insurance company's request, held improper.

In action for injuries in automobile collision, plaintiff's cross-examination of physician, as to who requested examination of plaintiff by him, for purpose of showing that it was made at request of insurance company, *held* improper.

6. Appeal and error 🔑1050(1)—Admission of testimony as to defendant's statement, after automobile collision, that he was late and wanted them to hurry, held not prejudicial error.

In action for injuries in automobile collision, admission of testimony as to defendant's statement, after accident, that he was late for supper and wanted them to hurry, *held* not prejudicial error; objection going to weight of such statement as tending to corroborate testimony that defendant was driving at rapid rate of speed.

7. Automobiles 🔑244(36)—Evidence held to support jury's finding that defendant's negligence was proximate cause of automobile collision at highway intersection.

In action for injuries in automobile collision at highway intersection, evidence *held* sufficient to support jury's finding that defendant's negligence was proximate cause of accident.

8. Automobiles 🔑244(43)—Evidence held to warrant finding, in action for injuries in automobile collision at highway intersection, that plaintiff was not contributorily negligent.

In action for injuries in automobile collision at highway intersection, evidence *held* to warrant jury's finding that plaintiff was not guilty of contributory negligence.

9. Negligence 🔑122(1)—Contributory negligence is defense, burden of proving which rests on defendant.

Contributory negligence is a defense, burden of proving which rests on defendant, and it is not incumbent on plaintiffs to establish affirmatively that they were free from negligence.

10. Appeal and error 🔑1064(1)—Negligence 🔑138(2)—Instruction, that contributory negligence is defense, burden of proving which rests on defendant, held not erroneous nor harmful.

Instruction, that contributory negligence is defense, burden of proving which rests on defendant, and that it is not incumbent on plaintiffs to establish affirmatively that they were free from negligence, *held* not erroneous nor harmful, though not containing proviso, "unless it be shown or can be inferred from the evidence adduced in support of the plaintiffs' case."

11. Automobiles 🔑246(25)—Instruction, that, if plaintiff failed to look or see whether it was safe to drive automobile across highway, and such failure substantially contributed to collision, she was contributorily negligent, and verdict must be for defendant, substantially told jury that she could not recover if contributorily negligent.

Instruction, that, if plaintiff failed to look or looked and failure to see whether it was safe for her to drive automobile across intersecting highway, and such failure substantially contributed to cause of collision with defend-

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★Rehearing denied.

ant's automobile, she was guilty of contributory negligence, and verdict must be for defendant, substantially told jury that she could not recover, if they found her guilty of contributory negligence, even if jury were not instructed as defendant claimed they should have been.

12. Appeal and error ⚷1060(4)—References of plaintiff's counsel to insurance company in impaneling jury and cross-examining witness held not prejudicial error, in view of evidence justifying verdict and nature of injuries.

Misconduct of plaintiffs' counsel in stating, during impanelment of jury, that verdict for plaintiff would affect juror's interest, if they were stockholders in insurance company, and cross-examination of physician to show that his examination of plaintiff was made at such company's request, *held* not prejudicial to defendant, in view of evidence justifying verdict for plaintiff, who was 32 or 33 years old, and nature and extent of injuries to her arm and hand, which were reasonably certain to be permanent.

Appeal from Superior Court, Sutter County; E. P. McDaniel, Judge.

Action by F. O. Daniel and wife against Hugh Asbill. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. Hampton Hoge, of San Francisco, and W. E. Davies, of Marysville (Enid Childs, of Berkeley, of counsel), for appellant.

Alvin Weis and W. P. Rich, both of Marysville, for respondents.

MONCUR, Justice pro tem. Plaintiffs are husband and wife, and brought this action to recover damages from defendant for injuries to plaintiff, F. O. Daniel's automobile and damages for physical injuries to plaintiff Mrs. Bertha Mae Daniel, as the result of a collision between the said automobile and the automobile of defendant. The case was tried before a jury, and resulted in a verdict awarding plaintiff F. O. Daniel the sum of $185 as damages to his automobile, and Mrs. Daniel was awarded the sum of $7,804.60 as damages resulting from the injuries suffered by her. From the judgment entered upon the verdict, defendant, in due time, moved for a new trial, which was denied.

The appellant urges as grounds for a reversal: (1) Reference to an insurance company upon the impanelment of the jury, and at other times as being prejudicially erroneous; (2) plaintiff was guilty of contributory negligence as a matter of law; (3) the court gave an erroneous instruction upon the question of contributory negligence; (4) the court erred in admitting in evidence statements made by defendant prior to the collision.

At the commencement of the trial defendant moved for a continuance upon the ground that his attorney, J. Hampton Hoge, was occupied in the trial of an action in San Francisco, and unable to be present. The motion was submitted on affidavits, and the court stated that the motion would be granted upon the payment of costs incurred by plaintiff, by reason of the continuance, and fixed the amount of such costs at the sum of $343. The motion was presented by Mr. W. E. Davies, acting for defendant, and, the defendant having determined that the amount of costs fixed as the basis for granting a continuance was more than he cared to pay, the motion was thereupon withdrawn by Mr. Davies, and Mr. Davies was associated in the case as attorney for the defendant.

It is not contended that there was any error in the ruling of the court on the motion for a continuance, and defendant only urges this proceeding for consideration upon this appeal in connection with the alleged errors occurring during the trial.

We will consider the several grounds urged for a reversal in the order in which they are presented in the briefs, except that the fourth ground will be considered in place of the third, and the third ground will be considered last. In doing so, it seems advisable to state, as briefly as possible, the circumstances under which the collision occurred, and also to state the damages resulting therefrom.

It appears from the evidence that on the 21st day of September, 1926, at about the hour of 5:20 in the afternoon, plaintiff Bertha Mae Daniel was driving her husband's Ford coupé automobile in a northerly direction on the highway, known as the Sutter Basin road, which extends between Sutter Basin and O'Banion Corners, Sutter county. There were riding with her at the time of the accident a Mrs. Goetz and a Mrs. W. Holm. At the same time defendant was driving his Flint touring car in a westerly direction on the highway, known as the Tudor road, which intersects the Sutter Basin road at a point about two miles south of the O'Banion corners. Mrs. Daniel had been driving at the rate of about 15 to 18 miles per hour, but as she entered the intersection she slowed down to approximately 10 miles per hour, and had passed the center of the intersection by approximately 8 feet when defendant drove his car into the intersection at a rate of speed of about 40 miles per hour and crashed into the Ford coupé being driven by Mrs. Daniel. As a result of the collision, the Ford car was driven about 40 feet northwesterly of where it was struck, and landed bottom side up near the ditch alongside of the road.

At the time of the collision the sun was low and was shining directly in defendant's eyes as he drove in a westerly direction along the highway. The tracks of defendant's automobile, just after he reached the intersection, showed that he skidded for approximately 53 feet before hitting the Ford car, and that he swerved slightly toward the north just before the collision.

As a result of the accident the Ford coupé was considerably damaged, and Mr. Daniel incurred expenses in repairing it, amounting to the sum of $185. Mrs. Daniel suffered a number of injuries as a result of the accident, sustaining a broken left arm, immediately below the elbow, the skin and flesh were torn from both sides of her left hand, the third finger of her left hand was broken in two places, the first break being between the first and second joints of that finger, and the second break being where the bone of that finger was joined to her left hand; that the bones of the second finger of her left hand were broken in the hand; also, her neck was severely strained, and she had a number of minor bruises on her body.

For medical and hospital services, X-rays, ambulance, and other expenses for a housekeeper and nurse, an expense of $304.20 was incurred. Recovery of this amount is sought, and further damages in the sum of $10,000.

Considering now the first ground urged for a reversal, it appears that one of the counsel for plaintiffs during the impanelment of the jury, interrogated the jurors on their voir dire as follows:

"Q. I will ask the jurors if any of you own any stock in the Union Automobile Insurance Company?

"Mr. Davies: We object to that question on the ground it is irrelevant, immaterial and incompetent, and not pertaining to any issue in the case.

"The Court: I do not see that it would do any harm—no insurance company is a party to the action.

"Mr. Rich: It might be that they are financially interested in it, and if they are stockholders in the company it would certainly affect them under that subdivision of the section.

"Mr. Davies: We object to that on the grounds stated and ask that it be stricken out and the jurors instructed to disregard it.

"Mr. Rich: * * * Now, it is our claim that in the event that it could be shown that they are stockholders in the company I have mentioned, a verdict in favor of the plaintiffs would affect their interest. * * *

"Mr. Davies: We object to that, and assign it as misconduct on the part of counsel."

Following this, the court sustained the objection, and instructed counsel not to ask questions along that line. Subsequently, in connection with further reference to the insurance matter, the court instructed the jurors to pay no attention to anything that had been said by the court or counsel bearing upon this matter, and directed them to disregard the matter entirely in their considerations and deliberations in all respects, saying, "that it was not a question for honest jurors to follow."

Subsequently, Dr. Hoffman, one of defendant's witnesses, after testifying to an examination of Mrs. Daniel, made by him shortly after the accident, on cross-examination, was asked at whose request he made the examination, and said that it had been made at the request of Mr. Ralph McCormick, insurance broker in the city of Marysville, but that he did not know the name of the company at whose request it had been made. No objection was made to this line of cross-examination. Immediately following it a letter written by Dr. Hoffman reporting the result of his investigation was offered in evidence, to which offer counsel for defendant said there was no objection.

[1-3] It seems to be the settled law of this state that counsel may ask jurors such questions as may be reasonably necessary to ascertain whether they are free from bias or interest that may affect their verdict. To this end it is proper for counsel, in good faith, to ask of each juror whether he is interested as an agent or stockholder or otherwise in a specified casualty company. Or he may be asked the broad question whether he is interested in any insurance company insuring against liability for negligence. But counsel must take pains to propound such questions in such a manner as not necessarily to convey the impression that the defendant is in fact so insured. It is misconduct on the part of counsel for plaintiff in such actions so to frame his question that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that the defendant is protected by insurance against liability for negligence. And if the amount of the verdict is large as compared with the nature of the injuries sustained, or the defendant's liability is a close question, such misconduct is prejudicial and ground for reversal. Eldridge v. Clark & Henery Construction Co., 75 Cal. App. 516, 243 P. 43; see, also, Arnold v. Cal. Portland Cement Co., 41 Cal. App. 420, 183 P. 171; Rinklin v. Acker, 125 App. Div. 244, 109 N. Y. S. 125; Grant v. National, etc., Co., 100 App. Div. 234, 91 N. Y. S. 805.

[4] From these authorities it appears that it was not error to ask the jurors if they owned stock in the indemnity insurance company named. The subsequent statements in connection with the matter occurred during the conversation between the court and the respective counsel, but, it appears that in this conversation it was definitely stated by Mr. Rich that a verdict in favor of the plaintiffs would affect the interest of the jurors, if they were stockholders in such company. Obviously, this statement of Mr. Rich constituted misconduct, and would constitute ground for reversal in the event that it is

evident the verdict of the jury was influenced in any respect by such statement.

[5] The cross-examination of Dr. Hoffman was improper. In the case of Eldridge v. Clark & Henery Const. Co., supra, it is said: "As going to the question of the credibility or the weight of his testimony, it would seem that it ought to be proper for plaintiff to show by cross-examination of a physician called by defendant to testify and who does testify that he had examined plaintiff's injuries and found that they were less serious in nature and effect than as claimed by plaintiff, that such physician had been specially employed by a surety company by which defendant was indemnified against the payment of any damages awarded against him to make such examination and state the result thereof to the jury. (See sec. 1868, Code Civ. Proc.) Such, however, is not the rule in this state, so our decisions seem to hold. (McPhee v. Lavin, 183 Cal. 264, 269, 191 P. 23; Roche v. Llewellyn, 140 Cal. 563, 74 P. 147.)"

[6] As for the fourth ground for reversal urged by defendant, that it was error to permit the testimony concerning the statement by defendant at the Tudor Mercantile Store to the effect that he "was late for supper and that he wanted them to hurry," even if it were error, it was not of sufficient importance to be prejudicial, but, rather, it seems that it would be more of a question of weight than of admissibility, as such statement, if made, would have a tendency to corroborate the testimony to the effect that defendant was driving at a rapid rate of speed just prior to the accident.

[7-10] Considering now the question of the alleged negligence of the defendant and the contributory negligence of the plaintiff, we are satisfied that the finding of the jury in its verdict, to the effect that the proximate cause of the accident was the negligence of the defendant, and that the plaintiff Mrs. Daniel was not guilty of contributory negligence, is amply supported by the preponderance of the evidence. In this connection, the alleged error of the court in giving the instruction complained of, at plaintiffs' request, will be considered. The particular instruction is as follows: "I instruct you that in this state contributory negligence is a defense, the burden of proving which rests upon the defendant and it is not incumbent upon the plaintiffs to establish affirmatively that they were free from negligence."

It is claimed that this instruction was erroneous, for the reason that it did not contain the provision that "unless it be shown or can be inferred from the evidence adduced in support of the plaintiffs' case." The instruction complained of is a correct statement of the law (Howard v. Worthington, 50 Cal. App. 556, 195 P. 709; Hall v. San Francisco, 188 Cal. 641, 206 P. 459), and does no more than inform the jury as to the question of the burden of proof. If defendant desired a further instruction to be given, he should have requested it, but, obviously, no harm could have resulted from the giving of this instruction.

[11] The ground upon which contributory negligence is to be imputed is the failure of Mrs. Daniel to see the approach of defendant's automobile, even though she had not looked in the direction of its approach until a second or so before the collision, and as to this phase of the matter, the court instructed the jury, at the request of the defendant, as follows: "I hereby charge you that, if the plaintiff, Mrs. Bertha Mae Daniel, in this action, at the time of the accident upon which said action is based was approaching or entering upon an intersection of the public highway, and if at said time she failed to look or looked and failed to see whether or not it was safe for her to drive her machine upon and across such intersecting highway, and if you find that such failure on the part of the plaintiff to look or to see the condition of the intersecting highway substantially contributed to the cause of the accident, then said plaintiff was guilty of contributory negligence and your verdict must be for the defendant."

Even if the jury were not instructed as is claimed by the defendant they should have been, it, nevertheless, appears that they were substantially told that if they found Mrs. Daniel guilty of contributory negligence, she could not recover, and taking all of the instructions together, the jury were fully informed as to the law necessary to guide them in reaching their verdict.

[12] We will now consider whether, in view of the size of the verdict in favor of Mrs. Daniel, the amount thereof was based upon evidence properly before the jury, or, if any verdict at all should have been rendered in favor of plaintiffs, the rendition of such verdict in any amount was based upon the improper matters concerning the question of insurance. We are satisfied that the facts of this case justify the verdict in favor of Mr. Daniel, and in some amount in favor of Mrs. Daniel, and that the improper matters concerning insurance may only be considered in connection with the amount of the jury's award to the latter. Considering the nature and extent of the injuries, the fact that the injury to her arm and hand are reasonably certain to be permanent; the suffering resulting from the accident; that she was still suffering some pain at the time of the trial; her age, she being 32 or 33 years old at that time; also, the fact that even further surgical and other operations, in all probability, will not correct the injuries to her arm and hand; and the further fact that the jury and court heard the witnesses, and particularly observed the condition of Mrs. Daniel, and the jury having rendered their verdict in the amount stated; and the court, in denying a

motion for a new trial, having, in effect, approved such verdict—we are not prepared to hold that, under the evidence in the case and the plain instructions of the court, the alleged misconduct, or claimed errors referred to, resulted in prejudice to the rights of the defendant.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

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97 Cal. App. 707

PEARSON v. CRUMMER. (Civ. 5201.)

District Court of Appeal, Second District, Division 2. California. March 20, 1929.

1. Appeal and error 🔑544(1)—On appeal on judgment roll only, findings of fact are not reviewable.

Findings of fact cannot be questioned on appeal founded upon the judgment roll alone.

2. Brokers 🔑60—Broker having completely performed services resulting in agreement for exchange of properties was entitled to commission, irrespective of whether exchange was consummated.

Where broker employed to negotiate exchange of property had done everything for which he was employed, and the minds of the parties had met as to all matters except one reserved for future determination, the broker's commission was earned when that matter was determined, irrespective of whether exchange was ever consummated.

3. Brokers 🔑43(3)—Statute did not deprive broker of compensation, whether services were rendered prior to signing contract or contract executed merely in confirmation of obligation (Statute of Frauds).

Broker's right to compensation for negotiating contract for exchange of property was not rendered unenforceable by Statute of Frauds (Code Civ. Proc. § 1973) on refusal of employer to consummate exchange, irrespective of whether defendant had realized fruits of plaintiff's services before signing contract of employment or had executed same as promise to pay for services already rendered and in acknowledgment and confirmation of obligation.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by F. T. Pearson against C. C. Crummer. Judgment for plaintiff, and defendant appeals. Affirmed.

Hazlett & Albee, of Los Angeles, for appellant.

Walter C. Davison, of Riverside, for respondent.

CRAIG, J. The respondent instituted an action in the superior court of Riverside county for commissions alleged to have been earned by him as a realtor in obtaining for appellant an agreement in writing, between the latter and G. W. Short and Henry Pitcher, for the exchange of certain real and personal properties. A demurrer and motion to strike out portions of the complaint having been overruled, and after trial judgment being rendered in favor of the plaintiff, the defendant appealed.

The plaintiff alleged that he procured for the defendant a contract in writing, by the terms of which the defendant agreed to convey certain real property, described in the complaint, for certain real property of the value of $30,000, and the "stock of feed, grains, fuel, tires, etc., and two trucks and fixtures connected with the business," including parts of farm machinery, seeds, poultry supplies, and all personal property and stock in trade, of the value of $12,000, belonging to the defendant. The contract also provided for the delivery of "one Bethlehem truck and one stump puller to be decided upon later." The complaint further alleged that the plaintiff was employed by defendant to obtain such agreement, for which the latter agreed to pay him a commission of 2½ per centum of the value of defendant's real property, and 5 per centum of the value of the personal property as it should inventory at the time of acceptance and approval of the agreement for exchange. The plaintiff averred that the parties to the proposed exchange inspected all of the properties mentioned, and that each executed and delivered to the other said exchange contract.

It appears that the contract of employment was at first merely oral, but that, after such inspection and definite agreement, and before conveyance by either party, it was committed to writing, providing that, in the matter of commission "in the deal now pending," said commission should be paid "on or before consummation of this exchange," and that the value of the personal property should be based "on the amount on hand at the acceptance or approval of said agreement" between the vendors.

The grounds of appeal consist of contentions (1) that the description and amount of personal property proposed to be conveyed was uncertain; (2) that, since the personal property was worth more than $200, the statute of frauds required some note or memorandum in writing, signed by the party to be charged, but that the contract of employment was not signed until after execution of the exchange agreement; and (3) that the plaintiff did not allege nor prove that the exchange was consummated, and hence that no commission was earned.

[1] The findings of fact and judgment recite that the cause came on regularly for trial, and that evidence, both oral and documentary, having been introduced by the respective parties, and the cause having been

argued and submitted, the court rendered its decision and judgment accordingly in favor of the plaintiff in the sum of $1,136.90, together with interest and costs. Since the appeal is founded upon the judgment roll alone, we are not called upon, nor are we empowered, to question findings of fact. It was agreed that the commission of 5 per centum be computed upon the amount of personal property "on hand at the acceptance or approval of said agreement," and that all commissions be paid "on or before consummation." The trial court found that the value of the personal property as of the time stipulated, excluding the Bethlehem truck and stump puller, was $11,000. The plaintiff also alleged, and the court found, that the parties had agreed that whether or not the truck and stump puller might be included should not affect the trade, and that the plaintiff did and performed all of the conditions of his contract, which is tantamount to a declaration that, if the deal were not consummated, it was through no fault of respondent. The court further found and adjudged that the plaintiff earned, under his contract of employment, a commission of $1,300, and that the allegations of the answer were untrue.

We must presume that the preponderance of the evidence adduced by the respective parties compelled the rendition of the findings and judgment as presented by the record before us, and that the amount and value of the personalty on the date of acceptance and approval of the principal contract was made definite and certain at the time of trial.

[2, 3] The plaintiff having done everything that he was employed to do, the commissions were earned. The minds of the parties definitely met, with the one exception last above noted, which was left for future determination. That element having been ascertained, all that remained was the actual exchange by mutual conveyances (i. e., the consummation of the exchange), over which the plaintiff had no control. The solemn covenants of the contracting parties required performance of this, the vital object of their contract, but, if by mutual consent or owing to the default of either party, the conveyances were not completed, the plaintiff was entitled to compensation, for the reason that he had earned it, and that it had previously been agreed that the commissions should be paid on or before such event. We do not deem it necessary upon the facts as presented to seriously consider the applicability of the statute of frauds (Code Civ. Proc. § 1973) in such cases, since in either view, as to whether the defendant had realized all the fruits of the plaintiff's services before signing the contract of employment, or had executed the same as a promise to pay for services already rendered and in acknowledgment and confirmation of the obligation, his failure or refusal to make the conveyances would not absolve him therefrom.

Other grounds assigned for reversal are directed at the complaint, but are of the same tenor, and raise no different issues of law.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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97 Cal. App. 51

WELLNITZ v. SACRAMENTO SUBURBAN FRUIT LANDS CO. (Civ. 3610.)★

District Court of Appeal, Third District, California. March 21, 1929.

Hearing Denied by Supreme Court April 18, 1929.

Fraud ⚷47—Allegation that property as represented was worth in excess of $2,000 amounts only to claim that it was worth such sum.

Allegation of complaint, in action for damages on account of fraudulent representations in sale of land, that property would have been worth in excess of $2,000 if it had been as represented, amounts to no more than that it would have been worth $2,000.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 274 P. 1016.

Butler, Van Dyke & Desmond, of Sacramento, for appellant.

Ralph H. Lewis and George E. McCutchen, both of Sacramento, for respondent.

PER CURIAM. Appellant has filed a petition for a rehearing, in which counsel reargue the question of the measure of damages. They urge that "the jury may have found in favor of defendant upon the matter of whether or not there was a representation as to the market value of the land" and against it on the other alleged false representations, "first, that the value of the land was the sum of $1,000, and that its value, had the false representations been true, would have been $2,620; and so that the plaintiff's damages were the sum of $1,620, the amount which the jury actually found he had lost." If it be conceded that counsel's premises are correct, then their syllogism is faultless and their conclusion irresistible.

The only theory upon which defendant's rights could have been prejudiced by the application of the California rule as the measure of damages is that the jury may have found that the property would have been worth more than $2,000 if it had been as represented. If they found such value would have been $2,000, the amount for which the

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★Hearing denied by Supreme Court.

plaintiff became liable, the application of either rule would lead to the same result. If the jury found that such value would have been less than $2,000, the California rule would be more favorable to the defendant than would the Minnesota rule.

The complaint alleges "that had said real property been as represented, it would have been worth in excess of $2,000, but, by reason of the actual condition thereof, said real property was never worth in excess of $50, and plaintiff has been damaged by reason of the fraud and deceit of defendant, as aforesaid, in the sum of $1,950." Under familiar rules of pleading, the allegation that the property "would have been worth in excess of $2,000" if it had been as represented amounts to no more than that it would have been worth $2,000. The prayer is for judgment in the sum of $1,950, the difference between the alleged value of $50 and the represented value of $2,000. The appellant has not called attention to any evidence in the record, and none has been found, to the effect that the land would have been worth more than $2,000 if it had been as represented. There being nothing in the pleadings or the evidence to warrant a finding that the land would have exceeded that sum in value if the representations had been true, it is not to be presumed that the jury so found. Since the jury could not have found that such value exceeded $2,000, and that sum being the amount the plaintiff had obligated himself to pay for the land, the amount of his damages under the California rule could not have been more than under the Minnesota rule, and therefore the defendant suffered no possible prejudice from the application of the California measure of damages.

Rehearing denied.

98 Cal. App. 28

PEOPLE v. STEVENS. (Cr. 1769.)★

District Court of Appeal, Second District, Division 1, California. March 28, 1929.

Rehearing Denied April 9, 1929. Hearing Denied by Supreme Court April 25, 1929.

Indictment and information ⟹110(31)—Information charging offense of possessing still in language of statute is sufficient; "designed" (Acts 1927, p. 497).

In Acts 1927, p. 497, relating to stills, word "designed" implies intention of defendant to use prohibited articles for unlawful purpose described in statute so that information charging offense of possessing still in language of statute is sufficient.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Designed.]

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

A. L. Stevens was convicted of possessing a still, and he appeals. Affirmed.

M. C. Spicer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

YORK, J. The defendant was convicted of having in his possession and control one still worm, two still caps, one still condenser, and one stilling device, all of which articles are alleged to have been designed for use in the manufacture and production of intoxicating liquor for beverage purposes.

The information under which the appellant was tried and convicted is sufficient, in that it states facts sufficient to constitute a public offense under the provisions of the "Act relating to stills," found in Statutes of 1927, p. 497.

The venue was amply proved not only by the statement as to location of a certain ranch, but by reference to certain streets in Ontario, and the location of the property where the still was found with reference to its being in Cucamonga township just outside the city limits of the town of Ontario. The fact that this township and town are wholly within the county of San Bernardino is a fact of which the court can take judicial cognizance. People v. Wright, 79 Cal. App. 523, 250 P. 204.

There was sufficient evidence to support the finding of the jury that the defendant was guilty, as charged. It is not necessary, under the law, that there should be direct evidence to show any intent on the part of the appellant to use the articles in the manufacture of intoxicating liquor for beverage purposes. The charge that was submitted to the jury was that of having in his possession the property described, *which articles were designed for use* in the manufacture or production of intoxicating liquor for beverage purposes. There was evidence that the articles found by the officers were such articles as the defendant was charged in the information with having in his possession, and that these articles were each of them *designed* for use in the manufacture or production of intoxicating liquor for beverage purposes.

It is not necessary that all of the component parts of a still should be produced by the prosecution, or that proof should be introduced that the articles found in his possession were sufficient to make a complete still, from which intoxicating liquor could be produced. The section of the statute does not require any more proof than proof of the facts alleged in the information.

No objection was here made to any of the instructions given, and the one objection to the introduction of evidence is answered by the statements hereinbefore contained in this opinion.

★Rehearing denied. Hearing denied by Supreme Court.

The judgment and order denying motion for new trial are therefore affirmed.

CONREY, P. J., and HOUSER, J. We concur in the judgment. We wish to make it clear, however, that in our opinion the word "designed" as used in the statute implies an intention of the defendant to use the prohibited articles for the unlawful purpose described in the statute. This being so, the information charging the offense in the language of the statute is sufficient. We think also that there is in the record sufficient evidence to support the implied finding that the defendant did intend to use the distilling devices referred to in the information in the manufacture and production of intoxicating liquor for beverage purposes.

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97 Cal. App. 692

PEOPLE v. JACKSON. (Cr. 1765.)

District Court of Appeal, Second District, Division 1, California. March 20, 1929.

Criminal law ⇨829(18)—Refusing instructions on reasonable doubt held not error, where they were merely refinements or elaborations of definition in instruction given (Pen. Code, § 1096, and § 1096a, as added by St. 1927, p. 1039).

Refusal of instructions on reasonable doubt *held* not error, where they were merely refinements or elaborations of definition and doctrine in Pen. Code, § 1096, set forth in instruction given, in compliance with section 1096a, as added by St. 1927, p. 1039.

Appeal from Superior Court, San Diego County; Shelley J. Higgins, Judge.

Marsh J. Jackson was convicted of robbery, and he appeals. Affirmed.

Whelan, Whelan & Smith, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CRAIL, Justice pro tem. The defendant was convicted of robbery. It is contended by him that the trial court erred in admitting certain hearsay evidence, that the district attorney was guilty of misconduct, and that the trial court erred in refusing to give certain instructions relative to reasonable doubt.

We are satisfied that there was no reversible error in the admission of evidence. People v. Hale, 64 Cal. App. 523, 222 P. 148. Neither was the conduct of the district attorney such as would constitute reversible error. The court, in compliance with section 1096a, Penal Code, added by St. 1927, p. 1039, gave an instruction fully setting forth the definition and doctrine of reasonable doubt as contained in section 1096, Penal Code. The instructions asked by defendant were merely refinements or elaborations of this definition and doctrine. The refusal to give them was not prejudicial.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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97 Cal. App. 682

RUZANOFF et al. v. RETAILERS CREDIT ASS'N OF SACRAMENTO. (Civ. 3615.)★

District Court of Appeal, Third District, California. March 20, 1929.

Rehearing Denied April 19, 1929. Hearing Denied by Supreme Court May 16, 1929.

1. Replevin ⇨100(1)—Damages are recoverable for retention of personal property, whether delivery can be had or not (Code Civ. Proc. § 667).

Under Code Civ. Proc. § 667, relating to judgment in action for possession of personal property, plaintiff is entitled to damages for detention of property, whether delivery thereof can be had or not.

2. Appeal and error ⇨1041(2)—Allowing amendment to prayer of complaint to recover personal property, by striking demand for recovery of property or value, did not prejudice defendant.

Allowance of amendment to prayer of complaint in action for recovery of personal property, by striking therefrom demand for recovery of property, or its value in case delivery could not be had, *held* not to prejudice defendant, in that amendment did not enlarge, but merely limited, the relief to which plaintiffs were entitled.

3. Replevin ⇨11(2)—Proof of demand for possession of personal property was not required, where answer denied right to possession.

Where answer in action for recovery of personal property denied plaintiffs' right to recover, and demand for possession thereof would have been useless, proof of demand under such circumstances was not required.

4. Replevin ⇨97—Findings in action to recover personal property held to support judgment for damages.

Findings in action for recovery of personal property relative to damage by the withholding of possession by defendant *held* sufficient to support judgment for damages.

5. Replevin ⇨82—Evidence held to establish damage in amount of $450 for withholding possession of personal property.

Evidence in action to recover possession of personal property *held* sufficient to show that plaintiffs were damaged in the amount of $450 by reason of defendant's continued withholding of possession of such property.

★Rehearing denied. Hearing denied by Supreme Court.

6. Replevin 🔑79—Successful party in replevin is not confined to interest as damages, if he can establish that value of use of property exceeded interest.

Though ordinarily, in replevin, loss of use and other injuries may be compensated by allowing interest on value of property, successful party nevertheless is not confined to interest as damages, if he can establish fact that value of use of property of which he was deprived exceeded interest.

7. Replevin 🔑76—Recovery may be had for usable value of property, regardless of whether other property was hired to take its place or not.

Plaintiffs in action to recover personal property and fixtures or their value were entitled to compensation for usable value of property of which they were deprived, regardless of whether they hired other property to take its place or not.

8. Replevin 🔑76—Recovery could be had for salary paid employee during week business was closed because of removal of personal property.

Plaintiffs, in action to recover personal property and fixtures or its value, were entitled to recover amount paid as salary to employee during week business was closed by reason of defendant's removal of property.

9. Replevin 🔑76—That loss of profits and of customers while business was closed because of removal of property cannot be accurately measured does not preclude compensation (Civ. Code, §§ 992, 993).

Though detriment due to loss of profits during week that business was closed by reason of removal of personal property, and fixtures, or loss of customers, constituting good will of business, in accordance with Civ. Code, §§ 992, 993, could not be measured with mathematical accuracy, such fact is not a sufficient reason for denying compensation therefor as damages in action to recover personal property and fixtures, or their value.

10. Damages 🔑103—Measure of damages for torts is ordinarily same as that for breach of contracts (Civ. Code, §§ 3300, 3333).

Measure of damages for torts, provided by Civ. Code, § 3333, is ordinarily the same as that for breach of contracts, as prescribed by section 3300.

11. Replevin 🔑72—Evidence held to show sufficient notice of right to possession of property at time of removal.

Evidence in action to recover personal property and fixtures, or their value, *held* to show sufficient notice to defendant of plaintiffs' right to possession of property at time of removal.

Appeal from Superior Court, Sacramento County; W. A. Anderson, Judge.

Action by Mary Ruzanoff and another against the Retailers Credit Association of Sacramento. Judgment for plaintiffs, and defendant appeals. Affirmed.

Chas. L. Gilmore, of Sacramento, for appellant.

H. Nelson French and Ralph H. Cowing, both of Sacramento, for respondents.

FINCH, P. J. The plaintiffs brought this action for the recovery of personal property and fixtures, or their value, if delivery could not be had, and damages for the detention thereof. After the case was tried and submitted, the court, on motion of counsel for the plaintiffs, ordered that the prayer of the complaint be amended by striking therefrom the demand for the recovery of the property or its value in case delivery could not be had.

The court found in substance: That at the times mentioned in the complaint the plaintiffs were entitled to the possession of such property, consisting of "one ice box, one cash register, one counter, one glass case, two scales, one meat block, and one bread box"; that December 29, 1926, the defendant wrongfully took possession of the property and "refused to deliver said property to plaintiffs, and still refuses to do so; * * * that plaintiffs used said personal property and fixtures to carry on and conduct a general grocery business; that by reason of the wrongful taking of the possession of said personal property * * * and the continued withholding of the possession of the same by defendant" plaintiffs were damaged in the sum of $450. Judgment for that sum was entered in favor of the plaintiffs, and the defendant has appealed.

[1, 2] Appellant contends that "the amendment to the prayer for judgment was erroneously allowed." Section 667 of the Code of Civil Procedure provides: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention." Under such a judgment the plaintiff is entitled to damages for the detention of the property, whether delivery thereof can be had or not. Nahhas v. Browing, 181 Cal. 55, 57, 183 P. 442 (6 A. L. R. 476); Blodgett v. Rheinschild, 56 Cal. App. 728, 739, 206 P. 674. It does not appear, therefore, that the defendant was in any manner prejudiced by the amendment, which did not enlarge, but merely limited, the relief to which the plaintiffs were entitled. From the amendment ordered by the court and the findings, it is clear that nothing was allowed for the value of the property, but that the judgment merely awards the plaintiffs damages for the wrongful detention thereof. Since judgment was not given for the value of the property, it is of no importance that the evidence fails to show such value.

[3] The answer denies the plaintiffs' right to possession of the property, and therefore

a demand for the possession thereof would have been useless. Under such circumstances proof of a demand is not required. 5 Cal. Jur. 169.

[4, 5] Appellant contends that the findings do not support the judgment and that the evidence is not sufficient to show that the plaintiffs were damaged in the amount found by the court. It appears from what has been stated herein that the findings support the judgment. Plaintiffs held the property in question and the building in which such property was located under a lease for the term of one year from November 5, 1926, at a monthly rental of $40 for the first three months and $45 a month thereafter. Plaintiff John Powl testified that the gross sales of the plaintiffs' business were as follows: November, 1926, $2,500; December, $2,600; January, 1927, $1,500, and February, $1,100; that they quit business about March 12; that in taking the property from plaintiffs' possession, during the absence of the witness, the defendant removed fresh meat from the ice box, causing it to spoil, and placed other provisions and goods in places that rendered them valueless, causing a total loss of nearly $60; that the removal of the personal property and fixtures made it impossible for the plaintiffs to do any business for about a week, at the end of which time they hired other fixtures and apparatus, at a rental of $47.10 a month, to take the place of the property which the defendant had taken; that the plaintiffs had 50 or 60 daily customers during the month of December; that by reason of their business being closed for a week they lost about half of their customers and were unable thereafter to regain them; that they had in their employ one person at a salary of $100 a month; and that they continued to pay the owner of the building $40 a month until the 1st of March. It cannot be said that the foregoing evidence is insufficient to warrant the inference that the plaintiffs were damaged in the sum of $450 by the wrongful detention of the property by the defendant.

[6-10] "Ordinarily, in replevin, loss of use and other injuries resulting from the taking and withholding of personal property may be compensated by allowing the successful party to recover interest on the value of the property from the time of the taking to the date of the verdict. However, he is not confined to interest as damages, if he can establish the fact that the value of the use of the property of which he was deprived exceeded the interest." Drinkhouse v. Van Ness, 202 Cal. 359, 379, 260 P. 869, 877. This does not mean that recovery for wrongful detention is limited in all cases to such interest or usable value. In Live Stock G. P. Co. v. Union, etc., Co., 114 Cal. 447, 450, 46 P. 286, 287, it is said that the successful plaintiff in replevin is entitled to such damages as will "compensate him for all the detriment proximately caused by the wrong complained of (Civ. Code, § 3333)."

Section 3333 of the Civil Code, cited in the foregoing quotation, provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." The loss of provisions and other merchandise was directly caused by the acts of the defendant. The plaintiffs were entitled to compensation for the usable value of the property of which they were deprived, regardless of whether they hired other property to take its place or not. Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471. They were entitled to recover the amount paid as salary to their employee during the week their business was closed. Lyle v. Seller, 70 Cal. App. 300, 223 P. 345.

Store fixtures are not ordinarily replaceable immediately, and the plaintiffs' loss of profits during that week was proximately caused by defendant's wrongful detention of the property in question as was, also, the loss of their customers. The loss of such customers was the loss, to that extent, of "expectation of continued public patronage," which constituted the good will of their business. Civ. Code, § 992. "The good-will of a business is property." Civ. Code, § 993. The detriment due to loss of profits, during the week mentioned, and the loss of customers cannot be measured with mathematical accuracy, but that fact is not a sufficient reason for denying compensation. Schumann v. Karrer, 184 Cal. 50, 57, 192 P. 849.

The measure of damages for torts, provided by section 3333 of the Civil Code, is ordinarily the same as that for the breach of contracts prescribed by section 3300 of the Civil Code. 8 Cal. Jur. 814; Siminoff v. Jas. H. Goodman & Co., 18 Cal. App. 5, 15, 121 P. 939. The following cases, some involving torts and other breaches of contract, are illustrative of the elements of damages to be considered: Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601; Schumann v. Karrer, supra; Hawthorne v. Siegel, 88 Cal. 159, 25 P. 1114, 22 Am. St. Rep. 291; Riechhold v. Sommarstrom Invest. Co., 83 Cal. App. 173, 256 P. 592; Lyle v. Seller, supra; Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471.

[11] The defendant purchased the property at a sheriff's sale to satisfy a judgment in favor of the defendant herein against Joe Butco, the owner of the store building in which such property was situated. Powl testified that at the time of the sale the defendant asked him if he desired to purchase the property and that he replied: "I don't have to buy that, I got contract from Joe Butco for all fixtures here." The plaintiffs were in possession of the property at the time, and had been in possession of it for nearly two months before the sale. This evidence shows

sufficient notice to defendant of the plaintiffs' right to the possession of the property.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

206 Cal. 740

COLEMAN v. FARWELL. (L. A. 9852.)

Supreme Court of California. March 29, 1929.

1. Appeal and error 🔑901, 1032(1)—Burden rests on complaining party not only to show error, but to show sufficient prejudice to justify reversal (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, prohibiting reversal for erroneous admission or rejection of evidence, unless court after examination of the entire cause is of opinion that error resulted in miscarriage of justice, burden rests upon party complaining not only to show error, but also to show that error is sufficiently prejudicial to justify reversal.

2. Appeal and error 🔑691—Error in admission or rejection of evidence cannot be declared prejudicial, when bill of exceptions does not contain all the evidence (Const. art. 6, § 4½).

In view of Const. art. 6, § 4½, prohibiting reversal unless error resulted in miscarriage of justice, errors in admission and rejection of evidence cannot be declared prejudicial, where bill of exceptions states that it does not contain all the evidence.

3. Appeal and error 🔑907(4)—It will be presumed that evidence omitted from bill of exceptions authorized findings, judgment, and decision.

Every intendment is in favor of findings, decision, and judgment, and, in support thereof, it will be presumed when bill of exceptions does not contain all the evidence that omitted evidence authorized the findings, etc., unless there is something in the record to overcome such presumption.

4. Appeal and error 🔑705—Allowance of $1,250 as attorney's fees in action on note for $5,000 cannot be held unreasonable, when record does not show extent of services.

Allowance of $1,250 as attorney's fees in action on note for $5,000, defended on ground of fraud and failure of consideration, while seemingly out of proportion to services required, cannot be held unreasonable where record does not disclose extent of services required and performed.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by R. B. Coleman against Lyman Farwell. From a judgment for plaintiff, defendant appeals. Affirmed.

Winterer, Combs & Ritchie, of Los Angeles, for appellant.

Odell S. McConnell and Bordwell, Mathews & Wadsworth, all of Los Angeles, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff in an action on a promissory note in the principal sum of $5,000. The plaintiff was the payee and the defendant the maker. The defenses were fraud and failure of consideration. The court found in favor of the plaintiff on all issues raised by the pleadings. The record is presented in a bill of exceptions which contains the following stipulation: "It is hereby stipulated and agreed by and between the attorneys of the respective parties to the within entitled action, that the foregoing bill of exceptions contains only part of the evidence offered by both plaintiff and defendant and was prepared and served within the time allowed by law and the stipulations of the plaintiff." In settling the bill the trial judge made the following order: "The foregoing bill of exceptions contains only a part of the evidence offered by both plaintiff and defendant; there was, however, and the court so certifies, sufficient evidence to sustain the findings of the court and said bill was prepared and served and presented within the time allowed by law and the stipulations of plaintiff and defendant, and the part of the record and proceedings of the said action which is included in said bill of exceptions is true and correct and said bill of exceptions as modified by the statement in this certificate is this 24th day of March, 1927, settled and allowed."

[1-3] As grounds for reversal the defendant specifies numerous alleged erroneous rulings in the admission and rejection of evidence and error in denying his motion for a new trial. Some of the rulings, when considered in connection with the immediate context, would appear to be erroneous. It is considered unnecessary to enumerate them for the reason that error under our law is no longer deemed prejudicial. In order to justify the reversal of the judgment on the ground of erroneous admission or rejection of evidence, the reviewing court must be of the opinion, after an examination of the entire cause, including the evidence, that the error complained of has resulted in a miscarriage of justice. Const. art. 6, § 4½. The burden rests upon the party complaining not only to show error but also to show that the error is sufficiently prejudicial to justify a reversal. 2 Cal. Jur. p. 1008 and cases cited. Confronted with the foregoing stipulation of counsel and the certificate of the trial judge reciting that the bill of exceptions contains only a part of the evidence offered by both the plaintiff and the defendant, and since, therefore, the record does not contain all of the evidence, we are unable to fulfill the constitutional requirement and declare that the errors complained of were prejudicial. See Foster v. Young, 172 Cal. 317, 156 P. 476. Every intendment is in favor of the findings, decision, and judgment, and in support thereof it will be presumed that the omitted evidence authorized the same unless there is something in the record to overcome the presumption. Owen v. Morton, 24 Cal. 373; 2 Cal. Jur. p. 852 et seq. For aught that appears in the record there may have been evidence of sufficient competency and weight to overcome any detriment caused by the erroneous rulings.

[4] The allowance of $1,250 as attorneys' fees is complained of as excessive. In an ordinary suit of this character and amount the allowance would seem to be out of proportion to the services required. One of the necessary elements entering into the proper allowance of attorney's fees is the service performed in the particular case. Here again the record does not disclose the extent of the service required and performed by counsel for plaintiff in this case. It is a matter of common experience that cases involving issues of fraud may require extensive preparation for trial and a protracted hearing. In the absence of a record showing what services were required by plaintiff's counsel, we cannot say that the allowance was unreasonable.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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206 Cal. 753

HARE et al. v. CRAIG. (L. A. 9344.)

Supreme Court of California. March 30, 1929.

1. Easements ⚿61(9½)—Finding that use was open, continuous, adverse, and under claim of right and with owner's acquiescence and knowledge held not to mean it was permissive.

In action to establish easement, finding that use of strip in question was open, continuous, uninterrupted, adverse, and under claim of right and with knowledge and acquiescence of defendants and their predecessors, did not mean that use was permissive or under license.

2. Easements ⚿16—Owner's use of paths or roadways cannot be adverse and give easement to subsequent purchasers of part of tract.

An owner's use of paths and roadways on his own land cannot be adverse or give right to easement of right of way in favor of subsequent purchasers of portion of tract.

3. Easements ⚿3(2)—Easement appurtenant to lots could not be acquired when there was no use in connection with such lots.

A right of way by prescription appurtenant to certain lots could not be acquired, where there was no use of the strip in question in connection with such lots.

4. Dedication ⚿20(3)—When public has traveled road without permission or objection by owner for five years, conclusive presumption of dedication arises.

When the public or such portion of the public as had occasion to use road has traveled over it for more than five years with owner's knowledge, without asking or receiving permission and without objection, conclusive presumption of dedication to public arises.

5. Easements ⚿36(3)—Evidence of use by public generally would not support finding that abutting owners acquired right of way by prescription.

In action to establish easement by prescription, evidence showing use of the strip in question by the public generally as a road for many years did not warrant finding that abutting owners gained private way appurtenant to their lands by prescriptive use.

6. Judgment ⚿249—Complaint on theory of private way appurtenant to lands would not support judgment on theory of dedication to public.

In action to establish easement by prescription, complaint, based on theory of private way appurtenant to plaintiffs' lands, would not sustain judgment on theory of dedication to public use as roadway.

In Bank.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by E. A. Hare and others against Mary C. Craig. From a judgment for plaintiffs, defendant appeals. Reversed.

Chas. D. Swanner and Roland Thompson, both of Santa Ana, for appellant.

Tipton & Cailor, of Los Angeles, for respondents.

SEAWELL, J. Plaintiffs and respondents have failed to file a brief or to furnish the court with points and authorities in aid of their cause. Said plaintiffs brought the action to establish an easement by prescription to use as a right of way the whole of lots 9 and 10, block B, Baker's addition tract, town of Westminster, county of Orange, and to restrain defendant, Mary C. Craig, from obstructing or destroying said right of way. Defendant is the owner of the westerly 34 feet of the strip of land over which the right of way is claimed and of an undivided one-half interest in the remaining 16 feet of said land. Plaintiffs own land adjoining lots 9 and 10 on the west. Upon the trial it was conceded by defendant that a right of way existed over the easterly 16 feet of lots 9 and 10. The court below entered judgment for plaintiffs, decreeing the existence of a right of way over the entire strip of land, from which defendant appeals.

The complaint is in two counts, which are practically identical with the exception that in count 1 the use by which plaintiffs claim to have acquired a right of way by prescription is alleged to have commenced in 1910, and in count 2, 1877 is designated as the date of commencement. The court found, in language following the complaint almost word for word, that on or about June, 1877, the plaintiffs and their predecessors in interest commenced to occupy and use the strip of land over which the right of way is claimed for ingress and egress to their respective homes; "that said occupancy and use by the plaintiffs and their predecessors in interest was open, continuous, uninterrupted, adverse and under a claim of right and with the knowledge and acquiescence of the defendants and their predecessors in interest and estate; that the plaintiffs and their predecessors in interest and estate occupied and used said strip of land in the same manner and to the same extent that the said land had been occupied and used from the beginning (June 1877) and until on or about the 7th day of December, 1923, when the same was obstructed by defendants."

[1] Appellant here contends that the finding that the use of plaintiffs was with the "knowledge and acquiescence of defendant and her predecessors in interest and estate" is a finding that the use was permissive and not adverse. Although more appropriate language might well have been used, it is apparent from said finding, considered as a whole, that the object of this declaration was not to imply that the use was by license or permission, but, rather, that defendant and her predecessors had "acquiesced" in the sense that they had not committed acts which would interrupt the continuity of the adverse use and prevent the running of the statutory prescriptive period of limitations.

[2] The conclusion of the court below that an "adverse use" was initiated to 1877 by plaintiffs' predecessors in interest and estate, which ripened into an easement appurtenant to land now owned by plaintiffs, is, as to the date when said user was found to have commenced, directly contrary to the evidence. Until 1889 the lands now owned by plaintiffs and defendant constituted a portion of a large tract held in single ownership. An owner's use of paths and roadways upon his own land cannot be "adverse," or give rise to an easement of right of way in favor of subsequent purchasers of a portion of said tract. An easement of right of way is a right in the land of another, and necessarily implies a separation in the ownership of the land over which the easement is claimed and the land to which it is appurtenant.

[3] In 1888 a map dividing the tract into residence lots was filed for record. At that date title to the lots over which the right of way is claimed and to the lots now owned by plaintiffs was vested in the same persons. In 1889 lot 11, to which plaintiff Marie L. Harris now claims title through mesne conveyances, was sold, and in 1892 lots 9 and 10, over which the right of way is claimed, were transferred; the ownership of lot 12 being retained. Thus, as to lot 11, 1889, rather than 1877, is the earliest date at which a prescriptive use could have been initiated by the predecessors in interest of plaintiff Marie L. Harris, and as to the southern half of lot 12, now owned by the Hares, 1892 is the earliest date. There is absolutely no showing, however, that the persons who owned the southern half of lot 12 prior to the time plaintiff E. A. Hare and his son acquired title by deed in 1910, occupied said lot 12, or made any use, adverse of otherwise, of lots 9 and 10 as a right of way. Plaintiff E. A. Hare testified that when he acquired the said property it was vacant land. This would tend to negative a use of lots 9 and 10 by the owners of the southern half of lot 12. Proof as to the use of lots 9 and 10 by the owners of lot 11 prior to the conveyance to Marie Larter Hare in 1912 is also lacking. A right of way by prescription appurtenant to said lot 11 and the southern half of lot 12 could not be established except by a use in connection with said lots.

[4] Although a continuous adverse use of a right of way for five years from the dates of acquisition of lot 11 and the southern half of lot 12 by members of the Hare family in 1912 and 1910, respectively, would be sufficient to establish a right by prescription, we are not disposed, as an appellate court, to

make a finding as to the existence of a private right of way appurtenant to plaintiffs' lands, for it does not appear as a matter of law that a private right of way was thus acquired. There is evidence tending to establish a dedication to the public as a roadway, based on long user by the public of not only the easterly 16 feet of said lots but of the entire 50-foot strip, and a right in plaintiffs to use the roadway without interference as members of the public, rather than as owners of a private right of way appurtenant to land. When the public or such portion of the public as had occasion to use a road has traveled over it for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by any one, a conclusive presumption of dedication to the public arises. Hartley v. Vermillion, 141 Cal. 339, 74 P. 987; Lantz v. City of Los Angeles, 185 Cal. 262, 196 P. 481; Leverone v. Weakley, 155 Cal. 395, 101 P. 304; Southern P. Co. v. City of Pomona, 144 Cal. 339, 77 P. 929; Schwerdtle v. County of Placer, 108 Cal. 589, 41 P. 448.

[5, 6] Lots 9 and 10 embrace a strip of land 50 feet in width by 314 feet in length, running through the center of block B from Almond boulevard, the main street of Westminster, on the south, to a public street on the north which is not named in the record. At the time McCoy owned the entire tract, between 1873 and 1887, there was a path on the easterly 34 feet of said lots bounded by a row of cypress trees on each side and a wagon road on each side of the trees. Witnesses for plaintiffs testified that the entire 50-foot area was used by the public generally as a road. One of said witnesses remembered the roadway from 1877, and others were familiar with it from early dates. Said witnesses had used the roadway and never knew of any permission having been obtained from the owners or of any objection having been made to its use. When plaintiff E. A. Hare purchased the south one-half of lot 12, lots 9 and 10 appeared to constitute a public street, and he built his house with the front facing said lots. During his ownership the public generally had used the lots as a roadway, he testified. O. J. Day, who conducted a grocery store facing on Almond boulevard on the lot adjoining lot 9 on the east, testified that he had lately discovered that the two lots were privately owned, but had not known this for many years.

In the face of this evidence we cannot find that plaintiffs gained a private way appurtenant to their lands by prescriptive use commencing in 1910 as to the southern one-half of lot 12, and 1912 as to lot 11. The complaint as it now stands is based on the theory of a private way appurtenant to plaintiff's lands, and would not sustain a judgment based on the theory of dedication to the public use as a roadway.

Judgment reversed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

SMELLIE et al. v. SOUTHERN PAC. CO. et al. (Sac. 4057.)★

Supreme Court of California. March 26, 1929.

Rehearing Granted April 25, 1929.

1. Automobiles 🔑224(1)—Guest in automobile must act as reasonably prudent man.

Though negligence of driver of automobile is not imputed to guest, guest must act as reasonably prudent man would act in similar circumstances.

2. Automobiles 🔑224(4)—Railroads 🔑327(12)—Guest in automobile, stating to driver, "It's all clear; let's go," held contributorily negligent as to injury received in crossing collision.

In action against railroad and driver of automobile for death of guest in car, resulting from collision at crossing, deceased, who made statement to driver after freight train had passed, "It's all clear; let's go," *held* contributorily negligent as matter of law.

3. Evidence 🔑591—Testimony of driver of automobile, called as adverse party in action for death at crossing, that deceased guest made statement, "It's all clear; let's go," held admissible and binding on plaintiff, where not rebutted (Code Civ. Proc. § 2055).

In action against railroad and driver of automobile for death of driver's guest at crossing, testimony of driver under examination as adverse party under Code Civ. Proc. § 2055, that guest made statement, "It's all clear; let's go," *held* admissible and binding on plaintiff, where not rebutted.

4. Automobiles 🔑224(5)—Guest in automobile is not relieved from contributory negligence where he encourages driver to take obviously hazardous risks.

While guest in automobile is not chargeable with contributory negligence of driver, guest is not immune where he acquiesces in or encourages and advises taking risks which are obviously hazardous to his own personal security and safety.

5. Negligence 🔑136(12)—Disputable presumption that person exercises ordinary care makes no issue of fact in face of direct evidence of contributory negligence (Code Civ. Proc. § 1963, subd. 4).

Disputable presumption under Code Civ. Proc. § 1963, subd. 4, that person takes ordi-

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★Hearing granted 299 P. 529.

nary care for his own concerns, does not make issue of fact for jury, where presumption is overcome by direct evidence of contributory negligence.

6. Trial 🔑139(1)—Court should direct verdict in defendant's favor, where verdict for plaintiffs would have to be set aside.

Where trial court is of opinion that verdict for plaintiffs would have to be set aside, court is under duty to direct verdict in defendant's favor.

7. Railroads 🔑344(10)—Railroad's allegation that injuries were caused solely by negligence of deceased and another was insufficient plea of contributory negligence, in action for death.

In action against driver and railroad for death of guest in automobile, allegation in railroad's answer that injuries were caused solely because of negligence of driver and deceased was insufficient plea of contributory negligence.

8. Appeal and error 🔑197(5)—Objection raised for first time on appeal, that no issue of contributory negligence was raised by pleadings, held unavailing.

Where, in action for death, evidence on issue of contributory negligence was introduced without objection that it was inadmissible under pleadings, and no such objection was raised in argument upon motions for directed verdict and nonsuits, objection raised for first time on appeal was unavailing.

Curtis, J., dissenting.

In Bank.

Appeal from Superior Court, Madera County; S. L. Strother, Judge.

Action by Lillie D. Smellie and others against the Southern Pacific Company and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

For opinion in department, see 269 P. 657.

W. M. Conley, Philip Conley, and Matthew Conley, all of Fresno, for appellants.

L. L. Cory, of Fresno, Cooley, Crowley & Gallagher and Cooley & Gallagher, all of San Francisco, Gallaher & Jertberg, of Fresno, and H. I. Maxim, of Madera, for respondents.

PER CURIAM. This case was originally decided in department. Because of the filing of persuasive petitions for hearing in bank, largely devoted to the question whether or not the disputable presumption "that a person takes ordinary care of his own concerns" (section 1963, subd. 4, Code Civ. Proc.) created a conflict on an issue of fact as between said presumption and the direct testimony given by the witness Ireland, a hearing in bank was granted. On a re-examination of the cause and a particularly careful consideration of the point just referred to, the court is of the view that the appeal was properly decided by the department. For that reason, the opinion heretofore written by Mr. Justice SEAWELL as the department opinion is adopted as the decision of the court in bank, viz.:

This appeal is taken from a judgment for defendants upon a directed verdict returned by the jury in an action brought by the widow and four minor sons of Robert S. Smellie, deceased, to recover damages for the death of said decedent, who was killed when the automobile truck in which he was riding as the guest of defendant L. Ireland, the driver and owner thereof, was struck by a train of defendant Southern Pacific Company. The court held at the conclusion of plaintiffs' case that the evidence established as a matter of law contributory negligence on the part of said decedent, and directed a verdict to be returned in favor of defendants. The correctness of this ruling is here challenged.

The accident occurred at about 5 o'clock p. m. on June 25, 1926, in the city of Madera. The truck in which decedent was riding, and which was being driven by defendant Ireland, was of the Reo manufacture, and was used by Ireland in a general trucking business conducted by him. Ireland was called by plaintiffs as their witness under the provisions of section 2055, Code of Civil Procedure. He testified that he turned off the state highway, on which he had been traveling in a northerly direction, into Ninth street. The situs of the accident seems to have been in an outlying district of the city of Madera. He proceeded easterly on Ninth street to a point between 20 and 25 feet from the westerly rail of a side track of defendant Southern Pacific Company which intersects Ninth street, and there brought his car to a stop to permit a freight train to pass. No signal of any kind was maintained at the intersection. The freight train was moving south at a speed of 5 or 6 miles an hour, and 6 or 8 cars remained to pass the intersection when Ireland brought his truck to a stop. East of the side track and parallel thereto was the main line track of the Southern Pacific Company. The distance between the center line of the side track and the center line of the main track was 13 feet. Both Ireland and decedent had resided in Madera for many years, and Ireland testified as to his familiarity with the crossing. Doubtless the decedent was also generally familiar with existing conditions. The moment the caboose, which was the rear car of the freight train, cleared the crossing, Ireland started his truck and crossed the side track, and, in an attempt to cross the main track, the autotruck was struck by the Fresno Flyer, north bound, which was traveling on the main track at a rate of speed estimated to be about 55 miles an hour. The accident happened so quickly that not more than an interval of a second intervened between the time Ireland saw the train and the time his truck was hit by it. He looked before starting, but the outgoing freight train blocked a view of the main track, and consequently his view to the south was obstructed, and he did not see the approaching passenger train. He listened, but did not hear the passenger train because of the noise made by the passing freight train. The distance which the passenger train traveled before it could be brought to a stop furnishes some evidence as to the speed at which it was moving. Upon cross-examination by counsel for the codefendant Southern Pacific Company, Ireland testified that both he and Smellie looked before Ireland started the truck, and Smellie, who was seated by his side, said, "It's all clear; let's go." The testimony of Ireland was not contradicted by that of any other witness. Respondents did not offer any evidence in their own behalf, but, upon the conclusion of plaintiffs' case, made motions for nonsuits and directed verdicts, and the court granted the motions for directed verdicts, upon which the judgment appealed from was entered.

[1, 2] We are of the view that the evidence is susceptible of no reasonable interpretation under the rule of this state, but that as a matter of law decedent was contributorily negligent in advising Ireland to go forward when he made the remark, "It's all clear; let's go;" and hence we must sustain the action of the court below in taking the case from the jury and directing a verdict for defendants. Respondents do not contend that the negligence of Ireland was imputable to decedent, his guest. Decedent, however, was himself bound to act as a reasonably prudent man would act in similar circumstances. This is not a case where the guest, reposing complete confidence in the driver, fails himself to note the situation of possible danger, nor is it a case where a guest, observing an imminent and suddenly approaching peril, remains silent in the realization that the highest degree of prudence may consist in inaction, rather than meddlesome interference. The guest, being as fully aware of the circumstances creating the peril as was the driver, assumed to advise the driver that he could proceed in safety, and thereby consented to accept the risk to be encountered. It must be held that he has brought the misfortune upon himself, and that he can recover neither from the driver nor the third party whose negligence concurred in causing the collision. Ireland and the decedent were acquaintances, and the latter had been riding with the former for several hours prior to the accident. They had discussed the hauling of some freight which the decedent had in contemplation. At the moment of the accident, they were engaged in casual conversation as they awaited the passing of the freight train. We are unable to give any other construction to the request or advisory remark made by the decedent, "It's all clear; let's go," than that, whatever risk there might be in attempting to cross the railroad tracks, decedent was willing to assume and share it with Ireland. It amounted to the assumption of responsibility for all consequences that might flow from the attempt to cross the railroad tracks. Appellants suggest that said statement made by the decedent should be limited to the crossing of the first track or switch, and not to the main track. There can be no doubt that decedent was aware of the existence of the two parallel tracks, and that said remark applied to the situation as it was presented by the physical fact. Besides, it would have been indulging in folly for decedent to have advised Ireland as to the obvious condition of the track over which the train had just passed.

[3] It is strongly insisted by appellants that the statement or remark attributed to decedent should not have been considered for any purpose. We cannot agree with this contention. Ireland was called to the stand to show the circumstances of the accident. We do not understand it to be the rule that that portion of a transaction which is favorable to a party calling a witness may be inquired into and his adversary denied the right to elicit other parts of the identical transaction which may put a different aspect upon the case. Certainly section 2055, Code of Civil Procedure, was not intended to work any such result. We think the remark formed a material part of the transaction, if it is not indeed in the nature of res gestæ. Ireland was asked by plaintiffs if decedent was not his guest, and he replied that he was. This alone entitled the defendants to bring out the fact as to whether decedent by his participation in the movement of the truck had not taken himself out of the class into which Ireland, by his conclusion, had placed him.

The effect of testimony elicited under the provisions of section 2055, Code of Civil Procedure, was clearly stated in Figari v. Olcese, 184 Cal. 775, 195 P. 425, 15 A. L. R. 192, as follows:

> "There is no merit in appellant's objection that no testimony was taken in behalf of defendants, because of the fact that the defendants were called only as plaintiff's witnesses. Section 2055, Code of Civil Procedure, provides that a party calling and examining as a witness an adverse party 'shall not be bound by his testimony' and that the testimony of such adverse witness 'may be rebutted by the party calling him.' This provision does not mean that such testimony may not be given its proper weight, but merely, as it declares, that the party calling such witness shall not be concluded from rebutting his testimony, or from impeaching the witness. Dravo v. Fabel, 132 U. S. 487, 33 L. Ed. 421, 10 Sup. Ct. Rep. 170, see, also, Rose's U. S. Notes. In other words, such testimony is to be treated as though given on cross-examination."

See, also, Goehring v. Rogers, 67 Cal. App. 253, 227 P. 687; Gates v. Pendleton, 71 Cal. App. 752, 236 P. 365.

No attempt was made to impeach Ireland or to rebut his testimony. But, if it be conceded that, strictly speaking, the testimony objected to should not have been considered by the court as a part of the plaintiffs' case, it was admissible as a part of the defendants' case, and its effect, irrespective of order, was fatal to plaintiffs. We are of the opinion, however, that it was properly before the court and jury for consideration.

[4] The law as declared in Smith v. Maine Central R. R. Co., 87 Me. 339, 32 A. 967, is strikingly applicable to the facts of the instant case. The rule is well settled that a guest is not responsible or chargeable with the contributory negligent acts of the driver of an automobile. This rule, however, does not offer him immunity from culpability in cases where he acquiesces in or encourages and advises the encountering of risks which are obviously hazardous to his personal security and safety, such as no reasonably prudent person should assume.

[5, 6] Appellants contend that the disputable presumption "that a person takes ordinary care of his own concerns" (section 1963, subd. 4, Code Civ. Proc.), created a conflict on an issue of fact as between said presumption and the direct testimony given by witness Ireland to the effect that the directions or advice were given to him to move the truck forward, and that said issue should have been submitted to the jury. As against positive testimony, this was but a bare presumption, not supported or fortified by any independent fact in the case. "Disputable * * * presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled." Savings & L. Soc. v. Burnett, 106 Cal. 514, 39 P. 922. The trial court having heard the witness Ireland testify and having observed his manner was unquestionably of the opinion that, should the jury return a verdict in favor of the plaintiffs, it would be its bounden duty to set the verdict aside. This being so, under a long line of decisions of this state, the trial court was acting in the purview of its duty when it directed the jury to return a verdict in favor of the defendants. We cannot say, in the circumstances of the case, that the court's direction was not fully sustained by the case as presented.

[7, 8] Further, it is argued that the motions for directed verdicts on the ground of contributory negligence of the deceased were improperly granted because contributory negligence was not made an issue by the pleadings. It must be conceded that the allegation, that the injuries were caused solely and alone because of the negligence and want of care of the driver of the truck and the decedent was an insufficient plea of contributory negligence. Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 143 P. 714; Hughes v. Warman Steel Casting Co., 174 Cal. 556, 163 P. 885; Off v. Crump, 40 Cal. App. 173, 180 P. 360. However, evidence relevant to the issue of contributory negligence was introduced without objection on the part of plaintiffs that it was inadmissible under the pleadings because contributory negligence was not properly pleaded, and upon argument of the motions for directed verdicts and nonsuits no question was raised on behalf of plaintiffs as to the defective plea of the issue, but, on the contrary, it was assumed that it was involved in the case. Where the defense of contributory negligence is considered as properly pleaded throughout the trial, an objection for the first time on appeal that no such issue was made by the pleadings will not be of any avail to the objecting party. Western States, etc., Co. v. Bayside L. Co., 182 Cal. 140, 187 P. 735; Schuh v. Herron Co., 177 Cal. 13, 169 P. 682; Coffman v. Singh, 49 Cal. App. 342, 193 P. 259. Ireland at the conclusion of the evidence was granted leave to set up the defense of contributory negligence on the part of the deceased. Defendant Southern Pacific Company attempted to plead by its answer contributory negligence on the part of both Ireland and the deceased. Its answer alleged that the accident was caused "solely and alone" by the contributory negligence of said Ireland and deceased. No objection was taken by demurrer or motion as to the insufficiency of said allegation, and no specific objection was made by plaintiff as to the admission of the evidence on the ground that contributory negligence had not been sufficiently pleaded, but it was resisted by plaintiffs on other grounds. No doubt the court would have permitted an amendment which would have cured the defective pleading had the plaintiffs made the point.

The judgment appealed from is affirmed.

CURTIS, J., dissents.

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206 Cal. 775

PASADENA CITY HIGH SCHOOL DIST. OF LOS ANGELES COUNTY et al. v. UPJOHN, County Superintendent of Schools et al. (S. F. 13245.)

Supreme Court of California. March 30, 1929.

1. Statutes 🔑64(4)—Invalidity of exception in statute as to transportation of school pupils would invalidate statute (Pol. Code, § 1741, as amended by St. 1927, p. 676; Const. art. 1, § 21).

Under Pol. Code, § 1741, as amended by St. 1927, p. 676, authorizing high school districts to provide for transportation of pupils, except pupils living within limits of city, invalidity of the exception, under Const. art. 1, § 21 prohibiting grants of privileges and immunities, would destroy the whole grant of power, as there is no indication that Legislature would have enacted the section without the exception.

2. Schools and school districts 🔑159½—High school district containing two cities may provide for transportation of pupils living in city in which no high school is maintained (Pol. Code, § 1741, as amended by St. 1927, p. 676).

Under Pol. Code, § 1741, as amended by St. 1927, p. 676, authorizing high school district to provide for transportation of pupils, except pupils living within limits of city, district containing two cities, in one of which there is no high school, may provide for transportation of pupils living in the city having no high school, as well as pupils living in unincorporated territory.

3. Schools and school districts 🔑90—Statute authorizing transportation of pupils does not violate constitutional provision against gifts of public money (Const. art. 4, § 31; Pol. Code, §§ 1610, 1764b, and § 1741, as amended by St. 1927, p. 676).

Political Code § 1741, as amended by St. 1927, p. 676, authorizing high school districts to provide for transportation of pupils, is not invalid as providing for gift of public money or thing of value in violation of Const. art. 4, § 31, in view of prior provisions of Pol. Code, §§ 1610, 1741, 1764b, providing for transportation of pupils.

4. Constitutional law 🔑208(3)—Schools and school districts 🔑159½—Statute authorizing high school districts to provide for transportation of pupils, except pupils living in cities, does not provide invalid classification (Pol. Code, § 1741, as amended by St. 1927, p. 676).

Political Code, § 1741, as amended by St. 1927, p. 676, authorizing high school districts to provide for transportation of pupils, except pupils living within limits of city, does not provide unconstitutional classification, though some pupils within city may be farther from school than pupils living outside city.

In Bank.

Original application by Pasadena City High School District of Los Angeles County and another against H. S. Upjohn, as County Superintendent of Schools of the County of Los Angeles, and another. Writ granted.

Cruickshank, Brooke & Evans, of Pasadena, for petitioner the Pasadena City High School Dist.

Frank Karr, C. W. Cornell, and R. E. Wedekind, all of Los Angeles, for petitioner Pacific Electric Ry. Co.

Everett W. Mattoon, Co. Counsel, and Claude H. McFadden, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHENK, J. The Pasadena city high school district of Los Angeles county and Pacific Electric Railway Company have joined in a petition for a writ of mandamus to compel the respondents, as superintendent of schools and auditor, respectively, of the county of Los Angeles, to approve and issue certain warrants ordered by the school board of the high school district in favor of the railway company.

The facts are undisputed. The Pasadena city high school district comprises the territory included within the cities of Pasadena and Sierra Madre and unincorporated territory between and separating said cities. The high school district maintains high schools within the city of Pasadena, including a four-year high school located on Colorado street between Hill avenue and Sierra Bonita avenue in said city. No high school is maintained within the limits of the city of Sierra Madre. The Pacific Electric Railway Company is a common carrier of passengers for hire, and operates an electric interurban street car and motor coach system, a portion of which is located within the urban and rural territory comprising the high school district. On August 15, 1927, the school board of the high school district and the railway company entered into a contract for the transportation of pupils residing in the high school district to and from the high schools maintained by the district, including the transportation of pupils residing in the city of Sierra Madre, to and from the Colorado street high school in the city of Pasadena. This contract by its terms was to continue until the end of the school year on June 30, 1928. Pursuant to said contract the high school board called upon the railway company to transport pupils who had their homes within said district, including the pupils residing in the city of Sierra Madre to and from the Colorado street high school, and the transportation was furnished accordingly. In due time the railway company presented to the high school board statements of the cost of such transportation in accordance with published tariffs on file with the railroad commission. Statements covering the cost of transportation of pupils residing within the corporate limits of the city of Sierra Madre, dated March 21, April 21, May 21, 1928, and in the amounts of $252.72, $203.58, and $177.21, respectively, were presented by the railway company to the high school board. Included also within each of said statements were many items covering the transportation of pupils residing within the unincorporated territory of the district. The board approved said statements, and issued its orders for requisitions upon the county superintendent of schools, and requisitions upon the county auditor for warrants upon the county treasurer for payment of the demands of the railway company. The superintendent and auditor refused to approve and allow said warrants in so far as they included items for the transportation of pupils residing in the city of Sierra Madre. Following this refusal, the high school board and the railway company, under date of September 7, 1928, entered into a contract for the transportation of pupils residing within the district, but outside of the limits of incorporated cities to and from said Pasadena high school. It thus appears that the high school board is holding in abeyance the exercise of the power, if it has such power, to provide further transportation for pupils residing in Sierra Madre until the determination of this matter.

The question presented by the petition is this: Has the board of education of the Pasadena city high school district the power to provide, at the expense of the district, transportation for high school pupils residing in Sierra Madre to and from said Pasadena city high school? The petitioners contend for the existence of such power because of the alleged unconstitutionality of an exception incorporated in section 1741 of the Political Code added by amendment in 1927 (Stats. 1927, p. 676). The respondents deny the existence of the power because of the presence in the statute of the exception and for other reasons.

The pertinent portion of said section 1741 as amended is as follows: "The high school board of any high school district may provide, in such manner as they deem best, for the transportation to and from the high school of such pupils thereof, except pupils living within the limits of any city, as such board find to be in need of such transportation; and the cost of such transportation shall be deemed a part of the cost of maintaining the high school and paid accordingly." Prior to the amendment in 1927 that portion of said section 1741 provided as follows: "The high school board of any county, union or joint union high school district may provide, in such manner as they deem best, for the transportation to and from the high school of such pupils thereof as such board find to be in need of such transportation; and the cost of such transportation shall be deemed a part of the cost of maintaining the high school and paid accordingly." Stats. 1915, p. 769. It will thus be seen that the amendment of 1927 enlarged the scope of the section so as to confer like power on boards of city high school districts, but at the same time, by the insertion of the proviso, "except pupils living within the limits of any city," the Legislature sought to withhold from the school board the power to provide transportation for all high school students wherever residing, and to include within the grant of power the authority to provide transportation for those pupils only who reside within unincorporated territory within the district. In this connection the petitioners allege that the nearest boundary of the city of Sierra Madre to said Pasadena city high school is approximately five miles distant therefrom; that the greater part of the city of Sierra Madre is at least six miles from said high school; and that many of the high school pupils having their homes in the unincorporated area within the district reside at points approximately the same distance from the high school as the pupils residing in the city of Sierra Madre. It is therefore argued by the petitioners that, since no high schools are maintained in the unincorporated area available to pupils residing in the city of Sierra Madre, nor in the city of Sierra Madre, the pupils in both areas are in precisely the same situation with reference to accessibility to said high school, and that the operation of the exception in its literal terms is to permit a privilege to be granted to the pupils in the unincorporated area which is not accorded to pupils similarly situated in the city of Sierra Madre, in violation of section 21 of article I of the Constitution, which provides that no citizen or class of citizens shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens. It is accordingly argued that the entire exception is void, and should be disregarded.

[1, 2] We cannot so conclude. Assuming for the moment that the entire exception be void, its invalidity would destroy the whole grant of power, for there is no indication that the Legislature would have enacted the amended section without including the exception. See Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235; Mordecai v. Board of Supervisors, 183 Cal. 434, 192 P. 40. On the contrary, the character of the legislation plainly indicates that it was not the intention of the Legislature to permit free transportation to be afforded to all high school pupils regardless of the proximity of their homes to the high school if the exception should be held invalid. The obvious legislative intent was to authorize the transportation of pupils residing within the district, but residing outside of the limits of the city in which a high school is maintained and where no high school advantages are afforded such pupils in the territory of their residence. Considered literally the exception in its operation would seem to discriminate unlawfully in favor of pupils residing in the unincorporated area and against pupils similarly situated residing in the city of Sierra Madre. This discrimination would destroy the whole grant unless it may be said that the exception, when read in the light of the context and the subject-matter of the legislation, was not intended to, and does not in fact, operate as a discrimination between pupils residing outside of the city maintaining the high school. We are of the view that there is such uncertainty as to the application, meaning, and effect of the exception as to warrant us in declaring that it does not apply to pupils residing in territory outside of the city maintaining the high school, whether such territory be incorporated or unincorporated. When so construed, the conditions that must exist in order that the power to provide transportation be exercised are that the pupils receiving the same shall reside in territory

within the district but without the boundaries of the city maintaining the high school, and that in such outside territory there is no high school which in the opinion of the board affords high school advantages required by the pupils for whom the transportation is furnished.

[3] The contention of the respondents, that the furnishing of transportation as authorized by the statute is a gift of public money or thing of value in contravention of section 31 of article 4 of the Constitution, cannot be maintained. The state has a vital interest in the education of its youth. It furnishes free instruction, free text-books, and supplies, and builds and maintains buildings representing large investments. It recognizes the public duty to provide adequate and accessible school facilities not only for those who reside in populous centers, but also for those who reside in sparsely settled communities. The tendency to combine and enlarge high school districts in the interest of economy and proficiency is recognized. It seems reasonable to assume that training in our schools may best be accomplished by such centralization of educational facilities, and that greater economy may result by transporting the pupils residing in sparsely settled communities to a central high school than to expend large and perhaps unwarranted sums of money in constructing numerous high schools in such outlying sections. Our laws have provided for transportation to be given to school children for many years as a maintenance cost (section 1610, Pol. Code, Stats. 1917, p. 739; section 1741, Pol. Code, Stats. 1909, p. 486; section 1764b, Pol. Code, Stats. 1921, p. 734). This has been done without question in the courts of this state on the ground that such provision is unconstitutional as a gift. In Veterans' Welfare Board v. Riley, 189 Cal. at page 161, 208 P. 679, 22 A. L. R. 1531, it was stated: "The plan of transporting school pupils to and from their homes, particularly in large union districts, is quite common in this state, and is expressly authorized by statute [citing the sections of the Political Code above noted]. * * * The validity of these sections of the code has not been questioned in the courts of this state."

[4] The respondents concede and contend that, if the section (1741, Pol. Code) does not authorize the making of a gift of public money, it is general in its application, and therefore valid in its entirety, including the exception, for the reason that by the selection of those pupils who reside in the unincorporated territory as the specially privileged ones and by the denial of like privileges to those residing in cities, proper classifications have resulted within well-recognized rules interpreting the constitutional provision. We cannot go to the full length contended for. The character of the territory as incorporated on the one hand and unincorporated on the other is one, but not the sole, determinative factor in the classification. The question of the availability of high school facilities and advantages must also be taken into consideration. When these two factors are considered, and the statute is construed as above indicated, we find two classifications of pupils resulting from the legislation, viz.: Those residing in the city of Pasadena in one class, and those residing in the unincorporated area of the district and the city of Sierra Madre in the other. The question is then presented whether such classification is valid. On this point the petitioners allege that some of the pupils residing within the limits of the city of Pasadena travel a greater distance to the Pasadena city high school than some of the pupils who reside in the unincorporated area and in the city of Sierra Madre. In answer the respondents allege that additional high schools are maintained by the district, six of which are maintained within the city of Pasadena in addition to the Pasadena city high school, and which are more conveniently accessible to the pupils living in the city of Pasadena who now attend the Pasadena city high school. It must be assumed that the Legislature took into consideration the well-known fact that high schools maintained in cities are usually more accessible to pupils residing therein than to pupils residing without said cities. Because of the frequent irregularity of city boundary lines, it may at times be demonstrable that such is not the case in particular instances. But we think the classification is entitled to be tested by the conditions which usually and ordinarily exist. On this basis there would seem to be a reasonable distinction between those who live within the city where the high school is maintained and who have access to the school without transportation and those who live in outlying and more inaccessible portions of the district and require transportation. It cannot be said that under such circumstances the Legislature may not provide for transportation to the latter and deny it to the former.

The peremptory writ should therefore issue directing the respondents to approve and issue warrants for the payment of the claims presented by the petitioners covering the cost of transporting the high school pupils who reside in the city of Sierra Madre to and from said Pasadena city high school pursuant to the contract under which said transportation was furnished.

It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

206 Cal. 782

TAKEUCHI v. SCHMUCK et ux.

(L. A. 9375.)

Supreme Court of California. April 1, 1929.

1. Aliens ⚷16—Presumption of intent to evade Alien Land Law arises where transferee is eligible to own realty, if deposit is made by ineligible alien, and balance is also payable by latter (Alien Land Law 1921, § 9(a)(c), amended by St. 1923, p. 1020, § 8).

Though transfer of realty under land contract is not actually consummated by a conveyance, a presumption of intent to evade the Alien Land Law 1921 (St. 1921, p. lxxxiii) arises under section 9(a)(c), amended by St. 1923, p. 1020, § 8, where transferee is eligible to own property if the payment of deposit on account of purchase price is made by ineligible alien and balance of said price is also to be paid by said ineligible alien.

2. Contracts ⚷141(3)—Evidence held to show vendors were parties to conspiracy to evade alien land law, and rights of parties were determinable as between persons in pari delicto (Alien Land Law 1923; Pen. Code, § 31).

In action by American citizen of Japanese parentage to recover deposit on purchase price of realty and taxes paid thereon, which purchase was never consummated, evidence *held* sufficient to establish that vendors were parties to conspiracy to violate Alien Land Law (St. 1923, p. 1020) by conveying to person eligible to hold legal title with knowledge that entire beneficial interest vested in alien ineligible to citizenship, and that they were therefore principals in offense denounced by such act under Pen. Code, § 31, and rights of parties to transaction were therefore to be determined as between persons in pari delicto.

3. Contracts ⚷138(1)—Courts will not aid enforcement of contracts involving performance of acts against public policy.

Courts will not compel parties to perform contracts which have for their object performance of acts against sound public policy, either by decreeing specific performance or awarding damages for breach.

4. Contracts ⚷138(3)—Purchaser participating in conspiracy to evade Alien Land Law could not maintain action to recover deposit on purchase price and taxes paid (Alien Land Law 1923).

Where parties to land contract had conspired to violate the Alien Land Law (St. 1923, p. 1020), and by so doing had rendered themselves liable to criminal prosecution, purchaser could not recover deposit on account of purchase price nor taxes paid by her, though action therefor was based on an avoidance or rescission of illegal contract.

5. Vendor and purchaser ⚷39—Contract to transfer land in violation of Alien Land Law does not contemplate lawful object (Alien Land Law 1923).

A contract having for its object the transfer of land in violation of Alien Land Law (St. 1923, p. 1020), which expressly provides that conspiracies to violate its provisions are punishable by fine and imprisonment, cannot be said to contemplate a lawful object.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Haruko Takeuchi against A. F. Schmuck and wife. From an adverse judgment, plaintiff appeals. Affirmed.

J. Marion Wright, of Los Angeles, for appellant.

Reay, Scharf & Reay, of Los Angeles, for respondents.

SEAWELL, J. Plaintiff, a native-born American citizen of Japanese parentage, brought this action to recover the sum of $500 paid by her as a deposit on account of the purchase of real property in the city of Los Angeles for residence purposes, which purchase was never consummated, and also to recover the sum of $105, alleged to have been expended by her in payment of taxes on said property for the fiscal year 1923–1924, in accordance with her agreement with the seller.

[1] The trial court denied recovery to plaintiff on the theory that plaintiff's father paid the amount of the deposit and taxes in the accomplishment of an illegal conspiracy between the father and the daughter, a minor 17 years of age, whereby legal title to the said property should be held by the daughter, but the entire beneficial interest vested in the father, an alien ineligible to citizenship, in violation of the provisions of the Alien Land Law. Stats. 1923, p. 1020; In re Akado, 188 Cal. 739, 207 P. 245. The court's finding that the father paid the deposit and taxes, and that plaintiff and her father had conspired to violate the provisions of the Alien Land Law must be upheld. Section 9a of the act provides that a prima facie presumption that a conveyance of property, colorable in form, is made with intent to prevent, evade, or avoid escheat shall arise upon proof of the taking of the property in the name of a person other than an alien ineligible to citizenship, if the consideration is paid, or agreed or understood to be paid, by an alien ineligible to citizenship, and section 9c, that the enumeration of the presumptions set forth in section 9 shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade, or avoid escheat as provided for therein. We are of the view that, although the transfer is not actually consummated by a conveyance, a presumption of intent to evade the law arises where the transferee is eligible to own real property if the payment of the deposit on account of the purchase price is made by an ineligible alien, and the balance of said price is also to be paid

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

by said ineligible alien. The validity of section 9, and its application in other actions than escheat proceedings brought by the state, was upheld in People v. Cockrill, 62 Cal. App. 22, 216 P. 78, affirmed by the Supreme Court of the United States in 268 U. S. 258, 45 S. Ct. 490, 69 L. Ed. 944. The evidence relied upon by plaintiff as overcoming the presumption of illegality and proving that plaintiff was to be the beneficial owner of the property by virtue of a gift from her father may, in the circumstances of the situation, have been sufficient reason to arouse the suspicions of the trial judge. Such testimony, weighed down with the inherent improbabilities, could not be held to be sufficient to compel a finding of lawful intent.

[2] With the court's conclusion that neither defendant A. F. Schmuck nor defendant Theresa A. Schmuck, his wife, were parties to the said conspiracy, we cannot concur. Schmuck testified upon cross-examination that he was dealing directly with the father, and knew it was against the law for the father to buy the property; that the girl did not have the money; that he knew the title was being taken in the girl's name "to get around the law"; and that plaintiff and her father were violating the law, but he did not know it was a violation of law for him to participate in an unlawful transaction. It is difficult to credit such a profession, and he is precluded from protesting innocence by virtue of section 31, Penal Code, which provides that all persons concerned in the commission of a crime, whether they directly commit the act or aid and abet in its commission, are principals in any crime so committed. The rights of the parties must therefore be determined as between persons in pari delicto.

The terms of the contemplated purchase, as set forth in a deposit receipt, dated November 21, 1923, and executed by the defendant in favor of plaintiff, were that the purchase price should be $14,350, plaintiff to pay $500 as a deposit, the receipt of which was acknowledged, and an additional $3,500 upon the transfer of title, and to execute mortgages or deeds of trust for the balance, and pay taxes to July 1, 1924. The parties selected California Trust Company, a banking corporation, as an escrow holder, and a check for $2,395, which was drawn by plaintiff's father, as were the checks with which the $500 deposit and taxes were paid, was deposited in the escrow. When the deal did not go through, the bank returned a check payable to the joint order of plaintiff and her father for said sum of $2,395. Two small residences were located upon the property, and there was space for a third residence. Possession was never delivered to plaintiff or her father. According to plaintiff, the deal was not consummated, because as a minor she was unable to make a valid contract or execute notes and mortgages in favor of the seller. Other testimony, however, indicates that neither plaintiff nor her father, as purchasers, nor defendants, as sellers, persisted in their efforts to effect a transfer because of the unwillingness of the bank as an escrow holder and the title insurance company, which was to insure title to the property, to participate in a transaction which so strongly appeared to be tainted with illegality. Plaintiff testified that she asked for a return of the money soon after the transaction was abandoned. Defendant Schmuck denied any demand being made upon him until August, 1924, and testified that he told plaintiff at that time that he did not have the money.

[3, 4] It has long been a rule of law that courts will not compel parties to perform contracts which have for their object the performance of acts against sound public policy either by decreeing specific performance or awarding damages for breach. Pacific Wharf Co. v. Standard American Dredging Co., 184 Cal. 21, 192 P. 847; Howell v. City of Hamburg Co., 165 Cal. 172, 131 P. 130; Colby v. Title Ins. and Trust Co., 160 Cal. 632, 117 P. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515; Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; Demartini v. Anderson, 127 Cal. 33, 59 P. 207; Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Chateau v. Singla, 114 Cal. 91, 45 P. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63. This rule is not generally applied to secure justice between parties who have made an illegal contract, but from regard for a higher interest—that of the public, whose welfare demands that certain transactions be discouraged. Pacific Wharf Co. v. Standard American Dredging Co., supra; Berka v. Woodward, supra. In the instant case the action is not based upon an affirmance of the illegal contract by seeking specific performance or damages for breach, but on an avoidance or rescission thereof; the object of plaintiff being to recover a deposit made, and thus restore the status quo. Nevertheless, the parties had conspired to effect a transfer in violation of the provisions of the act, and by so doing had rendered themselves amenable to criminal prosecution. The cause of action arises from an illegal transaction. The gravity of the offense is indicated by the severity of the penalty attached, which is imprisonment in the county jail or state penitentiary not exceeding two years or a fine not exceeding $5,000, or both.

Since the first Alien Land Law was enacted in 1913 (Stats. 1913, p. 206), the law has been frequently amended by the Legislatūre and by the people through the exercise of the initiative prerogative, with the object of increasing the difficulty of evasions and promoting more stringent enforcement. To this end transactions through which attempts were made to comply with the letter of the law, while violating its spirit and purpose, have been expressly inveighed against. To permit the recovery of the deposit paid in the case herein in furtherance of an attempt to evade the law would be to remove a deterrent to wrongdoing. "The principle applicable to relief in such cases is embodied in the two maxims, 'Ex pacto illicito non oritur actio,' and 'Ex dolo malo non oritur actio,' in the application of which the court must, upon plaintiff's own statement, deny him its aid in the pursuit of that which he has lost." Schmitt v. Gibson, 12 Cal. App. 407, 107 P. 571.

[5] There is nothing inconsistent with the view herein expressed and the decision in Suwa v. Johnson, 54 Cal. App. 119, 203 P. 414. In the instant case our decision is based upon the application of well-settled principles of the law of contracts which contemplate an illegal object. In Suwa v. Johnson, supra, a lessor retook possession of property leased by him to an alien ineligible to citizenship. A judgment that plaintiff, the ineligible alien, recover possession, was affirmed by the District Court of Appeal on the ground that a consummated transfer to an ineligible alien could be attacked only by the state in escheat proceedings. We do not understand said decision, or other decisions of similar import, as declaring the legality of contracts for transfer to ineligible aliens, or stating that in no action except escheat proceedings initiated by the state may the question of alienage be raised. See Case v. Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. Ed. 513, and Ales v. Epstein, 283 Mo. 434, 222 S. W. 1012. Certainly, a contract having for its object the transfer of land in violation of the express provisions of an act which provides that conspiracies to violate its provisions are punishable by fine and imprisonment cannot be said to contemplate a lawful object. In the view we take of the matter, the principle that only the state can attack a consummated transfer is in line with the doctrine of the law of contracts that the courts will not afford relief to parties who have participated in an illegal transaction by permitting one party to recover from the other money or property transferred in violation of law.

It is with much hesitation that we have been brought to the point of holding that the law will not interfere to unloose the grasp of defendants upon the moneys involved in this appeal. While the law will not, upon grounds of public policy, afford relief to either party to an illegal transaction such as this one is shown to be, it is, nevertheless, proper to say that in the forum of good conscience the defendants are not justified in retaining possession of the money in suit. They were conspirators in an attempt to violate the statute in the same sense as were the Japanese father and daughter with whom they dealt, and their conduct, because of their citizenship, was more culpable than was the conduct of the ineligible alien or his daughter, who was of alien blood. The law, however, in this class of cases, provides no remedy for either of the offending parties.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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206 Cal. 742

GOTTSTEIN v. KELLY et al. (L. A. 8727.)★

Supreme Court of California. March 30, 1929.

Rehearing Denied April 29, 1929.

1. Taxation ⚿415—Assessment, naming owner but once, not misleading as to owner of each lot assessed, complied with statute, regardless whether owner's name should have appeared opposite each lot (Pol. Code, § 3650).

Where assessment on several lots in tract of land contained name of owner but once, followed by name of tract or subdivision in which property was located, correct number of each of lots, together with valuation of each, in accordance with Pol. Code, § 3650, and no one could have been misled as to name of person purporting to be owner of each of several lots, assessment complied with statute, regardless whether name of owner of property should have been repeated on assessment book opposite each lot assessed.

2. Taxation ⚿734(2)—Error, if any, in overcharge of less than one cent in assessing land, held immaterial, in determining validity of tax deed (Pol. Code, § 3731).

Where alleged overcharge in making assessment against land, under Pol. Code, § 3731, if any, was less than one cent, defect was of no consequence, so far as validity of ensuing tax deed was concerned.

3. Taxation ⚿627—All taxes, penalties, and costs should be placed opposite each description of property separately assessed, rather than total assessment against all property (Pol. Code, § 3764, as amended by St. 1913, p. 556).

Under Pol. Code, § 3764, as amended by St. 1913, p. 556, requiring taxes, penalties, and costs to be placed opposite each name and description of delinquent property, all taxes, penalties, and costs applicable thereto should be placed opposite each description, rather than placing total amount due on several pieces of property separately assessed and described, and stating such amount in one aggregate sum.

4. Taxation ⚿734(2)—Owner held not required to compute assessment against each lot, but duty thereof was jurisdictional prerequisite to validity of tax deed.

Where lots in designated tract were separately assessed and described, owner did not

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★Rehearing denied.

have burden of ascertaining amount of assessment against each lot, but duty of stating separate amounts on separate lots was jurisdictional prerequisite to validity of tax deed dependent on assessment proceedings.

5. Taxation ⚷734(7)—Notice of sale for delinquent taxes, not referring to penalties, but to unauthorized "percentage," held defective, and tax deed conveyed no title (Pol. Code, § 3764, as amended by St. 1913, p. 556).

Notice of sale to state of delinquent property under Pol. Code, § 3764, as amended by St. 1913, p. 556, reciting taxes, "percentage," and costs after property, without referring to penalties, was defective, as containing unauthorized item of "percentage" which was not synonymous with word "penalty," and hence tax deed based on assessment proceedings conveyed no title.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Percentage.]

6. Appeal and error ⚷877(4)—Plaintiff, claiming under tax deed, possessing no legal title, could not complain of judgment on cross-complaint quieting title in defendant.

Where plaintiff, claiming title under tax deed in suit for partition, was legally possessed of no property, he could not complain of relief granted to defendant in cross-complaint to quiet title.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John Gottstein against T. G. Kelly and another, in which defendant E. D. Brooks, Jr., filed a cross-complaint. Judgment from cross-complainant, and plaintiff and defendant Kelly appeal. Affirmed.

For opinion of District Court of Appeal, see 269 P. 940.

Herbert C. Kelly, of San Diego, for appellants.

Rolland C. Springer, of San Diego, for respondent.

PER CURIAM. When this cause was before the District Court of Appeal, Second District, First Division, an opinion was rendered therein, written by Mr. Justice Houser, affirming a judgment decreeing as void a certain tax deed referred to therein. At about the time that this action was decided by the District Court of Appeal the case of Southern California Bond & Finance Corporation v. Mathes, 269 P. 964, was decided by the District Court of Appeal of the First District. In that action a tax deed, issued under proceedings substantially the same as those forming the basis of the tax deed herein involved, was declared valid. These two opinions were in a direct conflict with each other, and for that reason said causes were transferred to his court for hearing. After considering the two opinions and the briefs of counsel filed in the two cases, we have concluded that the opinion handed down by the District Court of Appeal in the present action contains a correct statement of the law applicable to the questions considered therein, and we adopt the same as the opinion of this court. Said opinion is as follows:

HOUSER, J. This appeal originated in a suit brought by plaintiff against defendant Kelly and one Maud K. Messer for partition of real property. After the suit was commenced, one E. D. Brooks, Jr., with full knowledge of all the facts hereinafter set forth, acquired whatever interest said Messer owned in the property involved in the action, and thereupon was substituted as a party defendant therein. Thereafter defendant Brooks answered in the action and filed his cross-complaint therein, by which he sought to quiet his title to certain of the real property described in the complaint, and which formerly had been owned by the defendant Messer. Judgment was rendered in favor of defendant Brooks, and it is from such judgment that this appeal is prosecuted.

The property involved consisted of three several lots, numbered 10, 11, and 12, in a designated tract of land. The basis of plaintiff's claim of title was a tax deed, which by the lower court was held to be invalid. Concededly the question of the invalidity of the tax deed rested upon each of several contentions set forth in the brief herein, the first of which being that the statute (section 3770, Pol. Code) authorized the inclusion in the collection of delinquent taxes of an advertising charge of fifty cents for "each lot, piece, or tract of land separately assessed, * * *" and consequently, in view of the fact that the advertising charge herein was for three separate parcels at 50 cents each, making a total charge therefor of $1.50, a tax, with its incidents, had been imposed which was unauthorized by law, with the alleged result that a sale of the property for the amount of the original tax assessment, plus penalties and the advertising costs, as charged, was illegal, and carried with it no title to the purchaser.

[1] In substance, the form of the assessment was that the name of the owner of the property appeared but once. Thereafter followed the name of the tract or subdivision in which the property was located, the correct number of each of the lots, to wit, 10, 11, and 12 (each on a separate line), together with the valuation of each of them—all of which would appear to be in accordance with the provisions of section 3650 of the Political Code relating to the requirements of an assessment. With the exception that no direct ruling is made with reference to the feature that as to *each* of the lots the name of the owner must be repeated on the assessment book, in each of the following authorities substantially it is held that the assessment herein was in conformity

with the requirements of the statute; Wells Fargo & Co. v. Board of Equalization, 56 Cal. 194, 205; Emeric v. Alvarado, 64 Cal. 529, 605, 2 P. 418; Allen v. McKay & Co., 120 Cal. 332, 334, 52 P. 828; Hall v. Park Bank of Los Angeles, 165 Cal. 356, 358, 132 P. 452; People's Water Co. v. Boromeo, 31 Cal. App. 270, 272, 160 P. 574; Gottstein v. Holmes (Cal. App.) 264 P. 310.

An examination of the record in the case last cited discloses the fact that the form of the assessment was identical with that in the instant case, and it was there held that on the occurrence of the delinquency in the payment of the tax an advertising charge of 50 cents on each lot was "in exact conformity with the law." So far as concerns the question of the necessity for the name of the owner of the property to be repeated on the assessment book, so that it shall appear opposite each lot assessed, where, as in the assessment herein, from its form no one could have been misled as to the name of the person purporting to be the owner of each of the several lots, we think that a substantial, if not a literal, compliance with the terms of the statute was shown to exist.

The next alleged infirmity in the tax deed is that the sale was made for a greater amount of money than was legally due. By one form of computation, the sum for which the property was sold was the exact amount due thereon. By other methods of computation, dependent upon the recognition of fractions of a cent in the tax and the penalties, the difference between the amount for which the property was sold and the amount shown by such computation as actually due varied from two-tenths of a cent to as much as three cents.

[2] It is argued by respondent that, following the provisions of section 3731 of the Political Code, "fractions of a cent" must be rejected. On the other hand, appellant contends that by the plain terms of the statute the rejection of "fractions of a cent" applies to the computation of the *tax* only, and has no reference to computation of the penalties for delinquencies (Bell v. Fee Title Co., 69 Cal. App. 437, 231 P. 598), and that as so construed the amount for which the property was sold showed no variation from the correct computation of the amount which was legally due. On making the computation in accordance with the rule as announced in the case of Bell v. Fee Title Co., 69 Cal. App. 437, 231 P. 598, it appears that at most the overcharge, if any, was less that one cent. In such circumstances, at least by the great weight of authority, the defect was of no consequence, so far as the validity of the ensuing tax deed was concerned. Jacoby v. Wolff, 198 Cal. 667, 247 P. 195; Treadwell v. Patterson, 51 Cal. 637.

One of the reasons assigned for upholding the judgment herein is that the notice of sale to the state of the property affected by the judgment was defective. By the provisions of section 3764 of the Political Code, in force at the time the notice of sale was given (Stats. 1913, p. 556), the tax collector was required to "publish the delinquent list, which must contain the names of the persons and *a description* of the property delinquent, and the amount of taxes, penalties, and costs due, *opposite* each name and *description*. * * *" In this action, respondent's contention is that, while the notice contained a description of each of the lots 10, 11, and 12 of the described tract, the "taxes, penalties, and costs due" did not appear opposite each description as prescribed by the statute; that while the language of the statute calls for "taxes, penalties, and costs" applicable to each lot, the notice deviated therefrom, first, in that it recited the "taxes, *percentage*, and costs"; and, secondly, that, instead of the property, "taxes, penalties, and costs" being set "opposite" and made applicable to each lot as required by the statute, they were lumped together into one gross sum for *all* the lots.

At the time the notice of sale herein was published a further requirement of section 3764 of the Political Code, then in force, was that the delinquent list should contain the "taxes due on personal property, the delinquent state poll, road, and hospital tax, the taxes due each school, road, or other lesser taxation district, added to the taxes on real estate. * * * " It appears that, as affecting the property here involved, a tax of 71 cents on the $100 of valuation was levied for the school district. With reference to the meaning of the phrase appearing in the statute, "added to the taxes on real estate," it was held in California Loan, etc., Co. v. Weis, 118 Cal. 489, 496, 50 P. 697, 700, that "the word 'added,' as here used, does not contemplate a mathematical computation. It is employed in the sense of subjoined or appended. * * *"

In the case of Cordano v. Kelsey, 28 Cal. App. 9, 19, 151 P. 391, 396, among other things, it is held that, in a notice of sale for delinquent taxes, it is necessary that the amount of penalties and costs be separately stated, and that (citing Campbell v. Canty, 12 Cal. App. Dec. 373,[1] and quoting sections 205-207 of Black on Tax Titles), "the giving of notice in the manner and form prescribed by the statute is an essential jurisdictional fact"; also, that "not only is the giving of notice of the sale essential, but it must be such notice as the statute prescribes."

[3-5] Assuming the correctness of the conclusion hereinbefore stated to the effect that each lot was separately described and assessed, and reasoning from the rule announced in the case of California Loan, etc., Co. v. Weis, 118 Cal. 489, 496, 50 P. 697, as well as from the case of Cordano v. Kelsey, 28 Cal. App. 9, 19, 151 P. 391, 398, it becomes

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[1] For opinion on hearing by Supreme Court, see 162 Cal. 382, 123 P. 266.

apparent that the construction which should be placed on the statutory requirement that the amount of "taxes, penalties, and costs due" should be placed "opposite each name and description," is that opposite each *description* all "taxes, penalties, and costs" applicable thereto should be placed, rather than that where, as in the instant case, there are several pieces of property separately assessed and described, the total amount due thereon on account of the several charges of "taxes, penalties, and costs" should be added together and stated in one aggregate amount. But, as in substance is said in the case of Cordano v. Kelsey, 28 Cal. App. 9, 19, 151 P. 391, 398, while it is true that in the form the notice was given it was possible for the owner of the three lots in question to have ascertained or computed the amount of each of the several items affecting any one lot, the law did not place that burden upon him, but rather enjoined that duty upon others as a jurisdictional prerequisite to the validity of a tax deed dependent upon precedent proceedings.

However, the last preceding statement, as affecting the facts in the instant case, requires notation of the additional fact, that while the notice as published contained the statement that unless the delinquent taxes for the year ending June 30, 1917, with all penalties and costs due thereon, were paid on or before a specified date the assessed property would be sold to the state, so far as the property herein involved was concerned, and which by the terms of the notice was not to be sold to the state, but "to the highest bidder for cash," the notice contained no reference to "penalties," but instead thereof the column heading in the delinquent list contained the unauthorized item of "percentage."

As thus phrased or framed, the owner had no notice that any *penalties* were included in the sum total fixed as affecting all the lots combined. Nor did he occupy a positive situation in either his assumed or his actual knowledge of what was meant by "percentage." Obviously, such an expression might cover any number of different charges at an arbitrary rate or valuation, whether authorized by statute or not, and therefore the owner would be unable to do more than conjecture either as to what item or what amount was included in the "percentage," or what part or portion of the total charge was included therein. In the case of Bussenius v. Warden, 71 Cal. App. 717, 722, 236 P. 371, it was held that the requirement of section 3764 of the Political Code, as amended in 1913 (Stats. 1913, p. 556), that the delinquent list to be published by the tax collector must contain the names of the persons and a description of the property delinquent, and "the amount of taxes, penalties, and costs due," is not complied with where the tax list sets forth the amount due as taxes and costs, but fails to set forth the amount due for penalties; and that a subsequent tax deed predicated upon such defective notice is void. To the same effect is Snodgrass v. Bell (Cal. App.) 261 P. 497. The word "penalty" is not synonymous with the word "percentage," from which it would follow that, if the principle announced in the last two cited cases is correct, the notice of sale was insufficient, with the ultimate result that the deed upon which appellant relies was of no validity, and conveyed no title to him.

[6] Since plaintiff was legally possessed of no title to the property in question, he is in no position to complain of the relief which was granted to defendant in quieting his title thereto. In the case of Canty v. Staley (Cal. Sup.) 123 P. 252, 255, may be found the statement that:

> "Parties who purchase property at tax sales acquire the title to the property, if all the proceedings for the levy of the taxes and the sale are regular and in strict conformity to law; but, if not so, they acquire no rights to the property which either a court of law or equity can enforce" (citing authorities).

It becomes unnecessary to devote attention to other suggestions interposed by respondent as reasons for the affirmance of the judgment.

The judgment is affirmed.

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206 Cal. 789

SHIELDS v. FEE TITLE CO. et al.
(S. F. 12813.)

Supreme Court of California. April 6, 1929.

1. Appeal and error ⚿907(3)—Supreme Court must accept trial court's findings as true and sustained by evidence, in absence of bill of exceptions or typewritten transcript.

In absence of bill of exceptions or typewritten transcript of proceedings at trial, Supreme Court must accept trial court's findings as absolutely true, and presume that evidence necessary to sustain them was presented to such court.

2. Appeal and error ⚿183—Defendant voluntarily appearing and submitting claim to court's jurisdiction cannot question on appeal court's right to proceed under statute to quiet title (McEnerney Act).

Defendant voluntarily appearing and submitting itself and its claim to the court's jurisdiction precluded itself from raising any question on appeal as to court's right to proceed under McEnerney Act (St. 1906, Ex. Sess., p. 78) to quiet plaintiff's title to realty.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Mary Hull Shields against the Fee Title Company and all persons claiming any interest in or lien on described realty. Judgment for plaintiff, and named defendant appeals. Affirmed.

Chas. S. Conner, of Los Angeles, for appellant Fee Title Company.

Jerome A. Duffy, of San Francisco (George B. Harris, of San Francisco, of counsel), for respondent.

WASTE, C. J. The plaintiff brought this action under the provisions of the McEnerney Act (Stats. 1906 [Ex. Sess.], p. 78) to quiet her title to five separate and distinct parcels of unimproved real property, situate in San Mateo county, and particularly described in the complaint. The defendant, the Fee Title Company, answered, and directly placed in issue plaintiff's title to all or any part of the property, and prayed for affirmative relief. Judgment was entered for the plaintiff, and the Fee Title Company appeals on the judgment roll alone.

[1] No separate findings, as such, were made, but the judgment and decree is a combination of both findings and judgment, one of its recitals being, "The court having heard the evidence and taken proof of all the facts alleged in the complaint and affidavit filed therewith." As there is neither a bill of exceptions nor typewritten transcript of the proceedings had and taken at the trial, and it appearing that evidence was taken by the court, we must, upon this appeal, accept the findings as absolutely true and presume that the evidence necessary to sustain them was presented to the court below. Dalton v. Gore (Cal. App.) 263 P. 844; Caruthers v. Hensley, 90 Cal. 559, 27 P. 411. The findings indicate that all the requirements of the McEnerney Act were fully complied with, and it further appears that some eleven exhibits, including notice of pendency of action, were introduced and considered by the court.

[2] The appellant appears to question the right of the trial court to proceed under the McEnerney Act. It suffices to say that, by voluntarily appearing and submitting itself and its claim to the jurisdiction of the court, the defendant has precluded itself from raising any question on that point. Faxon v. All Persons, 166 Cal. 707, 712, 137 P. 919, L. R. A. 1916B, 1209.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.

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97 Cal. App. 768

SPRINGMAN v. SPRINGMAN. (Civ. 6719.)

District Court of Appeal, First District, Division 1, California. March 26, 1929.

1. Trial 🔑62(2)—Evidence offered in rebuttal, which did not tend to rebut evidentiary facts brought out by defendant in divorce action held properly excluded.

In divorce action, evidence offered in rebuttal that husband had locked dwelling house and refused to allow wife to enter, which tended to corroborate wife's testimony in her case in chief but did not tend to rebut any evidentiary facts brought out by husband, his testimony consisting of denials of wife's statements, *held* properly excluded.

2. Divorce 🔑108—Evidence that husband locked house against wife held inadmissible to show cruelty, where no such defense to husband's cross-complaint for divorce was pleaded.

In action by wife for separate maintenance in which husband filed cross-complaint for divorce, evidence that husband had locked dwelling house and refused to allow wife to enter *held* not admissible by way of recrimination to show cruelty or other marital misconduct on part of husband, where no such defense to cross-complaint was pleaded.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action for separate maintenance by Augusta Springman against Frederick Springman, in which defendant filed cross-complaint for divorce. From a judgment granting defendant a divorce, plaintiff appeals. Affirmed.

Davis & Thorne, of Los Angeles, for appellant.

Walter T. Casey and Thomas P. Hanlon, both of Los Angeles, for respondent.

PER CURIAM. An action for separate maintenance was brought by the plaintiff against her husband, the defendant, upon three counts, namely, failure to provide, habitual intemperance, and extreme cruelty. The defendant denied these allegations, and, by a cross-complaint, sought a divorce from the plaintiff upon the grounds of extreme cruelty and willful desertion, both of which charges the plaintiff denied in her answer thereto, but no facts in recrimination were pleaded.

At the trial the defendant dismissed his charges of cruelty and no evidence in their support was offered. The court found against the plaintiff, and granted the defendant a divorce upon the ground that his wife had willfully deserted him.

[1, 2] The plaintiff appealed from the judgment, and contends that the trial court erred by refusing to admit certain testimony offered by her in rebuttal.

The plaintiff, in support of her case, testified that the defendant on several occasions locked the door of their dwelling and refused to permit her to enter. This was denied by the defendant. Each party testified that a separation took place on November 20, 1924, on which date the plaintiff left the dwelling house of the spouses during the absence of the defendant. It was sought to be shown by the excluded testimony that some months before the separation the defendant had locked the dwelling house and refused to allow the plaintiff to enter. An objection that such testimony was not proper evidence in rebuttal was sustained. While the evidence tended to corroborate the testimony of the plaintiff in her case in chief, and if then offered would have been admissible, it did not tend to rebut any evidentiary facts brought out by the defendant, his testimony consisting of denials of his wife's statements; nor was it admissible by way of recrimination to show cruelty or other marital misconduct on the part of the defendant, no such defense to the cross-complaint having been pleaded. Avery v. Avery, 148 Cal. 239, 82 P. 967; Klemmer v. Klemmer, 42 Cal. App. 618, 187 P. 85.

There was no error in the ruling of the court, and this being the only ground urged for a reversal, the judgment is affirmed.

97 Cal. App. 688

LOS ANGELES COUNTY v. MAGA et al. (two cases). (Civ. 6701, 6702.)

District Court of Appeal, First District, Division 1, California. March 20, 1929.

1. Bail ⚷75—Technically, accused liberated on bail is considered as delivered into custody of sureties, who are liable for his appearance, unless excused by act of God, obligee, or law.

While giving of bail generally restores accused to his freedom, technically he is considered as having been delivered into custody of his sureties, who are liable for his appearance, in accordance with terms of their undertaking, unless performance of condition thereof is rendered impossible or excused by an act of God, obligee, or the law.

2. Bail ⚷79(1)—Accused's arrest in deportation proceedings did not exonerate bail, where they were free on bail when cases were called.

That accused were arrested in federal deportation proceedings, begun while criminal actions were pending, did not exonerate sureties on their bail bonds, where they were at liberty on bail, given in such proceedings, when their cases were called in state court.

3. Bail ⚷79(1)—That accused voluntarily fled jurisdiction after issuance of deportation warrants did not exonerate bail.

That accused, at liberty on bail, voluntarily fled the jurisdiction, following issuance of deportation warrants, did not exonerate their sureties.

4. Bail ⚷79(1)—Sureties on bail bonds of accused, fleeing from jurisdiction after issuance of deportation warrants, held not exonerated on ground that they would have been deported.

Sureties on bail bonds of accused, voluntarily fleeing jurisdiction after issuance of deportation warrants, *held* not exonerated on ground that accused would have been deported in any event, object of requiring bail not being to compensate government, but to compel accused's presence in court so that justice may be administered, while conclusion, that issuance of such warrants would have interfered with sureties' right or power to surrender principals, had they remained within jurisdiction, would be mere conjecture.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Actions by the County of Los Angeles against Domenica Maga and others. Judgments for defendants, and plaintiff appeals. Reversed and remanded, with direction.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for appellant.

Walter C. Fisher, of Los Angeles, for respondents.

PER CURIAM. The above actions are between the same parties, involve the same questions, and it was accordingly stipulated that the appeals be presented on the same record.

The following appears from the agreed statements of facts filed in the two cases: On February 4, 1924, there was filed in the justices' court of Los Angeles township in Los Angeles county a criminal action against Mary Bartodatto, wherein she was charged with the crime of pandering. She was arrested, and her bail fixed in the sum of $2,000, following which the defendants executed a bail bond in that amount, which was filed on February 5, 1924. Her preliminary hearing was regularly set for May 27, 1924, at which time the case was called, and she failed to appear, whereupon the bond was declared forfeited.

While the criminal action was pending, a civil proceeding in the federal court for her deportation was begun, the charge being that she had entered the United States in violation of the immigration law. She was arrested by officers of the immigration service, and, upon giving a separate bond to the immigration service, was released from custody. She was, in fact, a deportable alien, and, prior to the forfeiture of the bond first mentioned, a warrant for her deportation to Italy was issued. After the issuance of the warrant, but without having again been taken into custody, she departed from the state before the forfeiture of the bond involved in the present action, and now resides in Italy.

On February 4, 1924, a charge of bribery was filed in the same justices' court against Dominico Bartodatto. He was arrested and released upon giving bail in the sum of $2,000, this undertaking being also executed by the defendants. After a preliminary hearing he was held to answer, following which there was filed in the superior court of Los Angeles county an informantion charging him with the above crime. Thereafter his case was regularly called for trial, but he failed to appear, and on May 26, 1924, the latter bond was also declared forfeited. As was the case with Mary Bartodatto he was a deportable alien, and was charged by the immigration service with a violation of the immigration law. A bond was given in that proceeding, and he was released from custody. A deportation warrant was subsequently issued, but, being apprised of the fact and without again being taken into custody by the federal authorities, he also returned to Italy before the forfeiture of the bond in the criminal proceeding, and is now in that country.

It was stipulated in each case that the accused left the jurisdiction without the consent, connivance, or knowledge of any of the defendants.

Actions were brought upon the forfeited bonds, based upon the foregoing facts, and judgment for each case was entered for the defendants. Motions for new trials were denied, and the plaintiff appealed, its contention being that the judgments are contrary to the law and the evidence.

[1] While the giving of bail as a general rule restores the accused to his freedom, technically he is considered as having been delivered into the custody of his sureties, who are liable for his appearance in accordance with the terms of their undertaking (Taylor v. Taintor, 16 Wall. (83 U. S.) 366, 21 L. Ed. 287; Hammons v. State, 59 Ala. 164, 31 Am. Rep. 13; State v. Sandy, 138 Iowa, 580, 116 N. W. 599; Worthen v. Prescott, 60 Vt. 68, 11 A. 690; State v. Schenck, 138 N. C. 560, 49 S. E. 917, 3 Ann. Cas. 928); but performance by them of the condition of the undertaking may be rendered impossible or excused by an act of God or of the obligee or of the law. In such cases the sureties are exonerated. Taylor v. Taintor, supra; 6 Cor. Jur., Bail, p. 1025, § 279, and cases cited. In the cases at bar, however, no such facts appear as the accused voluntarily left the jurisdiction. Had this course not been taken, their sureties, so far as shown, would not have been prevented from surrendering them.

[2, 3] That the accused had been arrested in other proceedings did not exonerate their sureties, it appearing that they were at liberty on bail when their cases were called in the state court (West v. Colquitt, 71 Ga. 559, 51 Am. Rep. 277; People v. Robb, 98 Mich. 397, 57 N. W. 257); nor did the fact that they had fled the jurisdiction following the issuance of the deportation warrant have that effect. In State v. McAllister, 54 N. H. 156, the accused, who had been admitted to bail upon a criminal charge in the state court, was convicted of a federal offense. While awaiting the execution of sentence he escaped and was at large when his bond in the state court was declared forfeited. The court in holding that the sureties were not exonerated, said: "They were not prevented from surrendering him by the act of God, by any act of the government of the United States or of the state of New Hampshire, or any sentence of the law—his voluntary absence under the circumstances afforded no justification or excuse for his sureties' failure to produce him." And such is the general rule as declared in the following cases: Bishop v. State, 16 Ohio St. 419; Campbell v. Board, 103 Kan. 329, 175 P. 155, 3 A. L. R. 178; McDonald v. Commonwealth, 213 Ky. 570, 281 S. W. 538, 45 A. L. R. 1034, and note; State v. Crosby, 114 Ala. 11, 22 So. 110; Wheeler v. State, 38 Tex. 173; Dunlap v. State, 66 Ark. 105, 49 S. W. 349.

[4] The contention that the accused would have been deported in any event, and that such action pursuant to federal statute would have exonerated the sureties, is beside the question, as the object of requiring bail is not pecuniary compensation to the government, but to compel the presence of the accused in court to the end that justice may be administered. 6 Cor. Jur., Bail, § 7, pp. 893, 894. Moreover, no act of the federal authorities interfered with the right or power of the sureties to surrender their principals, and to say that such would have been the result of the issuance of the deportation warrant, had the accused remained within the jurisdiction, would be a mere conjecture.

The record discloses no facts which support the conclusions of the trial court. The judgments are therefore reversed; the causes are remanded; and the trial court is directed to enter judgment in each case in accordance with the prayer of the complaint.

98 Cal. App. 17

GEIBEL v. BURR CREAMERY CORPORATION. (Civ. 5094.)

District Court of Appeal, Second District, Division 2, California. March 27, 1929.

Attorney and client ⚿166(1)—**Evidence held to support verdict for defendant sued by attorney for corporation with which defendant had contract.**

Where creamery company had contract with bottle exchange company engaged in collecting and returning empty bottles and cans to milk distributing companies, under which it was bottle exchange company's duty to obtain return of cans held by third persons, evidence in its attorney's action against creamery for services in action to recover the cans *held* to support verdict for the creamery company.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Martin E. Geibel against the Burr Creamery Corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Martin E. Geibel, of Los Angeles, in pro. per., for appellant.

Farrand & Slosson, of Los Angeles, for respondent.

CRAIG, J. The appellant, an attorney and counselor at law, instituted this action for a balance alleged to be due him as attorney's fees upon an open book account. Respondent admitted having paid the sum of $100, but denied further liability. Pursuant to trial before the court without a jury, it was found and adjudged that the defendant did not become indebted to the plaintiff in any sum for legal services, or for moneys paid out, on a book account, or otherwise, in connection with the litigation alleged, or in any other cause or proceeding. The plaintiff appealed, contending that the judgment and findings were contrary to, and not supported by, the evidence.

It appears that, for some time prior to the commencement of the proceedings out of which this controversy arose, a firm or combination known as the Los Angeles Creamery Company, for whom appellant was the attorney, had been engaged in collecting and returning to the various milk distributing companies in Los Angeles empty bottles, crates, and cans bearing the marks or brands of the respective owners. During such service, and about two months previous to the relations between the parties to this appeal, in which the alleged services were rendered, an agreement in writing, dated May 1, 1920, was signed by the Los Angeles Creamery Company, a corporation, designated as "Exchange Agent," and nearly a score of individuals and corporations dealing in milk and other dairy products, therein designated as "Owners," among which latter were the Burr Creamery Company, respondent above named. By the terms of said agreement the parties recited that, whereas the distributors had found it necessary to operate a bottle exchange in order to avoid retaining containers of others than the true owners, the first party agreed to perform such service, and the distributors agreed to pay the exchange agent therefor, at certain stipulated rates, upon receipt of its bills which should be rendered each month. It is undisputed that investigations, co-operation with the district attorney's office, procuring of search warrants, and other outside work of the so-called bottle exchange in recovering property of the various dealers, were in charge of two men named Weaver and Volen. On or about July 1, 1920, respondent corporation, through its manager, E. Burr, complained to Volen that about 75 of its milk cans were in possession of Albert Deike and Gertrude Deike, doing business under the name and style of Rosemead Dairy. Volen attempted to recover the cans by means of a search warrant, and, failing in this, consulted Weaver, who directed Volen to take the matter up with appellant herein, as attorney for the exchange agent, as he had done upon a previous occasion, in 1916. Volen testified that he visited the offices of appellant, which were conducted under the firm name of Lloyd, Cheney & Geibel, stating that he had been sent by Weaver, and requesting that civil proceedings be instituted for the recovery of about 75 milk cans belonging to the Burr Creamery Corporation; that he had previously consulted with E. Burr, and that the latter had informed the witness that "it was up to the bottle exchange to get the cans"; and to "go ahead with it; I have nothing to do with that. I am paying the Los Angeles Bottle Exchange for service." It further appears that, at Volen's request, Burr called at appellant's office. Burr testified that he went to appellant's office at the latter's request; that "Mr. Volen told me that it would be necessary to file a civil suit for the cans; and I told him distinctly it was up to the bottle exchange to get our cans the same as other creameries." This witness was asked the following questions, to which he replied: "Q. Mr. Burr, * * * did you make any statement to Mr. Geibel that you wished to employ him exclusively? A. I certainly did not. Q. Was there anything said about his being employed at all one way or the other? A. Never." Appellant thereafter prepared and filed a suit in replevin, undertakings were furnished, and the sheriff promptly obtained 70 milk cans from the defendants in that proceeding, which was thereupon dismissed. Appellant kept an itemized account of charges for consultations, preparation, and filing of pleadings, and for expenses incidental to various steps taken in the suit, including its dismissal, aggregating $460; $108.40 was credited as having been received on account, and the instant suit against the Burr Creamery Corporation was instituted for the balance, upon an alleged "book account," though appellant concedes that he received but $100 from respondent, $30.75 of which was expended. Appellant contends that the $100 was advanced as a retainer, whereas the respondent insists that it was merely an advance for costs and expenses, although the witness Burr was not permitted to testify further than that the check was drawn at Volen's suggestion, and that he had no conversation with the plaintiff regarding compensation or court expenses.

The appellant strenuously urges throughout a somewhat extensive argument and analysis of the pleadings and testimony that he was employed by the Burr Company to represent it, and he quotes from much of his own testimony in conflict with that of witnesses called on behalf of the respondent. No attempt is made, however, to dispose of the fact that he was attorney for the exchange agency, whose duty it was for an agreed compensation to perform such services without further expense to the contracting creamery companies. It is further obvious that neither Volen nor Weaver, who acted as intermediaries between appellant and Burr, was in the employ of the latter, nor had authority to bind him in the employment of counsel. They were performing services for the Los Angeles Creamery Company, and suggested that Burr see its attorney, appellant herein. Beyond that, the evidence nowhere tends to connect the respondent corporation in any contractual relationship with appellant. The witness T. H. Brice, manager of the Milk Producers' Association, expressly stated under oath: "Mr. Burr called me and asked me to come and go up with him to see the Bottle Exchange attorney. * * * I asked him why we didn't get our own attorney, and he stated that this didn't cost us anything; it was bottle exchange work." Burr testified that appellant had at no time mentioned a retainer or the payment of expenses.

As we have observed, there is considerable conflicting evidence upon the details of the whole transaction. There is in the main, however, no room for dispute of the fact that respondent contracted in writing with appellant's client, for a consideration, to collect and return its missing receptacles. This being true, it was but natural and logical that representatives of the exchange agent should upon occasion therefor refer to the latter's counsel members of the association or compact for whose benefit they were employed. There is apparently no evidence tending to reveal the conditions of appellant's employment by the exchange, nor the terms upon which respondent might eventually adjust with it such advances as appear to have been made for expenses, but with these we are not here concerned. That the judgment is sufficiently supported by the evidence to require an affirmance, we think is patent.

Other questions as to whether or not appellant properly sued upon a book account, or individually instead of in his firm's name, do not, in view of the conclusion reached, require discussion.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

97 Cal. App. 724

TYLER et al. v. CITY COUNCIL OF HUNTINGTON PARK et al. (Civ. 6326.)

District Court of Appeal, Second District, Division 2, California. March 22, 1929.

Certiorari ⚷70(1)—Order sustaining demurrer to petition for writ of review is not appealable (Code Civ. Proc. § 963).

Under Code Civ. Proc. § 963, order sustaining demurrer to petition for writ of review was not appealable, especially where it was followed by an order of dismissal which would remain in force, notwithstanding disposition of appeal.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Proceeding for writ of review by Glen Tyler and another against the City Council of Huntington Park and others. From an order sustaining demurrer to the petition, petitioners appeal. Appeal dismissed.

S. A. Shoop and H. W. Hess, both of Los Angeles, for appellants.

Carson B. Hubbard, of Los Angeles, for respondents.

STEPHENS, Justice pro tem. Appellants petitioned the superior court for a writ of review as to certain actions of the city council of the city of Huntington Park. A demurrer to the petition was interposed, and the court sustained it without leave to amend. Defendants also filed a motion to dismiss the proceeding, and the court granted the motion and ordered the cause dismissed. This attempted appeal is from the ruling of the court on the demurrer alone, and it must be dismissed, as an order on demurrer is not appealable. Section 963, Code Civ. Proc. Even if this were not true, nothing could be gained by our consideration of the appeal, for the order of dismissal would remain in full force and effect.

The appeal is dismissed.

We concur: WORKS, P. J.; CRAIG, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

97 Cal. App. 759

ATKINSON v. BOYNTON. (Civ. 6588.)

District Court of Appeal, First District, Division 2, California. March 26, 1929.

1. Trusts ⟹88—In suit to establish trust in note and deed of trust taken by client, facts could be shown by parol, notwithstanding statute (Code Civ. Proc. § 1973).

Where, in closing exchange of land negotiated by broker, defendant advanced $17,000 to other party, and took deed of trust on land exchanged for $45,000, of which $2,000 represented commissions due from him to the broker and $3,000 commissions due from the other party to the broker, broker suing to establish trust in the note and mortgage could show such facts by parol, notwithstanding Code Civ. Proc. § 1973, requiring agreement employing broker to be evidenced by writing.

2. Trusts ⟹87—When broker was permitted to show by parol that part of consideration for note and deed of trust was commissions, defendant was entitled to show his version of transaction (Code Civ. Proc. §§ 1850, 1854, 1860).

In broker's action to establish trust in note and deed of trust taken by his employer in exchange of land, where broker was permitted to show that amount of the mortgage included commissions due him from parties to contract, defendant should have been permitted, under Code Civ. Proc. §§ 1850, 1854, 1860, to introduce evidence that it was part of broker's duty to negotiate a loan, and that, when he was compelled to take deed of trust, broker was paid $1,000, and it was agreed that, unless he negotiated sale of the note and mortgage, he was to have no further interest.

3. Trusts ⟹371(8)—In suit to establish trust in note and deed of trust taken by client, agreement that plaintiff's interest was to cease, unless he obtained purchaser, was provable without being specially pleaded.

In broker's action to establish trust in note and deed of trust taken by his client on exchange of lands, defense that broker was paid $1,000, and was to have no further interest if he failed to negotiate sale of the note and deed of trust, could be proved without being specially pleaded.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by W. L. Atkinson, doing business under the fictitious firm name and style of W. L. Atkinson & Co., against F. H. Boynton. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Bohnett, Hill & Campbell, of San Jose, for appellant.

J. M. Atkinson, of San Jose, for respondent.

BURROUGHS, Justice pro tem. This is an action by W. L. Atkinson, doing business under the fictitious name and style of W. L. Atkinson & Co., as plaintiff, against F. H. Boynton, as defendant, to have a trust declared in favor of the plaintiff in a certain promissory note and deed of trust, to the extent of $5,000; said note and deed of trust standing in the name of said defendant.

In so far as it is material on this appeal, the complaint alleges that on or about the 12th day of January, 1925, D. H. and Rebecca I. Arakelian made, executed, and delivered to the defendant an interest-bearing promissory note in the sum of $45,000, and, as security for the payment thereof, executed a deed of trust in favor of the defendant covering certain lands situated in the county of Santa Clara. It is further alleged that $40,000 of the consideration for said note was furnished by the defendant, and the remaining $5,000 by the plaintiff; that, ever since the execution of said note and deed of trust, the defendant has held, and still holds, the same in trust for the plaintiff to the extent of $5,000, with the accrued interest upon said last-named amount, but that the defendant refuses to acknowledge plaintiff's interest therein, and claims to be the sole owner and holder of said note and deed of trust and of all sums of money due or to become due thereon. By a supplemental complaint it is alleged that, since the commencement of this action, the promissory note has been paid in full, and $5,000 and interest on said sum has been deposited in escrow to satisfy any judgment rendered in this action.

The answer of the defendant denies that plaintiff has any interest in said note or deed of trust or the money due thereon, denies that defendant holds the same in trust for plaintiff, and admits that he claims to be the sole owner thereof and entitled to all sums of money represented thereby.

The court rendered judgment for the plaintiff and the defendant appeals.

[1] During the progress of the trial of the action, the plaintiff offered, and, over the objection of the defendant, the court admitted, parol evidence that the plaintiff acted as a real estate broker in negotiating an exchange of lands between the defendant and the Arakelians; that in the transaction the defendant took the note above referred to and the deed of trust on the land the defendant was transferring to the Arakelians to secure the payment of said note; that plaintiff's commission in the transaction amounted to the sum of $3,000 from each one of the parties; that to finance the deal it was necessary that the Arakelians raise the sum of $45,000. As they were unable to do so. and to carry the exchange through, the defendant assumed a mortgage of $25,000 on the property which he was obtaining from the Arakelians, and further advanced them the sum of $17,000; that of the latter amount $2,000 were commissions due from the defendant to the plaintiff, and the balance of $3,000 was the commission due from the Arakelians to the plaintiff. The

defendant paid plaintiff the balance of $1,000 due as commissions in cash.

Appellant claims that the court committed prejudicial error in allowing the plaintiff to introduce oral evidence of his commission on the exchange agreement. He cites in support thereof section 1973 of the Code of Civil Procedure to the effect that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission is invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent, and that evidence thereof cannot be received without the writing or secondary evidence of its contents. There can be no question that, if this action was for the recovery of a commission due the plaintiff for the sale of real estate, the objection would be sound. McGeary v. Satchwell, 129 Cal. 389, 62 P. 58. But this is not such an action. It is one to have the defendant declared a trustee of an interest alleged to be owned in a certain promissory note and trust deed standing in the name of the defendant. While it is true that the consideration for plaintiff's alleged interest in said note was a broker's commission on a sale of real estate, the contract of sale having been fully executed and the broker's commissions merged in the note which is the subject of this action, it was unnecessary to produce a written contract under subdivision 6 of section 1973 of the Code of Civil Procedure. In 12 Cal. Jur. 926, it is said: "A fully executed parol contract cannot be affected by the statute of frauds and cannot be assailed by either party or by third persons, on the ground that it is not in writing. * * *" The same principle is enunciated in Scott v. Glenn, 87 Cal. 221, 25 P. 405. In the instant case, $3,000 of the $5,000 interest in the promissory note were commissions owed by the Arakelians to the plaintiff, and, having been included in the note, it was a completed transaction. The remaining $2,000 were commissions owed by the defendant to plaintiff, and, having been advanced by defendant to the Arakelians to enable them to close the deal, and being included in the promissory note, also constituted an executed parol contract. The point urged is without merit.

[2] The next point urged for a reversal of the judgment is that the court erred in excluding certain evidence offered by the defendant. We are of the opinion that the point is well taken and the ruling of the court constituted prejudicial error. The plaintiff, in support of his case, offered parol evidence that the consideration for the note was $40,000 furnished by the defendant and $5,000 furnished by plaintiff. That the latter sum was made up of his commissions earned on the exchange of lands by defendant and Arakelian. As against this line of testimony, defendant endeavored to introduce evidence that, as a part of the duties of plaintiff in the exchange, the latter was to obtain a loan of $45,000 to finance the deal. Failing to obtain said loan, plaintiff and defendant made a new contract, by the terms of which defendant furnished the sum of $42,000 and paid the plaintiff the sum of $1,000 for his services as a broker under the exchange agreement. The note and deed of trust under said new contract was taken for the sum of $45,000, and plaintiff was to have one year from the date thereof in which to sell said note and deed of trust, and, if he failed to sell within said time, his interest in the note and mortgage ceased, but, if he succeeded in making said sale, then the defendant was to receive the sum of $40,000 thereof and the plaintiff the balance. Defendant also offered to prove that the plaintiff had failed to sell within the time limited. We are of the opinion that, the court having permitted the plaintiff to introduce evidence of his version of the agreement, defendant was entitled to rebut such evidence by a countershowing. We think that sections 1850, 1854, and 1860 of the Code of Civil Procedure warrant this conclusion.

[3] It is claimed by respondent that the foregoing is new matter, and, to be available to the defendant, should have been specially pleaded, but we think this claim is answered by the case of Mott v. Minor, 11 Cal. App. 774, 106 P. 244, where it is held that under a specific denial the defendant could prove that a cause of action never did exist in favor of the plaintiff.

It is further claimed that the judgment is not sustained by the findings. As the judgment must be set aside, it is unnecessary to pass upon this question.

The judgment is reversed, and the cause remanded for a new trial.

We concur: KOFORD, P. J.; STURTEVANT, J.

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97 Cal. App. 720

ROHER et al. v. LEONARD & HOLT et al.★
(Civ. 6590.)

District Court of Appeal, First District, Division 2, California. March 21, 1929.

Rehearing Denied April 19, 1929. Hearing Denied by Supreme Court May 20, 1929.

1. Trial 🔑260(8)—Refusal of instruction as to maximum speed held not error in motorbus passenger's action for injuries, in view of instructions given.

In action by passenger against operators of motorbus for injuries sustained in collision of bus with automobile, refusal of instruction regarding maximum speed which was permissible at place of accident *held* not error, where court gave instruction quoting introductory part of Motor Vehicle Act and section 113(a) thereof (Gen. Laws, Act 5128), and instructed jury as

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★Rehearing denied. Hearing denied by Supreme Court.

to duty of common carrier to exercise highest degree of care in transporting passengers.

2. Carriers ⚷321(21)—Instruction on res ipsa loquitur held not erroneous in passenger's action against motorbus operators, though defendants' witnesses testified as to circumstances of accident.

In action by passenger against operators of motorbus for injuries sustained in collision with automobile, instruction on res ipsa loquitur *held* not erroneous by reason of fact that defendants' witnesses gave evidence tending to prove how the accident occurred, where plaintiffs pleaded negligence in general terms.

3. Trial ⚷296(11) — Instruction permitting jury's consideration of injured plaintiff's condition in life held not prejudicial error as permitting consideration of pecuniary condition, in view of court's admonition relative to argument.

Instruction relating to damages, in action for injuries, that jury should take into consideration plaintiff's condition in life, *held* not to constitute prejudicial error as permitting consideration of plaintiff's financial ability, in view of court's subsequent admonition to jury to disregard any argument of attorneys in regard to wealth of parties.

4. Trial ⚷296(3)—Instruction permitting recovery against one defendant if his negligence was the proximate cause held not erroneous, in view of other instructions.

In action against several defendants for injuries, instruction to jury that, if they found negligence of one of defendants alone proximately caused injuries, and plaintiffs were free from contributory negligence, verdict must be against that defendant, *held* not erroneous as direction that such defendant was negligent, in view of other instructions.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Hans Roher against Leonard & Holt and another. Judgment for plaintiff, and defendants appeals. Affirmed.

Ross & Ross, of Redwood City, and Redman & Alexander, of San Francisco, for appellant Leonard & Holt.

Cooley, Crowley & Gallagher, of San Francisco, for appellant Rossotto.

J. Horton Beeman, of San Francisco, and Franklin Swart, of Redwood City, for respondents.

STURTEVANT, J. Anna Roher was injured while a passenger riding in a bus operated by the defendants Leonard & Holt when their bus collided with an automobile operated by the defendant Clorinda Rossotto. She filed a complaint charging negligence in general terms against both defendants. The defendants appeared and answered, and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiffs, and from the judgment entered thereon the defendants have appealed, and have filed separate sets of briefs.

Appeal of Leonard & Holt.

[1] The defendants Leonard & Holt requested the trial court to give an instruction regarding the maximum of speed which under the law was permissible at the intersection of Brewster avenue and Myrtle street in Redwood City, San Mateo county, at the time of the accident. The trial court refused that instruction, but did give an instruction quoting the introductory part and subdivision (a) of section 113 of the Motor Vehicle Act (1 Deering's Gen. Laws, 1851, 1886). These defendants complain of the ruling as being error. However, we see no error in the ruling. In the preceding instruction the trial court had instructed the jury that a common carrier is bound to exercise the highest degree of care in transporting its passengers. An instruction regarding minimum speed might have been pertinent, but an instruction regarding maximum speed would have had no effect excepting to confuse the jurors.

[2] The trial court also gave an instruction regarding the doctrine of res ipsa loquitur. It is not claimed that the instruction was improperly worded. However, these defendants claim that, under the facts, no instruction on that subject should have been given, because in the instant case these defendants called some witnesses to the stand and introduced some evidence proving, or tending to prove, how the accident occurred. As stated above, the plaintiffs pleaded their case by pleading negligence in general terms. The defendants cite and rely on Marovich v. Central California T. Co., 191 Cal. 295, 216 P. 595. That authority is not in point. That case was directed to a pleading in which the plaintiff set forth specific acts of negligence.

Appeal of Clorinda Rossotto.

[3] In instructing the jury on the subject of damages, the trial court gave an instruction as follows: "If your verdict is for the plaintiffs, then in assessing the damages to Anna Roher, if any, you should take into consideration her age and *condition in life;* the character of the injuries sustained by her, if any; the nature, extent and severity of the injuries sustained by her, if any; and if you find that she did sustain an injury, whether the same was temporary, or if permanent in its character. And in estimating the amount of such damages you may consider the pain suffered, if any; extent, degree and character of suffering, if any; and its duration and severity; also pain, if any, which you believe from the evidence plaintiff, Anna Roher, is reasonably certain to suffer in the future; and from all of these elements you will resolve what sum will fairly compensate her for the injuries and loss, if any, sustained by

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

her, not, however, in excess of the amount prayed for in the complaint." This appellant contends that the portion italicized was in effect to direct the jury to take into consideration "the pecuniary condition of the plaintiffs." The instruction is not clear, and should not have been given. Conceding that the instruction would have been error if it had been so worded, a sufficient answer is that the instruction is not necessarily susceptible of the meaning which the appellant would impress upon it. The instruction was not so worded. In construing the part objected to with the rest of the instructions given by the court, and reading all of the instructions together, the attack may not be sustained. If the instruction had been expressly worded, as this defendant contends for, then it will be conceded that it would have been erroneous. Story v. Green, 164 Cal. 768, 772, 130 P. 870, Ann. Cas. 1914B, 961; Shea v. P. & B. v. R. Co., 44 Cal. 414, 429. Malone v. Hawley, 46 Cal. 409, does not set forth in hæc verba the instruction which was under consideration, nor the other instructions which were given. For that reason it is not conclusive in this case. The financial ability of the plaintiffs in this case had not come before the court in any respect whatsoever except as we will note. Mr. Swart, one of the attorneys, while arguing in behalf of the plaintiffs, adverted in some respect to the subject. Thereupon the following proceedings were had: "Mr. Alexander: I assign the remark of Mr. Swart as misconduct, the fact that the plaintiffs were poor. I assign it as misconduct and ask that the jury be discharged at this time. The Court: That question is not before the jury and should not have been mentioned in any way and I will just say to the jury that they will not take into consideration anything the attorneys may say in regard to the wealth of any parties connected with this case. Mr. Swart: I am sorry to have made that statement." Bearing in mind that all instructions are to be read together, and reading the instruction objected to and the firm admonition of the court which we have just quoted, we are bound to assume that the jury understood the trial court fully and that the jury understood that it was not to take into consideration the financial condition of the plaintiffs when the jury was making up its verdict.

[4] While reading numerous instructions to the jury, the trial court, among other things, read an instruction as follows: "If you find from the evidence that it was the negligence of the defendant Clorinda Rossotto alone which proximately caused or contributed to the injuries to Mrs. Roher, and that plaintiffs themselves were free from negligence which proximately caused or contributed to said accident, your verdict must be in favor of plaintiffs and against defendant Clorinda Rossotto." This defendant claims the instruction was to the effect that Mrs. Rossotto was negligent. Turning to the other instructions given by the court, it is very clear that the trial court did not in any respect whatsoever instruct on any question of fact in the case; on the other hand, that it made itself very clear that the function of determining facts rested with the jury, and in particular the function of determining whether the defendants were, or either of them was, guilty of negligence; and, if so, which one.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NORTON, Justice pro tem.

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97 Cal. App. 764

WILLIS v. PERINONI et al. (Civ. 6595.)★

District Court of Appeal, First District, Division 2, California. March 26, 1929.

Rehearing Denied April 24, 1929. Hearing Denied by Supreme Court May 23, 1929.

1. Appeal and error 🔑1002—Jury's verdict resting upon conflict in evidence may not be disturbed on appeal.

Reviewing court may not disturb verdict of jury which rests upon conflicting evidence.

2. Assault and battery 🔑35—Finding that assault by defendants on carpenter working on adjoining building was malicious, participated in by both defendants, and was not in defense of property, held sustained.

Finding of jury that defendants striking carpenter at work on building on adjoining lot were actuated by malice, that one of defendants aided and abetted other in assault, and that they were not acting in defense of property, *held* sustained by evidence, in action for actual and exemplary damages for assault.

3. Assault and battery 🔑40—$5,000 damages to carpenter for fractured skull, impaired eyesight, numbness in limbs, and loss of efficiency, resulting from malicious assault, held not excessive.

$5,000 damages to one suffering fractured skull and permanent injuries impairing his efficiency as a carpenter and affecting eyesight and causing numbness in limbs, *held* not excessive, where injuries resulted from malicious assault by defendants with iron bar and both actual and exemplary damages were prayed for; amount awarded being within jury's province.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by John E. Willis against Ida Perinoni and another. Judgment for plaintiff, and defendants appeal. Affirmed.

G. P. Hall, of Petaluma (J. Hall Lewis, of Petaluma, of counsel), for appellants.

H. B. Churchill, of Santa Rosa, for respondent.

★Rehearing denied. Hearing denied by Supreme Court.

BURROUGHS, Justice pro tem. In this action plaintiff sued the defendants for the sum of $5,000 actual damages alleged to be due him for personal injuries inflicted by said defendants, and also for the sum of $5,000 exemplary damages. The cause was tried by a jury and a verdict returned in favor of the plaintiff and against both defendants for the sum of $5,000. Defendants have appealed from the judgment entered on said verdict.

In support of his cause of action it is alleged in the amended complaint that on or about the 21st day of May, 1926, in the city of Petaluma, county of Sonoma, the defendants wantonly, maliciously, grossly, outrageously, and violently assaulted the plaintiff, in that the defendant Ida Perinoni did then and there hold the plaintiff while the defendant Romildo Perinoni did then and there, while said Ida Perinoni held the plaintiff, strike him on the head with an iron bar, causing plaintiff's skull to be fractured and inflicted upon him permanent injuries. The defendants deny the allegations of the complaint and by way of a further defense allege that defendant Ida Perinoni was on the day of the alleged assault the owner of a piece of real property in the city of Petaluma, and that the plaintiff forcibly entered upon said real property against her will and without her consent, and that she thereupon ordered him to leave said premises, which he refused to do, and that he thereupon attacked her, and assaulted her, and struck her with a hammer. That the said defendant Romildo Perinoni witnessed said assault, and both the defendants, believing that the life of defendant Ida Perinoni was in danger, and in order to prevent further assault by the plaintiff, forcibly ejected plaintiff from the premises, using only sufficient force necessary for that purpose. In support of the appeal appellants contend that the verdict and judgment against the defendant Ida Perinoni is against law; that the judgment, in so far as it affects the defendant Romildo Perinoni, is excessive. In support of these claims it is contended: First, that there was an entire absence of malice shown by either defendant against the plaintiff; second, that the defendants were resisting a trespasser on the premises of the defendant Ida Perinoni at the time of the alleged assault and used only necessary and sufficient force to eject him therefrom; third, that with respect to the defendant Ida Perinoni there was no evidence of aiding and abetting the assault or a conspiracy between the defendants that the defendant Romildo Perinoni should commit the alleged assault upon plaintiff.

[1, 2] After an examination of the entire record, we are satisfied that the verdict of the jury rested upon a conflict in the evidence, and therefore under well-settled principles of law this court may not disturb the verdict. There is substantial and satisfactory evidence of the following facts: The defendants are brother and sister. The latter was the owner of a house and lot in the city of Petaluma. A man named Baker was the owner of an adjoining lot. On May 21, 1926, said Baker was, through a contractor, erecting a building on his said lot; said building to be used in connection with an automobile shop. The building was located from 6½ to 8 inches back from the property line between the lots of said Baker and said defendant Ida Perinoni. The plaintiff was a carpenter working on said building. He commenced work thereon early in the afternoon of said day. While working on the building the defendant Ida Perinoni called to him in a loud tone of voice, from the window of her own home, to keep off of her property, repeating this admonition a number of times and finally calling to him that she had warned him the last time. Within a few moments she left her house and went over to the place where the plaintiff was leaning over and nailing some sheeting on the side of the building. She caught him by the back of his clothing and began to shake and pull him to her property. While she was thus shaking the plaintiff and ordering him off her property, her codefendant, Romildo Perinoni, ran toward them and struck the plaintiff over the head several times with an iron bar. A man named Dillingham, who was a witness to the attack, undertook to prevent the defendant Romildo Perinoni from further striking the plaintiff. He ran between Romildo and the plaintiff and got hold of Romildo's upraised arm, whereupon Romildo tried to hit Dillingham with the iron bar. Thereupon the defendant Ida got hold of Dillingham and started to scratch his eyes. There was also evidence of witnesses that Ida Perinoni held the plaintiff while her brother struck him. There was also direct evidence that the plaintiff was not on her land at the time of the attack, nor had he been on there at any previous time. It further appears from the evidence of a witness named Hosty, who a short time prior to the commencement of the erection of the building was preparing the lot for the building, that he was told by the defendant Ida Perinoni: "You are not going to put up any building up here." Her codefendant told the same witness he would have to be pretty damn careful and keep off his property. There was also evidence to the effect that Ida Perinoni had applied to the city council to try to stop the erection of said building. Further, that the defendant Ida had served a notice on Baker to keep off her property, and during the day of the assault she was constantly warning the workmen to keep off of her lot. The evidence also discloses that the plaintiff received a fractured skull from the assault, that his eyesight had been affected, and that at the date of the trial he

was undergoing massage treatment for numbness in his limbs, and also that his efficiency as a first-class carpenter had been impaired. It is true that a large part of this evidence was contradicted by the defendants and they also testified that the plaintiff struck the defendant Ida Perinoni with a hammer, but this was denied by the plaintiff and several disinterested witnesses. We are of the opinion that under the foregoing evidence the jury were justified in the implied finding that both defendants were actuated by malice and that the defendant Ida Perinoni actually aided and abetted her brother in the assault and that they were not acting in defense of property.

[3] It is next pointed out by appellants that the amount of damages awarded was excessive, but we are of the opinion that the amount of damages awarded was peculiarly within the province of the jury and should not be disturbed by this court. Redfield v. Oakland Consolidated Street R. Co., 110 Cal. 277, 42 P. 822, 1063; Lee v. S. P. R. Co., 101 Cal. 118, 35 P. 572; Boyce v. California Stage Co., 25 Cal. 474.

The judgment appealed from is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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97 Cal. App. 790

BERKELEY CHIROPRACTIC COLLEGE et al. v. COMPTON et al. (Civ. 6646.)

District Court of Appeal, First District, Division 2, California. March 26, 1929.

1. Physicians and surgeons 🔑5(2)—Board of chiropractic examiners, empowered to examine applicants to practice chiropractic, and requiring certain qualifications, held unauthorized to examine college as to reputability (St. 1923, p. xx, § 5).

Under St. 1923, p. xx, authorizing creation of chiropractic board of examiners, and giving it power to examine applicants, to issue and revoke licenses to do things necessary to exercise of powers and duties, and by section 5 providing qualifications of applicant, board was not required, and was not given implied privilege or duty, to examine college as to its reputability; burden of proving eligibility to take examinations being upon applicant himself.

2. Constitutional law 🔑70(1)—Court cannot read into statute what was not clearly intent thereof.

It is not the province of the court to read into St. 1923, p. xx, authorizing creation of a chiropractic board of examiners, and defining their powers and duties, what was not clearly the intent thereof.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Berkeley Chiropractic College and another against James Compton and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Frank V. Kington, of San Francisco, for appellants.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for respondents.

BURROUGHS, Justice pro tem. This is an appeal from an order of the superior court of the city and county of San Francisco, granting an injunction in favor of the plaintiff the Berkeley Chiropractic College, and against the defendants as the acting state board of chiropractic examiners. The appellants contend that the state board of chiropractic examiners, under and by virtue of a statute of this state creating the board and declaring its powers and duties, has a right of its own motion to conduct an investigation into the qualifications and status of a chiropractic school or college holding itself out to be one organized for the purpose of qualifying applicants for chiropractic licensure; also to summon witnesses, demand the production of records, examine into the qualifications of teachers of said institution, and to pass upon the reputability of such school or college. The injunction granted by the court reads as follows:

"The plaintiffs in the above entitled action having commenced said action by filing their verified complaint against the above named defendants as the State Board of Chiropractic Examiners of the State of California praying for an injunction against said defendants as said Board to refrain from certain acts set forth in said complaint, and hereinafter more particularly mentioned, and this court having issued its order to show cause directed to said defendants directing them to appear and show cause why injunction should not issue as prayed; and said defendants having appeared and filed their demurrer to said complaint, and it appearing to this court as a matter of law that said defendants have no right, authority or jurisdiction as said Board to do and perform said acts.

"It is therefore ordered, adjudged and decreed that you the said above named defendants James Compton, W. W. Tait, H. D. McFarland, W. N. Clayton and J. K. Gilkerson as said State Board of Chiropractic Examiners of the State of California, do absolutely desist and refrain and you are hereby permanently enjoined and prohibited from conducting any investigation of the plaintiff Berkeley Chiropractic College, a corporation, and/or the qualifications and status thereof as a chiropractic college; and/or to issue citations, subpœnas or other processes, and/or to examine witnesses and take testimony or other evidence in the matter of such investigation of said plaintiff Berkeley Chiropractic College."

The act regulating the practice of chiropractic in this state is found in the Statutes of 1923, page lxxxix, authorizing the creation of a chiropractic board of examiners, and defining their powers and duties. It contains, among other provisions, the following:

"The board shall have power: * * *

"(c) To examine applicants and to issue and revoke licenses to practice chiropractic, as herein provided.

"(d) To summon witnesses and to take testimony as to matters pertaining to its duties; and each member shall have power to administer oaths and take affidavits.

"(e) To do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed."

The act further provides: "Sec. 5. * * * Each applicant shall be a graduate of an incorporated chiropractic school or college which teaches a course of not less than two thousand four hundred hours, extended over a period of three school terms of at least six months each, and must give satisfactory proof of having attended not less than ninety per cent. of said two thousand four hundred hours, and shall present to the board at the time of making such application, a diploma from a high school, or proof, satisfactory to the board, of education equivalent in training power to a high school course."

Appellants contend that under the foregoing provisions the power of the board to examine into the qualification of colleges, though not expressly given, is implied, and in support of its contention appellant cites the general rule of implied powers from Throop on Public Officers, § 342, as follows: "That in addition to the powers expressly given by statute to an officer or a board of officers he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers."

[1, 2] The implied power in the case at bar is clearly "to do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed." The powers and duties granted or imposed by this statute are: To examine applicants as to their character and qualification, and to issue and revoke licenses. The statute neither states nor implies that the board shall pass upon the reputability of a college, nor does it say a college in good standing, but, on the contrary, the language of the statute is: "Each applicant shall be a graduate of an incorporated chiropractic school or college," and, further, in the requirements for eligibility of an applicant to take the examinations, the statute says he "must give satisfactory proof of having attended, * * *" and, further, "and shall present a high school diploma or other proof of equivalent education." We are of the opinion that the intendment of section 5 is that the applicant must give to the board satisfactory proof of his eligibility to take the examinations. The statute has gone further and required of the board that the examinations shall cover certain subjects, and a certain average shall be attained before the certificate may be granted. The burden of proving his eligibility to take the examinations is put upon the applicant himself, and the act contains no provision requiring or implying a privilege or duty on the part of the board of chiropractic examiners to examine a college as to its reputability. The case of Ex parte Whitley, 144 Cal. 167, 77 P 879, 1 Ann. Cas. 13, cited by appellant, involved the power of the board of dental examiners. The power claimed in that instance is clearly implied in the act creating a board of dental examiners, to be found in the Statutes of 1915, p. 698. It is therein provided that an applicant for a license to practice dentistry shall furnish "satisfactory evidence of having graduated from a reputable dental college, which must have been approved by the board of dental examiners of California." Section 6. If the school must be reputable and must have been approved by the board, the board must have examined into the qualifications and status of the college and either approved or disapproved the college from which the applicant has graduated. Other jurisdictions have by statute given to the board of examiners the express or clearly implied power to examine and pass upon the reputability of medical or dental schools. In the case of the People ex rel. v. Dental Examiner, 110 Ill. 181, the court, at page 183, cites the Illinois statute as follows: "Unless such person shall have received a diploma from the faculty of some reputable dental college duly authorized by the laws of this State. * * *" And, further: "But said board shall, at all times, issue a license to any regular graduate of any reputable dental college, without examination, upon the payment by such graduate," etc.; and further in the opinion of the court it is held that the word "reputable" is in addition to the other requirements in regard to the college, and "whether a college be reputable or not is not a legal question but one of fact * * * the reputability of the college lies with the board of examiners." In Iowa Medical College Ass'n v. Schrader, 87 Iowa, 661, 55 N. W. 24, 20 L. R. A. 355, it is clearly held that the law required the board of examiners to decide the standing of the college. The statute is cited as follows: "If the diploma is found genuine, and is issued by a medical school legally organized and in good standing, of which the state board of examiners shall determine." The court held that the action of the board of examiners in passing upon the standing of the college was within its jurisdiction and legal. The powers here claimed by appellant have been granted by

this and other states in similar statutes. Had it been intended that this board of examiners should exercise such control over chiropractic colleges, the act could have been so framed. It is not the province of the court to read into the statute what was not clearly the intent thereof. The act itself provides for the examination of the applicant by the board.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: KOFORD, P. J., STURTEVANT, J.

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98 Cal. App. 143

FISH v. RASOR et al. (Civ. 6208.)

District Court of Appeal, Second District, Division 1, California. April 5, 1929.

1. Appeal and error 🔑1056(2)—Evidence of damage from breach of warranty was properly excluded as immaterial, where court found warranty was not made.

In action on promissory note, where trial court found against defendant's contention of warranty that well would produce certain amount of water, evidence of defendant's damage by reason of lack of water from well was properly excluded as immaterial.

2. Appeal and error 🔑1010(1)—Trial court's findings on issue made upon evidence is conclusive on appeal.

Findings of trial court on issue made upon evidence is conclusive on appeal.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by E. B. Fish against Jesse A. Rasor and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Samuel D. Weil and Don R. Lehman, both of Los Angeles, for appellants.

W. C. Shelton, of Los Angeles, for respondent.

YORK, J. This is a suit brought on a promissory note, on which payment on account of interest had been made. The answer of the defendants denies nonpayment, and sets up an affirmative defense by alleging certain agreements made as to the drilling of a well, claiming damages for failure of the well to produce the amount of water alleged to have been warranted.

The court, in its findings on evidence introduced, finds against the contention of the defendants that such a warranty was made. The appellants urge "that it is inherently improbable that the casing could have been properly perforated under the flow conditions as they existed before reperforation," but the finding is not of an impossible fact, and the evidence is sufficient to support the finding made.

[1] One contention of the defendants is that the court erred in excluding evidence of defendants' damage by reason of lack of water from the well. If the trial court was right in its findings, and if we are right in the conclusion we have heretofore reached, all of this evidence which was ruled out is now immaterial.

[2] As to the last contention of the appellants, that they were entitled to a set-off of $300 for pulling and reinstalling the pump, the findings of the trial court on this issue made upon evidence is against this contention, which therefore cannot be heard here.

The main arguments of the appellants appear to be in regard to matters relating to the flow of water underground, and the contention of the appellants that the plaintiff warranted that the well upon the land of the defendants would produce a certain amount of water. This was denied by the plaintiff, and the trial court found in accordance with the testimony of the plaintiff.

We do not believe that any of the contentions of the appellants are well founded, and judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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97 Cal. App. 713

GARDNER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6312.) ★

District Court of Appeal, Second District, Division 2, California. March 21, 1929.

Rehearing Denied April 18, 1929. Hearing Denied by Supreme Court May 20, 1929.

1. Injunction 🔑157—Order restraining interference with possession of premises until title was finally determined in pending actions held not uncertain as to acts restrained or duration.

Order restraining petitioner from interfering, hindering, or molesting another in peaceable and quiet possession of premises until title and right of possession thereto should be finally determined in four pending actions, *held* not void for uncertainty either as to time of its duration or as to act from doing of which petitioner was restrained.

2. Injunction 🔑157—Order restraining interference with possession of premises until title was finally determined in pending actions held not void as enjoining exercise of legal right (Code Civ. Proc. § 526, subds. 1, 6).

Order restraining petitioner from interfering, hindering, or molesting another in peaceable and quiet possession of premises, until title and right of possession thereto should be finally determined in four pending actions, *held* not void for attempting to enjoin exercise of legal right, it being presumed that one of controlling reasons was to prevent multiplicity of

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★Rehearing denied. Hearing denied by Supreme Court.

proceedings under Code Civ. Proc. § 526, subds. 1, 6.

3. Injunction 🔑157—Restraining order held not void for not disclosing that bond was required or reason for issuance.

Order restraining petitioner from interfering, hindering, or molesting another in peaceable and quiet possession of premises, until title and right of possession thereto should be finally determined in four pending actions, *held* not void on ground that order does not disclose on face that bond was required or reason for its own issuance.

4. Injunction 🔑157—Order restraining interference with possession of premises until title was finally determined in pending actions held not void as self-contradictory.

Order restraining petitioner from interfering, hindering, or molesting another in peaceable and quiet possession of premises until title and right of possession thereto should be finally determined in four pending actions *held* not void as being self-contradictory.

5. Injunction 🔑230(2)—Affidavit in contempt proceeding for violating restraining order held not insufficient for failure to show order was in effect when acts were committed.

Affidavit in contempt proceeding setting forth issuance of order restraining interference with possession of property and service on defendant on or about September 7, and that defendant, for purpose of setting at naught such restraining order and destroying quiet enjoyment of premises, procured others to file actions against corporation in possession, *held* not insufficient to confer jurisdiction on ground that it did not disclose that restraining order was in force on September 14, when acts complained of were committed.

6. Injunction 🔑230(2)—Affidavit in contempt proceeding for violating restraining order held not insufficient for failure to disclose act complained of was act restrained.

Affidavit in contempt proceeding, setting forth issuance of order restraining interference with possession of property and service on defendant on or about September 7, and that defendant, for purpose of setting at naught such restraining order and destroying quiet enjoyment of premises, procured others to file actions against corporation in possession, *held* not insufficient for failure to disclose that act complained of was act restrained.

7. Injunction 🔑230(2)—Affidavit in contempt proceeding for violating restraining order held not insufficient for not averring knowledge of restraining order.

Affidavit in contempt proceeding, setting forth issuance of order restraining interference with possession of property and service on defendant on or about September 7, and that defendant, for purpose of setting at naught such restraining order and destroying quiet enjoyment of premises, procured others to file actions against corporation in possession, *held* not insufficient for failure to aver defendant's knowledge of existence of restraining order.

8. Contempt 🔑54(4)—Affidavit for constructive contempt must show on face facts constituting contempt.

In proceeding to punish for constructive contempt, affidavit must show on its face facts which constitute contempt.

9. Contempt 🔑60(1)—No presumptions are indulged respecting jurisdiction of court, in absence of essential averment in contempt proceeding.

In proceeding to punish for constructive contempt, no presumptions are to be indulged with respect to jurisdiction of court, in absence of essential averment.

10. Injunction 🔑230(2)—Affidavit in contempt proceeding for violating restraining order held not insufficient for not showing giving of undertaking prior to issuance of original restraining order.

Affidavit in contempt proceeding for violating restraining order *held* not insufficient for failure to set up giving of undertaking prior to issuance of original restraining order, since order presupposes giving of bond, and, if none was given, it was incumbent on defendant to show such fact as excuse for nonobservance.

Application for certiorari by Benjamin Gardner to review an order of the Superior Court of Los Angeles County, Ruben S. Schmidt, Judge, adjudging petitioner guilty of contempt. Order affirmed.

Heyfron, Davis & Heyfron, of Hollywood, and Max Lewis, of Los Angeles, for petitioner.

William P. Redmond, of Los Angeles, for respondents.

THOMPSON, J. The petitioner here was found guilty of contempt by the respondent court, and sentenced to five days' imprisonment in the county jail. He seeks by the writ of review to have the judgment annulled on the ground that the court had no jurisdiction to pronounce it. In support of this contention, he advances two arguments. He says, first, that the original restraining order which the respondent is claimed to have violated is void on its face, and, second, that the affidavit upon which an order was made for the petitioner to show cause why he should not be punished was insufficient to confer jurisdiction on the court.

It appears from the record that, prior to September 7, 1928, four actions were pending in the respondent court, all of them in some way relating to the title or right of possession to certain real property in the possession of Beth David Nusach Sephard, a religious corporation, from about January 11, 1926, to about August 21, 1928; that on the latter day, well knowing that a writ of assistance had previously issued to the plaintiff in the action entitled Morrow & Baer v. Gardner, one Annie Weinberg, by and through her agent B. Gardner, secured a writ of assistance to issue out of the respondent court to place Annie Weinberg in possession; that on September 7, 1928, after hearing for that purpose, the respondent court made its order setting aside the writ of assistance issued to Annie Weinberg, and restraining Annie Weinberg, B. Gardner (the petitioner here), and E. T. McGann from applying for or obtaining an order in an effort to obtain possession of the real property involved until the title and right of possession thereto should be finally determined in the four actions then pending, to wit: W. E. Morrow et al. v. W. N. Stamps et al., Anshei Sfard Congregation v. Beth David, Halstead Lumber Company v. W. E. Morrow, and B. Gardner v. W. E. Morrow, and restraining them from "interfering, hindering or molesting the Beth David Nusach Sephard, a corporation," in the peaceable and quiet possession of the premises. It is for a violation of this order that the petitioner was found guilty of contempt.

[1-4] We can therefore revert to petitioner's first argument that the restraining order is void on its face. It needs barely more than a statement of the various contentions in this particular to show that some of them at least are untenable. It is said the order is void on its face for the following reasons: (a) It is uncertain as to the time of its duration; (b) it is uncertain as to the act from the doing of which petitioner was restrained; (c) it attempts to enjoin the exercise of a legal right; (d) it does not show on its face that a bond was required to be given by those at whose instance it was issued; (e) it is self-contradictory because it attempts to enjoin petitioner from applying for an order until an order is made; and (f) it does not disclose on its face the necessity for its own issuance.

With respect to the argument that the order is uncertain in the particulars mentioned, we must confess our inability to agree with petitioner. The order runs until title and right of possession is determined in the actions pending, this being equivalent to an ordinary order "until the further order of the court," and it restrains those named from interfering with the peaceable possession of the property, and from instituting any further or other proceedings which shall have as their object the disturbance of possession.

Next, we cannot agree with petitioner's assumption that the exercise of a legal right may never be restrained. In subdivision 6 of section 526 of the Code of Civil Procedure it is provided that an injunction may be granted "where the restraint is necessary to prevent a multiplicity of proceedings," and it is said in the first subdivision of the same section under the heading: "An injunction can not be granted: 1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings." Aside from the fact that all the reasons for the order are not necessarily to be incorporated in it, it does appear here from the face of the order that four actions were then pending, and it also appears from the record that two additional actions, affecting the title or right of possession to the property in question in the other four, were caused to be filed subsequently. It cannot be denied, therefore, that we must indulge the presumption that one of the controlling reasons for the issuance of the order was to prevent a multiplicity of proceedings. That the order does not disclose on its face that a bond was required, or the reason for its own issuance, may be dismissed with the answer that we know of no law or rule of procedure requiring the order to so show. If either of these defects actually existed, petitioner had his remedy, but he cannot urge that the order shows its own invalidity by its failure to disclose these essentials. Nor can we sustain his contention that the order is void because it is self-contradictory. It is plainly apparent that the court intended to enjoin the petitioner and the others from cluttering the courts with further proceedings —not actions, but mere attempts to secure possession pendente lite—until their claim of title and of right to possession should be determined in the actions then pending. It was not intended nor said that they should be precluded from asserting their rights therein.

[5-7] We now turn to petitioner's contention that the affidavit was insufficient to confer jurisdiction on the respondent court to sentence him for contempt. In effect, petitioner's argument in this regard is: First, that the affidavit does not disclose that the restraining order issued September 7, 1928, was in full force and effect on September 14, 1928, when the acts complained of were committed; second, that the affidavit does not disclose that the act complained of was the act restrained; third, that it does not aver knowledge by petitioner of the existence of the restraining order; and, fourth, that it does not set up the giving of an undertaking prior to the issuance of the original restraining order. The affidavit sets forth the issuance of the order and its effect as we have heretofore outlined it and its service on petitioner on or about September 7. It then avers that petitioner, with "absolute intent and purpose and in contempt and contrary to the sanctity of the decrees and restraining order of the Court and in violation of the Court's Order," did institute and procure certain persons to file actions against the Beth David Nusach Sephard, a corporation, and caused writs of attachment to be issued and the synagogue located on the property to be padlocked, for the purpose of setting "at naught the purpose of said restraining order and to destroy the peaceful and quiet enjoyment of said premises by the Beth David Nusach Sephard, a corporation, and with intent

to interfere, molest and destroy the peaceful and quiet religious worship of the members of said Beth David Nusach Sephard. * * *" It also says that, as a direct result of the attachments, the religious corporation was interfered with in the celebration and observance of the high holidays known as "Roshashonah," occurring September 14, 1928, and "Yom Kippur," on September 24, 1928. It is unnecessary to comment at any great length upon the first three reasons assigned by petitioner for the insufficiency of the affidavit. The order, it says, was issued September 7, and one week later, for the sole purpose of setting it at naught, the petitioner committed the act which it is alleged was for the purpose and did actually interfere with the peaceable possession of Beth David Nusach Sephard. The act could not have been done for the purpose of setting at naught the order, unless it was a subsisting order. In considering whether the act complained of was restrained, it must be borne in mind that complaint is not made of the filing of the actions and the issuance and service of the writs of attachment, which it is claimed would not have been filed except for the actions and persuasion of the petitioner, but the act which is made the basis of the judgment is the stirring up of the litigation and the securing of the complaints to be filed by the petitioner with the purpose, object, and effect of interfering with the observance of religious holidays. Also it must be noted that, during the temporary possession of the premises under a writ of assistance which it is said petitioner knew was procured to be wrongfully issued on account of the previous issuance of the same writ in favor of the Beth David Nusach Sephard Corporation, in an action in which the petitioner was a defendant, the petitioner caused certain people to perform labor upon and furnish materials to the premises in question. After he was dispossessed the second time, he persuaded these same people to file the attachment actions. This was but an indirect way of asserting title to the premises, for the reason that the validity of the attachments depended upon the title of the petitioner, the defendant in the actions which he procured to be filed. In other words, we may say of the actions that they were in the nature of being fictitious actions secured to be filed for the purpose of violating the second portion of the order, i. e., interfering with the peaceable possession of the Beth David Nusach Sephard, a corporation. So far as knowledge by petitioner of the order is concerned, it is averred in the original affidavit that it was served upon him on September 7. It is true that subsequently, and in response to a reply affidavit of the petitioner, a supplemental affidavit was filed in which the force of this statement is considerably weakened by the confession of affiant that the statement that the order was served upon petitioner "apparently may or may not be true." The supplemental affidavit does aver in detail, however, that the petitioner had knowledge of the order at the time it was made and at all times since, and the court found in accordance with this averment. It cannot, therefore, be successfully argued either that the original affidavit was insufficient to support the order to show cause or that the subsequent showing was insufficient to authorize the court to sentence the petitioner.

[8-10] The last point made by petitioner is that the affidavit does not disclose whether a bond was given prior to the issuance of the restraining order. There can be no doubt upon the proposition of law advanced by counsel that in a proceeding to punish for a constructive contempt the affidavit must show on its face the facts which constitute the contempt, and that no presumptions are to be indulged with respect to the jurisdiction of the court in the absence of an essential averment. This is quite different, however, from saying that all of the steps leading up to the order which it is claimed has been violated must be set forth. It would undoubtedly be presumed in an attack upon the restraining order, in the absence of a showing to the contrary, that the judge had required the requisite bond prior to the issuance of the order. How, then, can it be said that in this proceeding a like indulgence should not be granted? The order presupposes the giving of a bond, and, if none in fact was given, it was incumbent on this petitioner to show that fact, as an excuse for his nonobservance.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

98 Cal. App. 97

In re CASASSA'S ESTATE. (Civ. 6645.)

District Court of Appeal, First District, Division 2, California. April 2, 1929.

1. Wills 🔑82—Will, leaving all property to children, though in unequal portions, held not "unnatural will."

Will under which testatrix transferred all property to her children *held* not "unnatural will," though contestant was given $2,000, another son $5,000, another $1,000, and the remainder given one-fourth to each of four remaining children, so that some received $7,500.

2. Wills 🔑326—In ruling on nonsuit, power to weigh evidence does not obtain as on submission of cause.

In ruling on nonsuit in will contest, court will bear in mind contention that power to weigh evidence does not obtain as it does on submission of cause.

3. Wills 🔑52(1)—Testatrix is presumed to be of sound mind.

In action for revocation of probate of will, testatrix is presumed to be of sound mind.

4. Wills 🔑423—Order admitting will to probate is presumed to correctly determine and set forth rights of parties.

In action for revocation of probate of will, order admitting will to probate, though not conclusive, is presumed to correctly determine and set forth rights of parties.

5. Wills 🔑324(2)—In action for revocation of probate, nonsuit held proper under evidence on issue whether testatrix was of unsound mind.

In action for revocation of probate of will, nonsuit *held* proper as to contention that testatrix was of unsound mind under evidence that she was weak, drowsy, uncommunicative, eccentric, and miserly, and spoke in broken sentences, was absent-minded and of short memory before and after time of making will.

6. Wills 🔑165(1)—Declaration by decedent held incompetent against testatrix's children to prove they had exercised undue influence.

In action by son of testatrix for revocation of will opposed by brothers and sisters, declaration by decedent *held* not competent evidence as against defendants to prove they had exercised undue influence.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

In the matter of the estate of Anna Casassa, deceased. Action for revocation of probate of will by Frank A. Casassa, contestant, opposed by Armand Casassa and others, proponents. From judgment of nonsuit, contestant appeals. Affirmed.

Walter A. Dold, of San Francisco (Pembroke Gochnauer, of San Francisco, of counsel), for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondents.

STURTEVANT, J. Anna Casassa died testate at San Francisco on the 14th day of December, 1925. Her will was admitted to probate, and later one of her sons, Frank A., filed a petition asking that the probate be revoked. He named his brothers Armand and Louis and his sister Louise as defendants, and they appeared and filed answers. A trial was had in the lower court before the court sitting with a jury. After the contestant had put in his case, the proponents made a motion for a nonsuit. The motion was granted, and the contestant has appealed.

[1] As something is said in the briefs concerning unnatural wills, it should be noted at this time that the decedent by her will transferred all her property to her children. The contestant was given $2,000, another son was given $5,000, still another son was given $1,000, and the remaining portion was divided into four parts, one-fourth given to each of the four remaining children. Not a dollar was given to any person, natural or artificial, outside of the members of the family. The contestant concedes that the brother who received only $1,000 had been generously remembered in the will of the father, who died only two years before. The son who received $5,000 makes no complaint. The case stands thus: A son who received $2,000, whereas other brothers and sisters each received $7.500, presents the claim of "an unnatural will." We think the expression has no application to the facts. To say that a testator may not give to one legatee selected from a certain class more than he gives to another legatee selected from the same class is, in legal effect, to say that a testator has no right to make a will. Estate of Shay, 196 Cal. 355, 237 P. 1079.

The plaintiff pleaded his case in five separate counts: (1) Nonexecution of the will; (2) decedent was of unsound mind; (3) the will was the product of undue influence; (4) and (5) in framing her will the decedent was acting under artifices of fraud practiced upon her. The first count was dismissed by the plaintiff. As to the fourth and fifth counts, there was not a particle of evidence introduced. It remains for us to consider the ruling as applicable to the second and third counts.

[2-5] We take up first the count alleging that the decedent was, at the time she made her will, of unsound mind. In doing so we will bear in mind at all times the contention which the plaintiff makes most vigorously; namely, that in ruling on a nonsuit the power to weigh evidence does not obtain as it does on a submission of the cause. Moreover, we will confine our consideration to the evidence printed in the appellant's brief, as we are entitled to assume that he has made the statement as favorable to himself as the record will permit. The plaintiff called a large number of witnesses, fourteen or more. With one single exception, all of these witnesses were descendants of the decedent. By the witnesses so called the plaintiff introduced evidence that the decedent made her will a short time before her death, and that both before the date the will was made and continuously thereafter until the death of the decedent she was weak, drowsy, uncommunicative, eccentric, miserly, spoke in broken sentences, called perfectly good phosphates "poison stickers," and that at times she was absent-minded and of short memory. On one or more of these elements the plaintiff introduced the evidence of two or more witnesses. The foregoing statement includes all of the evidence introduced by the plaintiff on her second cause of action. The amount and the nature of the proof which the plaintiff was

called upon to introduce was quoted with approval in Estate of Dole, 147 Cal. 188, 192, 81 P. 534, 536, as follows: "The soundness of mind required for making a will has relation to the act of the testator in making final disposition of his property as he desires. Although feeble in health, suffering under disease, aged and infirm, the testator, if of sound mind with reference to the disposition of his property, may make a will. If he is able to understand and carry in mind the nature and situation of his property and his relations to his relatives and those around him, with clear remembrance as to those in whom, and those things in which, he has been mostly interested, capable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, he has the capacity to make a will." See, also, Estate of Smith, 200 Cal. 152, 158, 252 P. 325. If, in the instant case, the trial court had refused to grant the motion for a nonsuit, and had submitted the case to the jury, and the jury had brought in a verdict for the plaintiff, it is patent that the verdict must necessarily have been set aside because the evidence was insufficient. One of the leading cases governing the power to grant or refuse a nonsuit is Downing v. Murray, 113 Cal. 455, 45 P. 869. Speaking on that subject, at page 463 (45 P. 872), the court said: "With respect to this matter it is sufficient to say that, with a jury present, the judge should grant a nonsuit where a verdict in favor of plaintiff should be set aside for want of evidence to support it, and, in the absence of a jury, where the evidence is insufficient to support a judgment for plaintiff. The judge of the court below is presumed to have acted on this principle, and to have concluded that the evidence was thus insufficient, and there is no reason for holding that he abused his discretion in coming to that conclusion." Mrs. Casassa was presumed to be of sound mind. When her will was admitted to probate, the order admitting it, although not conclusive, was nevertheless presumed to correctly determine and set forth the rights of the parties. The plaintiff undertook to introduce evidence to break down the foregoing presumptions and to show that the decedent at the time she made her will was of unsound mind. He wholly failed to do so.

Turning to the third cause of action, undue influence, the plaintiff introduced a declaration made by the defendant Louise Baer, and a declaration made by the defendant Armand Casassa. Those declarations, standing alone, as they did, did not make a prima facie showing against either one of the defendants. Estate of Rickey, 64 Cal. App. 733, 222 P. 628.

[6] Still addressing ourselves to the count on undue influence, the plaintiff introduced a declaration made by the decedent. While that declaration was properly introduced when the four counts were on trial, it was not competent evidence against the defendants to prove they had exercised undue influence. Estate of Calkins, 112 Cal. 296, 301, 44 P. 577.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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98 Cal. App. 33

SAN FRANCISCO REALTY CO. v. LINNARD. (Civ. 6587.)

District Court of Appeal, First District, Division 2, California. March 29, 1929.

1. Insurance ⟹102, 106—Sole agency for placing hotel insurance held revocable by surrendering hotel lease, but with liability for damages for violation of any legal right.

Where defendant lessee of hotel entered into contract with plaintiff insurance agent whereby, in consideration of plaintiff's promise to write specified insurance on terms favorable to defendant, latter appointed plaintiff as his exclusive agent for placing for five years all insurance to be carried by defendant in connection with his hotel, *held* that, since plaintiff had no interest in subject-matter of contract, the insurance to be procured, plaintiff's power under contract was not coupled with an interest, and defendant had power to terminate agency at any time, but a revocation within the five-year period by surrender of lease rendered defendant liable for damages for violation of any legal right of plaintiff, since provision for continuance of contract for five years was supported by consideration of favorable rates.

2. Insurance ⟹106—Exclusive agency for placing insurance in connection with occupation and maintenance of hotel negatived implied agreement to continue connection with hotel; "carry."

Written contract whereby, in consideration for plaintiff's written promise to write specified insurance on terms favorable to defendant, latter appointed plaintiff his exclusive agent or broker for placing all insurance then carried or thereafter to be carried by him in connection with the ownership, occupation, and maintenance of certain hotel for term of five years, *held* to negative any implication of any agreement by defendant that he would continue connection with hotel; word "carry" as applied to insurance meaning "possess" or "hold."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Carry.]

3. Insurance ⟹188(2)—Court need not determine question of insurance cancellation not raised by pleadings or evidence.

In action to recover insurance premiums and damages for breach of contract making plaintiff defendant's exclusive agent for placing insurance on certain hotel property, in which action there was no issue raised by pleadings or evidence as to any cancellation of insurance after defendant conveyed hotel to another, trial court was not required to pass on what defendant's rights might have been if he had canceled policies.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the San Francisco Realty Company against D. M. Linnard. From the judgment, both parties appeal. Affirmed.

James F. Peck and Robert L. McWilliams, both of San Francisco, for plaintiff.

Harold M. Sawyer, Alfred T. Cluff and William P. O'Brien, all of San Francisco, for defendant.

GRAY, Justice pro tem. D. M. Linnard (hereinafter referred to as the defendant), while he was lessee of the Fairmont Hotel, and San Francisco Realty Company, a corporation (hereinafter referred to as the plaintiff), entered into a written contract wherein and whereby, in consideration of plaintiff's promise to write specified insurance on terms admittedly favorable to defendant, the latter appointed the former, and the former accepted such appointment, as "*his sole and exclusive agent or broker for the placing of all insurance now carried or to be hereafter carried by him in connection with the ownership, occupation and maintenance of the Fairmont Hotel*," for the term of five years and upon express terms fixing the amount of the premiums to be charged for such insurance. Approximately seven months after the execution of this agreement, the owner of the hotel conveyed the hotel to the defendant, who forthwith conveyed it to the Fairmont Hotel Company, a corporation, which in turn conveyed the legal title to a trustee under a deed of trust securing a bond issue. At the same time the defendant surrendered his lease. After the execution of the agreement, but prior to the above transfers of title to the hotel, defendant ordered certain insurance on the hotel which plaintiff procured, its commissions thereon amounting to $398.20. After the said transfers of title, defendant advised plaintiff that he no longer had an insurable interest in the hotel, and thereafter no insurance was ordered or carried by him upon the hotel. In this action plaintiff seeks to recover (1) said sum of $398.20 and (2) damages for defendant's failure to place insurance on the hotel during the balance of the term of five years. Judgment was rendered in favor of plaintiff for the sum of $398.20. Each party appealed, the plaintiff claiming that it was also entitled to the second item of damages, and defendant claiming that plaintiff was not entitled to the first item. While, by stipulation, the appeals were consolidated, each will be considered separately in inverse order, as the legal propositions involved are distinct, although based upon the same contract.

In discussing the effect, upon a contract of agency for the distribution of a newspaper over a designated route, of the sale of such newspaper, the Supreme Court, in Boehm v. Spreckels, 183 Cal. 239, 248, 191 P. 5, 9, enunciated the following rules here applicable:

"The Civil Code provides that an agency is terminated by: '(1) the expiration of its term; (2) the extinction of its subject; (3) the death of the agent; (4) his renunciation of the agency; or, (5) the incapacity of the agent to act as such.' (Sec. 2355.) Also, that when not coupled with an interest in the subject of the agency, it is terminated by: '(1) its revocation by the principal; (2) his death; or, (3) his incapacity to contract.'

"It is also an established rule that a sale of the subject of the agency made in good faith by the principal operates as a termination of the agency and is equivalent to a revocation thereof. (1 Mechem on Agency, sec. 698.) Everyone is presumed to know the law, and it must therefore be presumed that the parties to the agreement contracted with knowledge of the possibility of a termination of the agency by either of the causes above specified.

"We know of no rule of law which allows the agent to recover damages from the principal on account of a termination of an agency for an indefinite period for any of the causes above mentioned, except where the agency was procured for a valuable consideration passing from the agent to the principal and the revocation is prior to the expiration of a reasonable time after its creation. In Frink v. Roe, 70 Cal. 309, 11 P. 820, it is said that an agency created for a valuable consideration is irrevocable, but, as this is directly contrary to the Civil Code, and as the expression was clearly obiter, the case cannot be considered as authority. There is a distinction between the power to revoke and the right to revoke an agency.

"Except where the agent's power is coupled with an interest, the power to revoke always exists, but the right to revoke without liability for damages depends upon circumstances. (1 Mechem on Agency (2 Ed.) § 568.) If the right does not exist, the principal will be liable for damages upon a revocation."

Again, in Roth v. Moeller, 185 Cal. 415, 418, 197 P. 62, 63, the same rules were thus expressed: "Save in the case of an agency coupled with an interest, a principal has the power to revoke an agent's authority at any time before the agent has completed performance. (Civ. Code, sec. 2356; Flanagan v. Brown, 70 Cal. 254, 11 P. 706; Parke v. Frank, 75 Cal. 364, 17 P. 427; Blumenthal v. Goodall, 89 Cal. 251, 26 P. 906; 1 Cal. Jur., p. 705.) A principal may, however, curtail his right of revocation by contracting not to revoke the authority for a definite time. If the principal does so contract, he still retains the power to terminate the agency and the termination cannot be prevented by the agent, but a revocation of authority within the designated period renders the principal liable for damages for the violation of a legal right of the agent, just as in the case of any other breach of contract. (Parke v. Frank, supra; Blumenthal v. Goodall, supra; Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354; Sill v. Ceschi, 167 Cal. 698, 140 P. 949; Boehm v. Spreckels, 183 Cal. 239, 191 P. 5.)"

[1] Since plaintiff had no interest in the subject-matter of the contract, i. e., the insurance to be procured, its power under the contract was not coupled with an interest. Todd v. Superior Court, 181 Cal. 406, 184 P. 684, 7 A. L. R. 938; McColgan v. Bank of California (Cal. Sup.) 274 P. 342; MacAdam Co. v. Bryant (Cal. App.) 260 P. 298. But, as the contract provided for its continuance for a definite term of five years, and was supported by a consideration in the favorable rates upon the specified insurance, defendant, while he had the power to revoke the contract of agency by his surrender of his lease, had curtailed his right of revocation, and is liable for damages for the violation of any legal right of the plaintiff.

It next becomes necessary to determine what plaintiff's rights and defendant's obligations were under the contract so as to ascertain whether defendant's revocation violated any rights and obligations. In determining the effect of a sale of a lumber business upon a contract, based upon a valuable consideration, to employ a truck "for lumber hauling for a period of one year—as our business warrants," the court in Langenberg v. Guy, 77 Cal. App. 664, 667, 247 P. 621, 622, used the following language here pertinent: "There is no basis for a contention that appellant has violated any express term of his contract. In no part of the instrument signed by him does he expressly covenant not to sell his business. Therefore, whether he could rightfully sell it during the year without breaching his contract with respondent depends entirely upon whether the contract imports an implied obligation on appellant's part not to sell the business prior to the year's expiration. That, in the last analysis, is the ultimate question presented for solution. If the contract does import such an implied undertaking on appellant's part, then upon selling the business before the end of the year he would become liable as for a breach of his agreement. For of course it must be conceded that where a party to a contract of employment obligates himself by either an express or an implied agreement not to disable himself from continuing the employment for a stipulated time, he will make himself liable in damages for breach of contract if, by a sale of his business before the expiration of the stipulated period, he voluntarily puts it out of his power to continue the employment to the end of its term in the manner agreed to by him. (White v. Lumiere North American Co., 79 Vt. 206, 64 A. 1121, and notes to that case in 6 L. R. A. [N. S.], p. 807 et seq.) It may also be conceded that, in the absence of some provision in a contract of employment which tends to negative the implication that the employment will continue uninterruptedly during a specified term, one who has bound himself to employ another during a definite time for a compensation, the amount whereof can be earned and determined only by an actual performance of the services over the whole of the stipulated period, will render himself liable for damages for breach of contract if he makes a disposition of his affairs which renders it impossible for him to receive the services in the manner contemplated by the contract. (Note to Turner v. Sawdon & Co., 2 B. R. C. 774.) In every such case the question in the last analysis is simply this: Do the terms of the contract—and, if the contract is ambiguous, do the circumstances under which it was made—necessitate the implication that the employer has undertaken not to dispose of his business during a fixed period of time?"

[2] Since there is no express agreement that defendant would not surrender the lease, such agreement, if any, must be implied. The court found the surrender of the lease and the transfers of title were in the ordinary course of business, and without any intent to avoid liability, under the contract. Furthermore, there is no ambiguity in the contract, apparent or claimed by either party. Our determination of the question here involved must be wholly decided by an interpretation of the terms of the contract. The only portion of the contract here material is the italicized quotation therefrom set forth in the first paragraph of this opinion. The word "carry" as applied to insurance means "possess" or "hold." Dimick v. Metropolitan Life Ins. Co., 69 N. J. Law, 384, 55 A. 291, 62 L. R. A. 774. The phrase "by him" (the defendant) following the phrase "to be carried" grants to defendant an option as to whether insurance was or was not to be carried or held or possessed. The next phrase "in connection with the ownership, occupation and maintenance of the Fairmont Hotel" is a further limitation on the insurance to be carried by confining it as to both purpose and time. It furthermore, by such limitation, shows that the parties intended that insurance was only to be placed while defendant was connected with the ownership, occupation, and maintenance of the hotel, and that the parties contemplated a possible change in defendant's relation with the hotel which might terminate his desire for insurance. This phrase neg-

atives any implication of any agreement by defendant that he would continue such connection. Defendant did not bind himself to order any particular amount of insurance, nor did he agree that the amount thereof should be fixed by the requirements of the hotel or the business conducted there, but expressly agreed that the amount thereof should be fixed by amount he was to hold or possess in connection with the ownership, occupation, and maintenance of the hotel. The defendant was the sole judge of the amount of insurance to be carried, and might, if he so desired, carry none. Therefore plaintiff was no worse off, as to the amount of insurance to be placed, after the surrender of the lease than it was before. Of course, if the contract provided that the amount was to be determined by the requirements of the hotel, as plaintiff argues, the obligation that defendant would not surrender his lease might well be implied (for discussion of broker's rights under such requirement contracts see cases listed in I. Tanenbaum Son & Co. v. Rothenberg, 201 App. Div. 272, 194 N. Y. S. 315, 319). Parenthetically, we might add that most of the cases cited in the briefs of the respective parties are discussed in Langenberg v. Guy, supra. We are satisfied, therefore, that the trial judge correctly determined that defendant's surrender of the lease did not violate any right of the plaintiff under the contract.

[3] Passing now to a consideration of defendant's appeal from that portion of the judgment which awards plaintiff the sum of $398.20, we find ourselves confronted solely with a question of fact. Briefly, the complaint alleges that defendant ordered insurance in the specified amount; that plaintiff procured such insurance; that its commission on the premiums amounted to $398.20, and that defendant failed to pay such premiums. The answer merely denies that he ordered it on his own behalf, but admits he did so on behalf of Fairmont Hotel Company and the former owner, and further denies the amount of commission. The court found that defendant refused to pay the premiums. Defendant, in his briefs, claims that he canceled the insurance and that he ordered the insurance for a shorter period than that specified in policies delivered. His answer did not raise any question of cancellation, and admitted the ordering of the insurance for the period as claimed by plaintiff. The only testimony upon the subject—that given by the vice president of plaintiff—amply supports the findings. A letter of defendant admitted in evidence does deny ordering the insurance in the form procured, but this, at best, merely raised a conflict upon which the findings are decisive. The letter does not warrant any construction that it canceled the policies. Therefore, since there was no issue or evidence as to any cancellation, the trial court was not required to pass upon what defendant's rights might have been if he had canceled the policies.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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98 Cal. App. 21

FIRST FEDERAL TRUST CO. v. STOCKFLETH et al. (Civ. 6572.)★

District Court of Appeal, First District, Division 2, California. March 28, 1929.

Rehearing Denied April 26, 1929. Hearing Denied by Supreme Court May 27, 1929.

1. Evidence ⚷413—Recital in contract that title to land sold was merchantable could not be contradicted by parol after performance (Code Civ. Proc. § 1962).

Under contract for sale of seven parcels of land, containing no express or implied agreement that vendor owned any interest sold, purchaser, after delivery of six deeds and performance of most of contract, could not contradict by parol truth of recital that title to certain parcels was merchantable, under Code Civ. Proc. § 1962, since contradiction would necessarily change contract in essential matters and permit court to make contract for parties different than voluntarily entered into.

2. Evidence ⚷419(13)—Recital in contract for sale of realty that title was merchantable held not recital of consideration, and evidence to show defective title was properly excluded (Code Civ. Proc. § 1962).

Under contract for sale of vendor's interest in realty, containing no express or implied agreement that vendor owned such interest, recital that part of land conveyed was merchantable was not recital of consideration for contract under Code Civ. Proc. § 1962, making truth of facts recited in written instrument conclusive between parties or successors except as to recital in consideration; and hence evidence to show title was defective at date of contract was properly excluded in action to determine title to realty.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action in interpleader by the First Federal Trust Company against Mary E. Brickett, formerly Mary E. Coggins, and another, in which defendant named filed a cross-complaint, and in which George A. Stockfleth, as special administrator of the estate of Mary E. Brickett, deceased, was substituted in her place and stead. Judgment for defendant Stockfleth, and defendant Fruit Growers' Supply Company appeal. Affirmed.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., voting for a hearing.

Dozier, Kimball & Dozier and Dozier & Kimball, all of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

★Rehearing denied. Hearing denied by Supreme Court.

GRAY, Justice pro tem. On November 10, 1909, respondent Mary E. Brickett and the assignors of appellant Fruit Growers' Supply Company entered into a written contract of sale by respondent and purchase by appellant of the dower right and an undivided eight-thirtieths interest in lands located in Jackson county, Or., and an undivided nine-thirtieths interest in lands located in Siskiyou county, California, of which right and interest the preamble recites the respondent was the owner, upon the following terms and conditions here material. The first term stated, in general language, that the title to the property in part was merchantable and in part unmerchantable, and then stated specifically that parcels "A," "D," and "E" were lands "to which merchantable title is held," and that parcels "B," "C," "F," and "G" are lands "to which the title is not yet merchantable." The third term provides the method of fixing the total price, credits thereupon a prior payment, requires payment of part on or before December 1, 1904, and part within 90 days thereafter and the balance in eight equal installments, with interest beginning on December 9, 1910. Under the fourth term respondent is required to place in escrow seven grant bargain and sale deeds, each conveying therein described portions of said lands. The sixth term authorizes the buyers, after payment of a portion of the total price and an advance payment per acre, to cut, log and manufacture the timber on parcels "A," "D," and "E." By the seventh term the buyers, upon payment of the part of total price applicable thereto, were entitled to each of said deeds in numerical order, and, by the eighth term, were obligated to pay all taxes upon said parcels for the fiscal year 1908–1909 and subsequent thereto. The tenth, fourteenth, and fifteenth terms, respectively, authorized the respondent, upon buyers' default, to terminate the contract and resume possession of the lands. The seventeenth term, after reciting that the title of parcels "B," "C," "F," and "G" has not been perfected and that it cannot be ascertained when same will be perfected, provides for payment therefor when title is perfected, and the subsequent terms provide a method for transfer of title after perfection along the same lines above stated as to other three parcels.

Plaintiff, First Federal Trust Company, as escrow holder, at proper time and for the sum of $13,608.41 tendered to appellant the last of the seven deeds, covering parcel "E" described in part in the contract as follows: "Lands purchased from Oregon and California Railroad Company *title to which is merchantable.*" (Italics ours.) Appellant offered to pay, upon delivery of said deed, the balance remaining of said sum of $13,608.41, after deducting therefrom the sum of $6,376.11 with interest, alleged to have been expended by it in curing defects in respondent's title. The respondent, claiming a default, demanded the return of the deed by the escrow holder. Thereupon the latter commenced this action in interpleader to determine who was entitled to the deed, and, pending such determination, deposited it in court. The respondent filed a cross-complaint seeking to recover either the deed or the sum of $13,608.41 with interest, and appellant, in its answer to this cross-complaint, sought delivery of deed upon payment of the balance offered to the escrow holder. Upon the trial, upon the issues framed by such cross-complaint and answer, respondent and appellant stipulated that any judgment entered should be for such sum as the court should determine was due under the contract and should further provide for delivery of deed to respondent if such sum were not paid within 90 days after such judgment became final. At the close of respondent's case, appellant offered to prove that respondent's title was defective at date of contract and that it had necessarily and properly expended $6,376.11 in curing such defects. Respondent objected to this offer upon the ground that the recitals of the contract that the title was merchantable were conclusive. The court sustained the objection and thereupon rendered judgment in favor of the respondent in accordance with her prayer and the stipulation, from which judgment appellant appeals. After appeal and pending its determination, Mary E. Brickett died, and by appropriate proceedings George A. Stockfleth, as the special administrator of the estate of Mary E. Brickett, formerly Mary E. Coggins, was substituted in her place and stead. For clarity, in this opinion, the deceased is referred to as the respondent.

This appeal raises the single question of the correctness of the court's ruling in sustaining respondent's objection to appellant's offer of proof. Section 1962 of the Code of Civil Procedure, so far as here pertinent, reads as follows: "The following presumptions and no others, are deemed conclusive: * * * 2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration." Do the recitals in the contract, that the title to the lands in parcel "E" is merchantable, conclude appellant as to the truth of that fact so as to deny it the right to show that such title was defective? If so, the court's ruling was correct and this judgment must be affirmed.

A good test, here applicable, is found in the language of McCrea v. Purmort, 16 Wend. (N. Y.) 465, 30 Am. Dec. 103, quoted in Rhine v. Ellen, 36 Cal. 362, at page 371, reading as follows:

"Another principle, and one more universal than the former in its application is, that wherever a right is vested or created, or extinguished, by contract or otherwise, and writing is employed for that purpose, parol testimony is inadmissible to alter or contradict the legal and common sense construction of the instrument; but that any writing which, neither by contract, the operation of law nor otherwise, vests or passes or extinguishes any right, but is only used as evidence of a fact and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts. Thus a will, a deed, or a covenant in writing, so far as they transfer or are intended to be the evidences of rights, cannot be contradicted or opposed in their legal construction by facts, aliunde. But receipts and other writings which only acknowledge the existence of a simple fact, such as the payment of money for example, may be susceptible of explanation, and liable to contradiction by witnesses.

"A party is estopped by his deed. He is not to be permitted to contradict it; so far as the deed is intended to pass a right or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything which it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed; nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations. And by analogy, the acknowledgment in a deed that the consideration had been received, is not conclusive of the fact. This is but a fact. And testing it by the reason of the rule which we have laid down, it may be explained or contradicted. It does not necessarily and undeniably prove the fact. It creates no right; it extinguishes none. A release cannot be contradicted or explained by parol, because it extinguishes a pre-existing right; but no receipt can have the effect of destroying, per se, any subsisting right—it is only evidence of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not pay the debt, it is only evidence that it has been paid. Not so of a written release; it is not only evidence of the extinguishment, but it is the extinguisher itself." 16 Wend. (N. Y.) 473, 474.

In Ingersoll v. Truebody, 40 Cal. 603, 610, the court used the following pertinent language: "Whilst the grantee in a deed will not be permitted by parol to contradict, vary or enlarge the operative words of a conveyance so as to defeat, change or modify the estate granted, he may, nevertheless, disprove collateral facts recited in the instrument, which are not essential to validity as a conveyance of the estate granted." This court stated the principle here involved in Gas Appliance Sales Co. v. W. B. Bastian Manufacturing Co. (Cal. App.) 262 P. 452, as follows: "The conclusive presumption of the truth of facts recited in a written instrument, between the parties thereto, as declared by the provisions of section 1962, subd. 2, of the Code of Civil Procedure, has reference only to the essential facts therein contained, which are necessary to determine the obligations or liabilities of the contracting parties. Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Ingersoll v. Truebody, 40 Cal. 603, 610; Moffatt v. Bulson, 96 Cal. 106, 110, 30 P. 1022, 31 Am. St. Rep. 192; Rhine v. Ellen, 36 Cal. 362, 370. * * *" For varying illustrations of the application of the code section reference may be had to Pierce v. Whiting, 63 Cal. 538; Simson v. Eckstein, 22 Cal. 581; Judson v. Malloy, 40 Cal. 299; Frink v. Roe, 70 Cal. 296, 11 P. 820; Moore v. Gould, 151 Cal. 723, 91 P. 616; Knoch v. Haizlip, 163 Cal. 146, 124 P. 998; National Hardware Co. v. Sherwood, 165 Cal. 1, 130 P. 881; Borland v. Borland, 56 Cal. App. 638, 642, 206 P. 478; Hamilton v. Consolidated Water Co., 56 Cal. App. 7, 204 P. 416.

[1] An examination of the terms of the contract clearly shows that respondent was selling and the appellant was buying the former's interest in the property as described without any express or implied agreement that she owned any such interest. California Land Security Co. v. Ritchie, 40 Cal. App. 246, 180 P. 625. The very definite recitals in the contract that the title to certain of the lands, including parcel "E," were merchantable provided the basis chosen by the parties themselves upon which each was willing to deal with the other and upon which the respective parties reciprocally assumed and granted respective rights and obligations. To permit appellant, at this late date, after the six other deeds had been delivered and most of the contract had been performed, to contradict by parol the truth of those recitals would allow it to substitute a new basis for the contract, upon which respondent in the first instance might not have been willing to negotiate. The contradiction by parol of the truth of those recitals would necessarily change the contract in essential matters, would contradict or vary the rights created by the contract, would enlarge the estate which respondent undertook to convey and would, in short, permit the court to make a contract for the parties different from the one they voluntarily made for themselves. Furthermore, such evidence could have no other effect than to force the court to ignore, as surplusage, the solemn language of the parties and to substitute therefor a covenant implied by law, only in the absence of an express agreement, that is, that the title be free of defects.

[2] Appellant seeks to escape this conclusion by an argument that the recital as to title is one of consideration inasmuch as a good title was the consideration moving from respondent to appellant. The cases cited are

not applicable under the facts. The rule which will determine whether or not the evidence is admissible on this theory is well stated in Harding v. Robinson, 175 Cal. 534, 543, 166 P. 808, 811, as follows:

"Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part, for the party has the right to make the consideration of his agreement of the essence of the contract, and when this is done the provision as to the consideration for the contract must stand upon the same plane as the other provisions of the contract with reference to conclusiveness and immunity from attack by parol or extrinsic evidence." 17 Cyc. 661; see, also, Feeney v. Howard, 79 Cal. 525, 21 P. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Winchester v. Winchester, 175 Cal. 391, 165 P. 965; Murr v. Cohn (Cal. App.) 262 P. 768; Blackledge v. McIntosh (Cal. App.) 259 P. 770.

Being satisfied as to the correctness of the court's ruling excluding the offered testimony, the judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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97 Cal. App. 784

CLARK v. UNITED FRUIT DISTRIBUTING CO. et al. (Civ. 6589.)

District Court of Appeal, First District, Division 2, California. March 26, 1929.

1. Sales ⚷379—Evidence held to show that contract between fruit grower and fruit distributing company was one of buy and sell as alleged.

In action for damages for breach of contract, evidence *held* to show that contract between fruit grower and fruit distributing company, whereby latter was to pay $30 per ton for grapes and deposit $6 per ton in escrow as guaranty to take total cars covered by contract, was a buy and sell contract as alleged in complaint, and not a consignment contract, so that there was no variance.

2. Sales ⚷153—Buyer notifying seller it would not accept further shipments excused seller from offering grapes (Civ. Code, § 1440).

Where buyer gave notice to seller that it would not accept any further shipment of grapes under contract, and seller was prepared to deliver grapes in accordance with terms and conditions of contract, it was unnecessary that seller actually offer to deliver grapes under Civ. Code, § 1440.

3. Trial ⚷343—Jury's verdict for seller carried with it implied finding that shortage in cars was not sufficient to warrant buyer in declaring sales contract was ended.

Jury's verdict for seller carried with it an implied finding that shortage of cars was not sufficient to warrant buyer in declaring that contract for purchase of grapes was ended.

4. Sales ⚷166(1)—Under contract calling for grade No. 1 grapes, buyer was not bound to accept those not up to standard required, but was compelled to accept those that did measure up.

Under contract calling for purchase of United States grade No. 1 grapes, buyer was not bound to accept grapes which were not up to standard required, but was compelled to accept those that measured up to contract.

5. Sales ⚷181(12)—Evidence justified jury's finding that grapes buyer refused to accept were grade called for.

In action for breach of contract to purchase grapes, evidence *held* to warrant jury's finding that undelivered grapes which buyer refused to accept were United States grade No. 1 which contract called for.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action for breach of contract by Susie Clark against the United Fruit Distributing Company and another. From a judgment for plaintiff against defendant named, said defendant appeals. Affirmed.

Robt. H. Schwab, of Sacramento, for appellant.

Everts, Ewing, Wild & Everts and A. W. Carlson, all of Fresno, for respondent.

BURROUGHS, Justice pro tem. This is an action for damages. The cause was tried with a jury and a verdict rendered in favor of the plaintiff and against the defendant United Fruit Distributing Company for the sum of $2,500. From the judgment entered thereon, said defendant appeals.

Appellant urges several points upon this appeal. The first of these is that there is a material variance between the allegations of the amended complaint and the proof. There are nine separate causes of action set forth in the amended complaint. The first six causes of action are based upon similar contracts which differ only in the names and the amounts involved. The last three concern the defendant Reedley National Bank, which was an escrow holder of certain moneys deposited with it in accordance with the terms of the contracts referred to in the first six counts of the amended complaint.

At the trial the money held by the Reedley National Bank was by stipulation of the parties deposited in court, and no judgment was entered concerning said bank. As heretofore stated, the six causes of action being the same except as to the names and amounts, a decision of the question involved by reference to the first count only will be decisive of all six.

It is alleged in the first count of the amended complaint: "That on or about the 19th day of September, at Reedley, California, plaintiff and the defendant, United Fruit Distributing Company, entered into an agreement in writing wherein and whereby plaintiff agreed to sell to the said defendant, and the defendant, United Fruit Distributing Company, agreed to buy certain Muscat U. S. Grade #1 grapes; that under the terms of said written agreement said defendant agreed to pay, upon delivery, this plaintiff for said grapes at the rate of Thirty Dollars ($30.00) per ton, and thereafter and under the terms of said contract plaintiff delivered to said defendant at Reedley, California, 141496 pounds of Muscat grapes, U. S. grade #1, and defendant paid said plaintiff for said grapes the sum of Twenty-one Hundred Thirteen and 43/100 Dollars ($2113.43) and no more; that said plaintiff was at all times during said grape shipping season of 1925 ready, able and willing to deliver to said defendant 108504 pounds of Muscat grapes, U. S. Grade #1, in fulfillment of the terms for the balance of said grapes to be delivered under said contract, and said plaintiff duly tendered said grapes to said defendant at its packing plant at Reedley, California, pursuant to the terms of said written contract; that the said defendant then refused to accept and ever since has refused to accept said grapes so tendered as hereinbefore set out and refused to pay for said grapes so tendered pursuant to its agreement, or otherwise, to the damage of plaintiff in the sum of Sixteen Hundred Twenty-seven and 56/100 Dollars ($1627.56)."

In support of this allegation of the complaint, the plaintiff offered, and the court received, in evidence over the objection of the defendant, the following contract:

"Original #30 No. 230

"Consigned Contract.

"Reedley, Calif., Sept. 19, 1925.

"For and in consideration of the covenants and agreements set forth and also in consideration of one dollar ($1.00) receipt whereof is hereby acknowledged, Susie Clark, hereafter called the Grower, hereby places in the hands of the United Fruit Distributing Company, of Sacramento, Calif., to market for grower's account on the following terms and conditions her crop of shipping Muscats U. S. Grade #1 grown or to be grown, during the season of 1925, on the property known as Clark Place in Fresno County, California, about ½ miles S. of Reedley, estimated as follows: 10 carloads (125 tons more or less) Price $30.00 per ton ¾ car per day shipment beginning Oct. 5 all of which the grower claims to be his absolute property free from any encumbrances.

"All fruit delivered under this contract to be of good merchantable quality suitable for eastern shipment subject to State Inspection. Said fruit to be picked and delivered at Growers expense, to United Fruit Dist. Co., packing house, or place of loading at Reedley, or in case of car shortage, strikes or any causes over which United Fruit Distributing Company have no control the grower shall deliver the fruit at the next available loading point where cars may be placed for loading.

"The United Fruit Distributing Co., shall have a lien upon all said fruit for any moneys that may be advanced by it. This contract shall not be revokable during its term and shall not expire until all moneys advanced by the Company have been fully satisfied, but shall continue from year to year on above crop until fully paid.

"The United Fruit Distributing Co., reserves the right to terminate this contract and be relieved from all liability in case of car shortage, strikes, epidemics, scarcity of labor, war affecting transportation, and other causes affecting the transportation and marketing of fruit.

"The United Fruit Distributing Co., reserves the right to restrict the grower's deliveries of fruit under this contract, this to be governed as nearly as possible by the number of cars available for loading by the United Fruit Distributing Co.

"U. F. D. Co. to deposit $6.00 per ton in escrow in Reedley Natl. Bank as guarantee to take total cars covered by this contract U. S. Grade #1

"Susie Clark, Grower.
"United Fruit Distributing Co.,
per T. C. Brazill
"Copy Ck 3017 deposit $750.00"

[1] It is claimed by the appellant that this allegation of the complaint is purely an allegation of a buy and sell contract, while the contract received in evidence is one of consignment only, and therefore constitutes material variance between the allegations and the proof. There can be no question that the complaint is predicated upon a buy and sell contract. It also appears from the contract itself that it is denominated "Consigned Contract." It also appears therein that the grower placed her crop of grapes in the hands of the defendant United Fruit Distributing Company "to market for grower's account." Standing alone and unaided by other portions of the contract, there can be no doubt that it would be a contract of consignment, but it further appears in said contract that the quantity of grapes which it was estimated would be produced on the ranch of the grower was 10 carloads or 125 tons of grapes more or less. That the price to be paid was $30 per ton. It further appears in the contract

that the United Fruit Distributing Company was "to deposit $6.00 per ton in escrow in Reedley National Bank as a guarantee to take total cars covered by this contract U. S. Grade #1." It would thus appear from the evidence just quoted that the defendant was to pay the plaintiff a flat price of $30 per ton for 125 tons, and that, as a guaranty that they would take the same they made the deposit of $6 per ton in the Reedley National Bank. We are of the opinion that this is sufficient to establish the contract as one of buy and sell, but, if the contract were held to be uncertain upon this point, the evidence introduced was sufficient to justify the court in holding that it was in fact a buy and sell contract. The evidence submitted to the court relating to the circumstances surrounding the execution of the contract was, as is usually the case, conflicting. The testimony of the plaintiff and her assignors was to the effect that, when the contract was first presented to them for signature, it was without doubt a consignment contract, but that they refused to sign the same, and stated they would not sell their crop except for cash; that thereupon certain portions of the contract were stricken out and the changes made, by which the defendant was to pay $30 per ton at the time of delivery for the entire crop of approximately 125 tons and the guaranty deposited with the Reedley National Bank to fulfill the terms of the contract. There is evidence on behalf of the defendants in rebuttal of this testimony, but the court in the first instance, and the jury in the last instance, adopted the testimony offered by the plaintiff that it was in fact a buy and sell contract. It has been held that one of the best methods of interpretation of a doubtful contract is the construction placed upon it by the parties themselves. In the practical construction of the contract before the court it appears without conflict that, when the shipments of grapes were made, the defendant, without waiting to receive any word whatever from those to whom the shipments were made, immediately paid cash to the plaintiff at the rate of $30 per ton. While defendant offered evidence to explain away this interpretation of the contract, it was for the court to determine which party was right. We are therefore of the opinion that upon its face the contract is one of buy and sell, but, if this conclusion is open to question, then the evidence offered to explain its effect also establishes that it was a buy and sell contract. The point is not well taken.

The appellant further claims that the implied finding of the jury, that under the terms of the written contract defendant agreed to pay upon delivery $30 a ton for the grapes, is not sustained by the evidence. However, we believe that this contention has already been answered by what has been heretofore said under the first claim of error.

[2] The next contention made by appellant is that there is no evidence to sustain the allegation of the amended complaint that "said plaintiff duly tendered said grapes to said defendant at its packing plant at Reedley, California, pursuant to the terms of said contract." It is undisputed that the defendant gave notice to the plaintiff that it would not accept any further shipment of grapes under the contract. It further appears from the evidence that the plaintiff was prepared to deliver grapes in accordance with the terms and conditions of the contract, and therefore it is immaterial whether or not she actually offered to deliver the grapes in accordance with the terms of the contract. Section 1440 of the Civil Code provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party." To the same effect are Lemle v. Barry, 181 Cal. 1, 183 P. 150; Hoover v. Wolfe, 167 Cal. 337, 139 P. 794; Gray v. Dougherty, 25 Cal. 266. Plaintiff was therefore excused from making an actual tender of the grapes.

[3] The fourth point of alleged error is based upon the claim that the defendant terminated the contract because of a shortage in cars. That there was a car shortage appears from the evidence, but, whether it was sufficient to justify the defendant in terminating the contract was one of the disputed facts in the case, and the verdict of the jury carried with it an implied finding that the shortage was not sufficient to warrant the defendant in declaring that the contract was ended.

[4, 5] The last point urged is to the effect that the evidence is overwhelming that the undelivered grapes were not U. S. grade No. 1. The evidence shows without conflict that after the termination of the contract the defendant accepted from the plaintiff, but under a different arrangement, U. S. grade No. 1 grapes. True, some of the grapes delivered were not up to the standard required by the contract, but such grapes the defendant was not bound to accept, while it was compelled to accept those that measured up to the contract. Therefore, defendant's claim is not substantiated by the evidence, and the jury were acting within their province when they determined this question adversely to the defendant.

No reason has been shown why the judgment should be disturbed, and, therefore, it is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

98 Cal. App. 6

LA SHELLS v. HENCH et al. (Civ. 3627.)

District Court of Appeal, Third District, California. March 27, 1929.

1. Appeal and error 🔑1010(1)—Appellate court must accept as correct trial court's finding supported by evidence.

Where record showed sufficient testimony to support trial court's finding, appellate court must accept finding as correct.

2. Schools and school districts 🔑133—Board's failure to classify teacher as permanent teacher did not prevent operation of law in making classification (Pol. Code, § 1609).

Failure of board of trustees to classify teacher as permanent teacher, under Pol. Code, § 1609, did not prevent operation of law in making such classification, and, where teacher was entitled to such classification, she must be considered as so classified, even though board failed to act.

3. Schools and school districts 🔑135(3)—That teacher and trustees entered into contracts after time when law had classified teacher as permanent teacher did not prevent operation of Teachers' Permanent Tenure Law (Pol. Code, § 1609).

That teacher and board of trustees entered into contracts after time when law had classified petitioner as permanent teacher could not be held to prevent operation of provisions of Teachers' Permanent Tenure Law (Pol. Code, § 1609), since action on part of board of trustees in making contracts was beyond their power.

4. Appeal and error 🔑951—Mandamus 🔑143(2)—Question of laches in mandamus proceedings is addressed to chancellor's sound discretion, and his decision will not be disturbed, absent abuse thereof.

Question of laches in mandamus proceedings is addressed to sound discretion of chancellor, and his decision will not be disturbed unless it is so clearly wrong as to amount to an abuse of discretion.

5. Equity 🔑72(1)—"Laches" is not mere delay, but there must be changed conditions resulting in injury to adverse party.

"Laches" is not mere delay, but there must have been some changed conditions from which injury would result to adverse party, or from which injury necessarily must be presumed.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Laches.]

6. Mandamus 🔑143(2)—Delay of nine months held not laches barring relief to teacher seeking writ directing restoration to position as teacher, where board had employed another teacher before dismissing petitioner.

Mere delay of about nine months *held* not to constitute laches barring teacher from relief by mandamus to compel board of trustees to restore her to position as teacher, where board had employed another teacher before notifying petitioner that her services had been dispensed with, so that delay did not result in injury to board.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Lillian La Shells against George M. Hench and others, as trustees of Tracy School District, for a writ of mandate to compel restoration of plaintiff to her position as teacher in the public schools. From a judgment for petitioner, respondents appeal. Affirmed.

Thos. H. Louttit, M. P. Shaughnessy, and Warren H. Atherton, all of Stockton, for appellants.

George Wadsworth, of Tracy, for respondent.

PLUMMER, J. This cause is before us upon appeal from a judgment and decree granting the plaintiff a writ of mandate directing that the petitioner and respondent be restored to her position and admitted to the position formerly occupied by her as a teacher in the public schools in and for the Tracy school district, and that warrants be issued to her in payment of her salary as such teacher for the months of July, 1927, to February, 1928, inclusive.

The record shows that the petitioner had been employed as a primary teacher in the kindergarten department of the public school of Tracy district, in the county of San Joaquin, for the years 1922, 1923, 1924, 1925, 1926, up to and including the end of the school year in June, 1927. The employment of the petitioner as such teacher appears to have been made under contracts purporting to employ the petitioner for one year only. The last contract entered into between the petitioner and the respondents bears date of June 4, 1926, and purports to be a contract whereby the respondents employ the petitioner as a teacher in the public school of Tracy district for the period of one year, for the stipulated salary of $1,620, payable in twelve monthly installments. The time for opening of the school under this contract was set for August 30, 1926. The record shows that the petitioner fulfilled her part of the contract just referred to, and acted as a teacher in the public school of Tracy district, and taught therein until the close of the school year in June, 1927. The record further shows that some time prior to April 23, 1926, the petitioner had had some conversation with the members of the board of trustees of Tracy school district to the effect that she would not desire to teach in the Tracy school after the close of the school year for 1926; that after having had this conversation with the board of trustees of said school district the petitioner appears to have reconsidered such intention or desire, and addressed the follow-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ing letter to the board of trustees, under date of April 23, 1926, to wit:

"Board of Trustees, Tracy, Calif. Dear Sirs: This is to explain my statement of last year in regard to remaining in the Tracy faculty as kindergarten teacher. When I made the statement that I would not care to remain the following year my husband was to be employed by my brothers in San Jose. At that time it was too late to apply for a position in San Jose. Naturally it was my desire to be where my husband was this next year.

"Within the last month my brothers have sold their stores and my husband has again returned to Tracy. I am very anxious to secure my life diploma which I am entitled to at the end of this coming school year.

"Hoping this will meet with your approval and I will continue to work for the best interest of pupil and school.

"Sincerely, Lillian La Shells."

In pursuance of this letter the petitioner was, by resolution of the board re-elected a teacher in said school district for the school year of 1926-1927, and a contract entered into covering said period. At about the same time the board directed its secretary to write a letter to the petitioner relative to her employment, which letter is in the words and figures following, to wit:

"Office of Tracy School District Board Trustee's

"Tracy, Calif., June 1st, 1926.

"Mrs. Lillian La Shells, Kindergarten Teacher, Central Building, Tracy, Calif.—Dear Madam: With further reference to your employment as kindergarten teacher for the coming year.

"The Board members gave consideration to your statements in your letter to the board in May and expressed themselves as glad to sign your contract for one more year. It was our understanding that at the end of one more year you would then have served the required length of time to secure for you the life certificate and that you are comfortably and well provided for, the board members direct this communication be addressed to you stating that with the close of the term ending in June, 1927, the kindergarten teacher's position at the Central Building will become vacant and this will give one year in which to obtain other employment if desired.

"The Board members are very appreciative of your past efforts and hope you will be equally successful for the coming term.

"Yours respectfully,

"Thos. O. Young, Clerk Board."

The contract of employment between the petitioner and respondents in the years 1926-1927 was finally signed and executed on or about June 20, 1926, after the respondent had received the above letter. Nothing further was said relative to the term of employment of the petitioner until on or about June, 1927, when the petitioner delivered to the board certain books relative to her school work, and after delivering the same to the board, stated to the board that she was not resigning her position and did not intend to. Thereafter, and on or about June 9, 1927, the following letter, over the signature of one of the members of the board, was forwarded to the petitioner, to wit:

"(Letterhead Tracy Grammar School.)

"L. E. Richards, Superintendent

"Tracy, California, June 9th, 1927.

"Mrs. Lillian La Shells, Tracy, California. Dear Madam: This is to advise you that your employment as a teacher in the Tracy School District terminated with the end of the 1926-27 school year, pursuant to your contract entered into on June, 1926, and, also, in accordance with the understanding between yourself and the Board of Trustees of the Tracy School District, at the time said contract was signed. Your contract is at an end and the Board has decided not to enter into a contract with you for the 1927-28 school year. Your services are therefore dispensed with at the close of the present school year, to wit, 1926-27 school year.

"This notice is given pursuant to the order and resolution of the Board of Trustees of the Tracy School District, passed at a regular meeting of said Board, held on the 3rd day of June, 1927. Very truly yours, T. O. Young, Trustees of the Tracy School District, County of San Joaquin."

[1] The record shows that some time during the month of May, 1927, preceding a statement made by the petitioner to the appellants that she did not intend to resign and had not intended to resign her position as a teacher in the Tracy school, and also preceding the letter notifying the petitioner that her services had been dispensed with, the respondents as a board of trustees of the Tracy school district had already employed another teacher to act in the place and stead of the petitioner herein. Thereafter, and on or about July 7, 1927, the petitioner, at a semipublic meeting held by the board of trustees of said district, for what purpose the record does not disclose—but it does appear that there were some 200 persons present—the petitioner informed the respondents of her desire to continue in her former position as a teacher in the Tracy school. The record would indicate that the conversation was had with the president of the board of trustees in the presence of the other members. At this time the president of the board advised the petitioner, and also an attorney who was present, apparently representing her, that the board had already employed another teacher to act in the place and stead of the petitioner. The testimony as to this transaction is conflicting, but as the court has found as we have herein stated, and as the record shows sufficient testimony to support the finding of the court, it must be accepted as correct, even though the court

might very well have found that the petitioner was only inquiring as to why she had not been rehired. The record further shows that on or about the 15th of August, 1927, the petitioner went to Berkeley, and from Berkeley to Oakland, and remained there, and did nothing further in relation to seeking her former position as a teacher in the Tracy school until on or about the 23d day of February, 1928, at which time she had a conversation with some members of the board in which she demanded salary warrants for the months of the school year that had already expired, and, also, according to her testimony, demanded reinstatement. Thereafter, and on the 2d day of March, 1928, a formal demand was served upon the board for salary warrants and for reinstatement. Upon the refusal of the board, this action was begun on the 26th day of March, 1928. The court found that at all times from the beginning of the school year of 1927, to and including the date of the beginning of this action, the petitioner was ready and willing to resume her position as a teacher in said school, and had made the oral demands herein referred to, and also the formal written demand of March 2, 1928. It does not appear, however, that the petitioner presented herself in person at the opening of the school year, which occurred during the last week of August, 1927, or that she ever presented herself in person at the school building where she had taught, or sought in any manner to resume her former position as a teacher, other than through the demands to which we have referred. The complaint in the action sets forth all the requirements showing the employment of the petitioner as a teacher in the public school of the Tracy school district, her legal qualifications; the compensation which had formerly been paid her; the fact that there were at least 23 teachers employed in said Tracy school district, under a principal devoting at least two hours per day to supervision of the schools under his control.

It is sufficient to say that the allegations of the petition are ample to bring the petitioner within the provisions of the Teachers' Permanent Tenure Law, as set forth in section 1609 of the Political Code. The answer of the respondents, admitting the allegations of the plaintiff as to employment, save and except as to the school year for 1927-1928, sets up as a defense that the petitioner had resigned as such teacher, had taken her permanent residence elsewhere, and then alleges, as a further and separate defense, as follows: "That the plaintiff has been guilty of laches and unreasonable delay, and her right of action, if any she has herein, is barred by laches, and she is now estopped from seeking relief because demand or request for the same has not been promptly made, and for the further reason that petitioner has not made any offer to perform her alleged contract prior to the 23d day of February, 1928, and for the further reason that the petitioner has made no offer to protect respondents herein from the necessity, if necessity there be, of paying two persons for the same services." This allegation does not show that the respondents relied upon any of the acts of the petitioner, or that any acts of the petitioner have led to the injury of the respondents or to the injury of the school district of which the respondents are the trustees. Nor is there any allegation in the answer, nor is there anything appearing in the record, to show that the respondents would not have acted in the manner in which they acted had it not been for the acts of the petitioner. In other words, there is no showing that the respondents have been misled, to their injury, or the injury of the district, by reason of any failure of the petitioner to bring her action more promptly. The record shows, as we have herein stated, that the respondents, as trustees of the Tracy school district, had already employed a teacher to act in the place and stead of the petitioner, prior to writing and forwarding to the petitioner of the letter dated June 9, 1927, informing the petitioner that her services had been dispensed with.

[2] The record also shows that from the beginning of the employment of the petitioner as a teacher in the public school of the Tracy school district, the respondents have consistently acted as though the Teachers' Permanent Tenure Law, as set forth in section 1609 of the Political Code, were not in existence. Every year from 1922 to 1927, the contracts of employment indicate that the board of trustees claimed the right and purported to exercise the right of employing teachers for one year at a time, and that at the expiration of the year, the term of employment would cease. So far as the record shows, the board of trustees made no classification of teachers who had successfully taught for two years in the Tracy school, and who possessed otherwise the legal qualification to be classified as permanent teachers. This lack of the board to act, however, does not prevent the operation of the law in making such classification, and as the petitioner, under the law, was entitled to such classification, she must be so considered as classified, even though the board of trustees has failed to act, and at all times proceeded to enter into contracts purporting to limit the term of employment from year to year. To hold otherwise would be to decide that the provisions of the Teachers' Tenure Act may be evaded by the expedient of using contracts reading for a yearly employment, and thus giving the board of trustees the authority to dispense with the services of a teacher, even though section 1609 of the Political Code prohibits dismissal of a teacher, other than for cause, and requires that notice shall be given to the teacher, and a hearing had.

In Grigsby v. King, 202 Cal. 299, 260 P.

789, where a teacher had been employed for at least two years, under yearly contracts, the court said: "It was stipulated that there were written contracts for the first and second years' service, and that the third year's service was rendered pursuant to re-election by the board, at the end of the second year. The law requires nothing more. The showing of two years' successful work brings plaintiff within the statute, and it was the duty of the board at that time to classify her as a permanent teacher, and any other action on its part was beyond its power and of no avail."

[3] Under this interpretation and application of the Teachers' Tenure Act the petitioner became, under the law, a permanent teacher at least two years prior to the time when the appellants sought to dispense with her services without proceeding according to the requirements of section 1609 of the Political Code. The mere entering into contracts after the time when the law had classified the petitioner as a permanent teacher cannot be held to prevent the operation of the provisions of the section, as such action, on the part of the board of trustees, was beyond their power.

The trial court found that the petitioner had not abandoned or resigned her position as a teacher in the Tracy schools, and that her right of action was not barred by laches or unreasonable length of time, and that no element of estoppel prevented her recovery. We do not need to discuss the question of estoppel because there is no showing whatever in the record that the appellants would have acted differently had any action of the petitioner been different. The entire record establishes clearly that the appellants acted upon the theory that they had a right, by reason of the yearly contracts, to employ and discharge teachers, irrespective of the Permanent Tenure Law; and to some extent the record shows that the petitioner was not aware of her rights under the provisions of section 1609 of the Political Code.

The appellants rely chiefly upon the alleged laches of the petitioner in beginning this action, and a number of cases are cited to sustain their contention. The principal case relied upon is that of Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 163 P. 69. In this case it appears that a police officer had been dismissed by the board of police commissioners of the city of San Francisco, and sought by way of certiorari to have the order dismissing him annulled. Among other things, in disposing of the case, the court said: "A petition for a writ of certiorari, being addressed to the sound discretion of the court, is very similar to an application for an injunction, and laches, which is the neglect or omission to assert a right, may be asserted as a defense to the petition." It further appears in that case that the petitioner had waited over 14 months before beginning his action, and that a number of changes had taken place during the interval. The court further defined "laches" to be "such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to the" opposite party, "operates as a bar in * * * equity." And, further: "In the absence of a showing sufficient to excuse this delay it certainly constituted laches. While it is true * * * that mere lapse of time short of that prescribed by a statute of limitations in any given similar case will not in itself suffice to constitute laches so as to bar a remedy, nevertheless, if in addition it appears from all the circumstances of the case that prejudice must or, from the very nature of the case, may be reasonably expected to result, the remedy will be denied." A number of New York cases are cited as well as several California cases, where the principle of laches has been applied and relief denied on that account.

In the case of Harby v. Board of Education, 2 Cal. App. 418, 83 P. 1081, the facts show that more than 3½ years had expired before the action was prosecuted, and the court held that the petitioner had been guilty of laches, and relief was denied.

In the case of Curtin v. Board of Police Commissioners, 74 Cal. App. 77, 239 P. 355, the facts show that nearly 3½ years had expired, and that in the meantime the persons who had filed charges against petitioner had died. The trial court held the petitioner's application barred by laches, and this judgment was affirmed.

The New York cases cited in the California cases to which we have referred are Supreme Court cases and reported in the New York Supplement. We do not need to refer to the cases specifically, because all of them are based upon section 2125 of the Code of Civil Procedure, which limits applications for writs of certiorari to four months. The case of People v. Collis, 6 App. Div. 467, 39 N. Y. S. 698, being one of the first cases upon the subject, the section of the Code of Civil Procedure limiting the right to institute certiorari proceedings to four months is referred to, and the same statute of limitations is applied to mandamus proceedings. This principle has been applied in all of the subsequent New York cases, the court holding that while there is no statute of limitations provided in mandamus proceedings, yet by the same reasoning the statute of limitations barring certiorari proceedings at the expiration of four months is applicable to mandamus proceedings. We have no such statute in this state, and, therefore, the New York cases applying the rule of laches in mandamus proceedings based upon a statute of limitations dealing with certiorari proceedings cannot be considered as authority in this state, further than that the general principle of laches applies to mandamus proceedings, even though the statute of limitations of actions has not run.

[4-6] In this state, as set forth in 10 Cal. Juris, 526, "there is no artificial or hard-and-fast rule either as to the lapse of time or the circumstances which will justify the application of the doctrine of laches. The question must be determined by a consideration of all the facts and circumstances of the particular case. Laches is a question of fact on the evidence, and each case becomes largely a law unto itself. In other words, the matter is one which reposes in the sound discretion of the chancellor. Lapse of time is an important element in determining laches. But it is so only as it may show an abandonment or waiver of rights, or an acquiescence in the situation created by the defendant's fault, or as it has resulted in prejudice or a presumption of prejudice to the defendant or others. Laches in legal significance is not mere delay, but delay that works a disadvantage to another, mere delay alone being unimportant. The reasoning upon which the rule of laches is based is not alone a lapse of time during which the neglect to enforce a right has existed, but the changes of conditions which have intervened. It may be added, though, that a great lapse of time, especially if the claimant has knowledge of the existence of his right, is often held sufficient to create the presumption or implication of another fact of an equitable nature, and thus to justify a decision against the claimant." The rule relating to laches in mandamus proceedings is set forth in 16 Cal. Juris. 773, practically as just herein stated. In 21 Corp. Juris. 217, the rule which we are considering, and its application, are thus stated: "There is no absolute rule as to what constitutes laches or staleness of demand, and no one decision constitutes a precedent, in the strict sense, for another. Each case is to be determined according to its own peculiar circumstances. In other words, the question of laches is addressed to the sound discretion of the chancellor, and his decision will not be disturbed unless it is so clearly wrong as to amount to an abuse of discretion. In determining whether there has been laches, there are various things to be considered, notably, the duration of the delay in asserting the claim, and the sufficiency of the excuse offered in extenuation of the delay, whether plaintiff acquiesced in the assertion or operation of the corresponding adverse claim, the character of the evidence by which plaintiff's right is sought to be established, whether during the delay the evidence of the matters in dispute has been lost or become obscured, or the conditions have so changed as to render the enforcement of the right inequitable," etc.

Under these rules, unless we can say there has been an abuse of discretion vested in the trial court, the judgment must be affirmed. It is not sufficient to say that if the trial court had sustained the plea of laches we would be under the necessity of affirming such decision. Whether there has been an abuse of discretion must be determined from the circumstances surrounding the instant case, and not by reference to any of the cases cited, for the reason that each case practically stands alone. As stated, mere lapse of time is not sufficient. There must have been some changed conditions from which injury would result to the defendants or from which injury necessarily must be presumed. These elements are wanting in the case at bar. The appellants, as the trustees of Tracy school district, in the month of May, 1927, employed another person to teach in the place and stead of the petitioner, before writing and sending to the petitioner the letter dated June 9, 1927, notifying the petitioner that her services had been dispensed with. In other words, the board of trustees had taken the act voluntarily, which might be urged as the prejudice suffered by them, before notifying the petitioner of her discharge. Had the employment of another teacher taken place after the dismissal of the petitioner and during the period of time that lapsed before she made demand for her position on July 7, 1927, or before she made her formal demand in writing under date of March 2, 1928, then and in that case it would present a matter of defense for the trial court to consider, but when it appears by the record that no act injurious to the defendants resulted from anything done or performed, or from the failure of the petitioner to make immediate demand or institute suit before beginning this action, we cannot very well see how this court can hold that a mere delay of about nine months constituted such laches as imposed upon the trial court the necessity of denying relief to the petitioner upon such grounds, or imposes upon us the necessity of holding that the trial court abused its discretion in not denying relief to the petitioner upon the ground of laches.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

97 Cal. App. 750

APPLING v. BRUECKNER. (Civ. 3691.)

District Court of Appeal, Third District, California. March 25, 1929.

1. Bankruptcy ⚷9(2)—Trustee in bankruptcy held entitled to recover preferential payment made by bankrupt, by virtue of bankruptcy act, suspending conflicting state statutes (Bankr. Act, §§ 60a, 60b, 70e; 11 USCA §§ 96(a), (b), 110; Const. U. S. art. 1, § 8; Civ. Code, §§ 3432, 3451).

Trustee in bankruptcy *held* entitled to recover money paid by bankrupt to defendant within four months before filing of petition, in satisfaction of antecedent debt, by virtue of Bankruptcy Act, §§ 60a, 60b (11 USCA § 96 (a), (b), permitting trustee to sue for recovery of preference and section 70(e) (11 USCA § 110(e) notwithstanding Civ. Code, §§ 3432, 3451, providing that debtor, though insolvent, may pay one creditor in preference to another, since state laws, to the extent that they conflict with laws of Congress on subject of bankruptcy, are suspended under Const. U. S. art. 1, § 8, and recovery is allowed under federal act.

2. Bankruptcy ⚷9(2)—Resort may not be had to state law to limit or defeat trustee's recovery of preferences by bankrupt (Bankr. Act, §§ 60a, 60b; 11 USCA § 96(a), (b); Const. U. S. art. 1, § 8).

Resort may be had to state law to reach property of bankrupt other than that mentioned in Bankruptcy Act, § 60a (11 USCA § 96(a), relative to preferences, but state act may not be resorted to to limit or defeat recovery under that section and section 60b, since, in case of conflict relative to bankruptcy proceedings, acts of Congress control under Const. U. S. art. 1, § 8.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by H. L. Appling, as trustee of the estate of Frank Brueckner, bankrupt, against Mrs. August Brueckner, also known as Wilhelmina Brueckner, to recover money paid within four months of bankruptcy. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Jennings, of Modesto, for appellant.
F. W. Reeder, of Oakdale, for respondent.

FINCH, P. J. This action was brought by the plaintiff, as trustee of the estate of Frank Brueckner, a bankrupt, to recover money paid by the bankrupt to the defendant, within four months before the filing of the petition in bankruptcy, in satisfaction of an antecedent debt. Judgment was entered in favor of the plaintiff, and the defendant has appealed on the judgment roll alone.

[1, 2] The only question raised by the appeal, although stated in various forms by appellant, is whether the case is governed by the provisions of sections 60a and 60b of the National Bankruptcy Act (11 USCA § 96(a), (b) or sections 3432 and 3451 of the Civil Code of this state. The court found that the payment referred to was made October 15, 1927, in satisfaction of a debt incurred in 1919, and that the petition in bankruptcy was filed November 2, 1927. The other facts found by the court show that the payment constitutes a preference under the provisions of section 60a of the Bankruptcy Act. Section 60b authorizes the trustee in bankruptcy to sue for the recovery of such a payment. Sections 3432 and 3451 provide, in substance, that a debtor, although insolvent, may pay one creditor in preference to another. That these sections of the Civil Code are in conflict with sections 60a and 60b of the Bankruptcy Act does not admit of doubt.

"The Federal Constitution, article 1, § 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. * * * The Bankruptcy Acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states. * * * Section 70e of the Bankruptcy Act [11 USCA § 110(e)] provides: 'The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided. * * *' This section as construed by this court gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law. * * * Under this subdivision if a creditor could have avoided a transfer under a state law, a trustee may do the same." Stellwagen v. Clum, 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507. Appellant cites the Stellwagen Case in support of the contention that the state law governs in the instant case, but the language quoted shows that it is an authority to the contrary. Resort may be had to the state law to reach property of the bankrupt other than that mentioned in section 60a of the Bankrupt Act, but not to limit or defeat a recovery under the provisions of that section. Retsloff v. Smith, 79 Cal. App. 443, 249 P. 886; and Oliver v. Staples & Pfeiffer, 67 Cal. App. 570, 227 P. 927, are cases arising under sections 60a and 60b of the Bankruptcy Act. Ury v. Van Every, 181 Cal. 604, 188 P. 985; Guernsey v. Douglas, 171 Cal. 329, 153 P. 227, and Brandenburger v. Chipman (Cal. App.) 262 P. 463, are cases involving other sections of the act, which "recognize the laws of the state in certain particulars." No case cited by appellant lends any support to the contention that the state law prevails over the Bankruptcy Act in case of a conflict between them. Of course, in actions which have no relation to any proceeding in bankruptcy, the provisions of the Bankruptcy Act have no application. Some of the cases cited by appellant are of that kind.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

98 Cal. App. 75

MORTON v. ALBERS BROS. MILLING CO.
(Civ. 3726.)

District Court of Appeal, Third District, California, April 2, 1929.

1. Corporations 🔑428(1)—Corporation is bound by notice to agent executing purchase contract that commodity is ready for delivery.

Where agent is authorized by corporation to execute contract for purchase of personal property, corporation is bound by notice to buying agent that commodity is ready for actual delivery, and may not deny tender of delivery of property at places indicated in contract executed by agent.

2. Sales 🔑153—Seller's offer to deliver, accompanied by ability to do so, held equivalent to actual delivery, where acceptance was refused.

Where seller was ready, able, and willing to deliver maize as required by contract and tendered delivery, but acceptance of offer of delivery was refused and maize rejected, offer to deliver should be deemed equivalent to actual delivery as regards recovery of damages from buyer for breach of contract.

3. Sales 🔑181(11)—Evidence held to support finding that seller had maize ready for delivery, but that part thereof was rejected.

In action by seller for damages for breach of contract to purchase maize, findings of trial court that plaintiff had maize ready for delivery, but that defendant refused to accept or pay for part of amount covered by contract, *held* sustained by evidence.

4. Appeal and error 🔑1170(5)—Variance between seller's complaint alleging delivery and evidence showing mere offer to deliver, which was rejected, held harmless (Code Civ. Proc. § 469).

Where complaint in seller's action for breach of contract alleged delivery of maize to defendant and defendant's refusal to accept or pay for part of maize, and evidence, though not showing actual delivery, established offer to deliver maize and refusal to accept offer as to such part, variance between the pleadings and evidence was immaterial and did not mislead and did not therefore warrant reversal under Code Civ. Proc. § 469.

5. Customs and usages 🔑15(2)—Where contract called for "good No. 1 marketable Milo maize," without further description, evidence as to customary methods of determining quality and character of maize sold as so determined held admissible.

In action by seller for damages for breach of contract to purchase "good No. 1 marketable Milo maize," evidence as to customary methods of determining quality of Milo maize and testimony of expert that when examined and measured by customary methods corn sold measured up to standard prescribed by contract, *held* admissible, where expression used was not defined in contract, contract being interpreted according to law and usage of place of performance, under Civ. Code, § 1646.

6. Appeal and error 🔑1011(1)—Whether maize sold was "marketable Milo maize" held question of fact, on which trial court's finding under conflicting evidence was conclusive.

In seller's action for breach of contract for sale of maize, question whether maize sold was "good No. 1 marketable Milo maize," as required by contract, *held* question of fact for trial court's determination, and finding of trial court sitting without jury that maize offered by plaintiff was up to required standard was conclusive where evidence on that issue was conflicting.

7. Appeal and error 🔑1050(1)—Admission of testimony apparently referring to corn which witness had not examined held not prejudicial error, in view of context and witness' explanations.

Admission of testimony of witness, apparently directed to corn which he had not examined, *held* not prejudicial error in action for breach of contract for sale of maize, where it appeared from context and witness' explanations that testimony was meant to refer to different corn.

8. Principal and agent 🔑120(1)—Testimony as to authority of agent beyond power to buy grain held inadmissible in action for breach of contract to buy maize.

Testimony of witness as to whether defendant's agent had any other or further authority than to buy grain *held* inadmissible in action for breach of contract to buy maize.

9. Sales 🔑384(7)—Where seller after buyer's rejection resold maize within reasonable time, obtaining best market value from date of rejection, allowance to seller of difference between contract and resale price held proper (Civ. Code, § 3311, subd. 1).

Where seller of maize, on buyer's rejection of part of amount sold and refusal to pay, resold the maize within a reasonable time and obtained best market value established in county between time of rejection and date of resale, court properly allowed seller to recover difference between contract price and resale price, under Civ. Code, § 3311, subd. 1.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by W. Morton against the Albers Bros. Milling Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hickcox & Trude, of El Centro, for appellant.

C. L. Brown, of El Centro, for respondent.

McDANIEL, Justice pro tem. This appeal is from a judgment by the court sitting without a jury in favor of plaintiff and against defendant for the sum of $2,898. The complaint alleges that on September 16, 1920, at Brawley, Cal., the defendant corporation purchased from plaintiff 250 tons of Milo maize at an agreed price of $50 per ton; that plaintiff delivered all of said maize in accordance with the contract, and that defendant received and paid for 112 tons thereof, but after receiving the same refused to pay for and turned back to the plaintiff against his will and consent 138 tons thereof, and that defendant has not paid for the said 138 tons; that at the time of delivery, when defendant refused to pay for the maize rejected, the current market price thereof at Brawley was $29 per ton; that by reason of defendant's failure to take and pay for said Milo maize the plaintiff was damaged in the sum of $2,898, no part of which has been paid.

The answer admits the purchase as stated in the complaint, and sets out a true copy of the written contract, due execution of which is admitted. A portion only of said contract need be herein set out, as follows, to wit: "W. Morton has this day sold, and the Albers Bros. Milling Co., a corporation, of El Centro, California, has this day bought, 250 tons of good No. 1 marketable Milo now being grown or located Mead and Arnold Ranches to be sacked in Standard, new jute bags at the purchase price of $50.00 per ton, said Milo to be delivered F. O. B. cars Main line points by Dec. 1st, and seller further agrees to keep said Milo insured to the time of its delivery, in said Albers Bros. Milling Co.'s favor to an amount equal to that paid on same by said Albers Bros. Milling Co."

This contract was signed Albers Bros. Milling Company, by B. F. McCormick. After the evidence was taken and the cause submitted the court made its findings of fact, some of which substantially are as follows: That defendant is a corporation duly organized under the laws of this state. That on September 16, 1920, at Brawley, Cal., the defendant purchased from plaintiff the maize above mentioned at the stated price of $50 per ton as shown by the contract set out in the answer. Findings III and IV are as follows:

"That plaintiff had ready for delivery to defendant all of said 250 tons of Milo maize at the place and in the condition and of the grade required by said contract, and within the time therein mentioned, and all in accordance with said contract, and offered to deliver all of said Milo maize to the said defendant at the price and in the condition and of the grade required by said contract and within the time therein mentioned, and all in accordance with said contract, but that said defendant refused to accept any of the said Milo maize, or to pay for any thereof, except 112 tons thereof, which 112 tons defendant accepted and paid for according to said contract. That upon defendant refusing to accept or pay for the remainder of said Milo maize, to wit, 138 tons, the plaintiff sold the same, to wit, 138 tons, of said Milo maize, at Brawley, Cal., for the sum of $29.00 per ton, and which said sum per ton was the current market price and value thereof.

"That by reason of the failure and refusal of the defendant to take and pay for the said Milo maize in accordance with said contract, the plaintiff has been damaged in the sum of $2,898.00, no part of which has been paid."

As a conclusion of law the court finds plaintiff entitled to receive from defendant the said sum of $2,898, for which sum it duly made and entered its judgment.

On January 3, 1927, a motion for a new trial was made on the following grounds: (1) Insufficiency of the evidence to justify the judgment; (2) that the judgment is against law; (3) error in law occurring at the trial and excepted to by defendants, and on the minutes of the court.

After argument this motion was denied on January 7, 1927. Appellant makes the following specifications of error:

"(1) There is a material prejudicial variance between the allegations of the complaint, the findings of fact, and the evidence.

"(2) The court erred in allowing certain evidence to be introduced over the objection of the defendant.

"(3) The findings of fact are not supported by the evidence.

"(4) The amount of damages fixed by the court (conceding for the sake of argument that plaintiff was damaged) was wrong."

[1] In support of his specification 1 as to prejudicial variance appellant cites Bryan v. Tormey, 84 Cal. 126, 130, 24 P. 319; Chetwood v. California National Bank, 113 Cal. 424, 45 P. 704. We concede the soundness of the legal propositions in those cases, but see no similarity or parallel in the facts therein with the facts found in the case here. The complaint herein alleges delivery of all Milo maize to defendant, the acceptance and payment for 112 tons thereof, the return of 138 tons and the refusal to pay for said 138 tons. Appellant argues there is no evidence it ever received any more than it paid for; and no evidence all the Milo maize purchased was ever tendered. We believe appellant to be wrong in the latter statement. The testimony of witness McCormick, the purchasing and contracting agent for defendant, and of Morton, the plaintiff, demonstrates that all the maize was at the proper places for delivery in November, several days prior to December 1, 1920. McCormick was the author-

ized buying agent for defendant. This is shown by the contract itself, which contract unquestionably was accepted and acted upon by defendant. An agent authorized by a corporation to execute a contract of purchase of personal property, and when necessary actually to buy, cannot well deny that it would be bound by due notice to such buying agent that the commodity was ready for actual delivery, nor to deny a tender of delivery of such personal property at the places indicated in the contract executed for it by its agent. Morton's testimony shows he in fact had the maize ready for delivery, and not only told McCormick, but also informed Mr. Prenot, assistant manager of the Los Angeles branch of defendant corporation, and Mr. Cuthbertson, the Imperial Valley manager for defendant during the year 1920, that the maize was ready to deliver in November, 1920. Morton stated:

"A. (In reply to question of his attorney): I told Mr. Prenot and Mr. Cuthbertson both that I had this 250 tons of corn. I had even more corn than that. I told them I had that corn ready to deliver to them.

"Q. When they were there testing it in the latter part of November, did any of them ask you then if you had the corn ready to deliver?

"Mr. Hickcox: Same objection.

"The Court: Overruled.

"A. Yes, sir. I don't know whether they asked me or not, more than it was discussed that I had the corn. I don't know whether they asked me or whether I told them, but they knew I had the corn. There is no argument about that.

"Q. Was this corn in the Calipatria warehouse, I will ask you whether that was good, number 1, marketable Milo on December 1st?

"Mr. Hickcox: Objected to as no sufficient foundation is laid for this witness to testify as to the quality of the corn, or grade of it.

"The Court: Overruled.

"A. It was."

[2-4] Notwithstanding denials in the answer to the averments in the complaint as to actual delivery, paragraph VII of the answer avers an affirmative defense:

"That thereafter the said plaintiff delivered to defendant 112 tons under the terms of said contract, which said defendant accepted as No. 1 Milo maize and paid the contract price therefor; that the remainder of the said Milo maize tendered to defendant for delivery did not grade, and was not good No. 1 marketable Milo maize, and therefore the same was not accepted by defendant, but was rejected."

The foregoing excerpt from the answer clearly indicates it to be an admitted fact that plaintiff tendered all the maize purchased by defendant, namely 250 tons, and that tender was rejected as to 138 tons solely because defendant then and there claimed that the maize "was not good No. 1 marketable maize." It seems reasonable also to hold that when, as shown by the evidence, plaintiff was ready, able, and willing to deliver the maize as required by the contract, actually tendered and offered delivery thereof, that acceptance of the offer was refused and the maize rejected, such offer should be deemed equivalent to actual delivery. The finding criticized, therefore, was supported by the evidence, was sufficient in material respects, and the variance, if any, from the allegations of the complaint as to actual delivery, was nonprejudicial. Defendant was not misled nor prejudiced in any manner nor in any degree. Respondent in this connection cites Cousin v. Mason, 78 Cal. App. 111, 248 P. 299, and cases therein collated on the point that as no objection at the time of the trial was interposed on the ground of variance nor motion made for nonsuit on that ground, the objection of variance is deemed waived and cannot be raised for the first time on appeal. See, also, Antonelle v. Kennedy, etc., Lumber Co., 140 Cal. 309, wherein at page 320, 73 P. 966, 970, the court says: "Under the Code no variance is to be deemed material, 'unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits,'" citing Code of Civil Procedure, § 469. We find no merit in the claim of variance. The findings squarely follow the evidence and answer on the matter of offer of delivery, rejection and refusal of payment.

[5, 6] In the second specification appellant complains of the overruling of his objection on the question propounded to Morton as follows:

"Q. As to this corn under this contract which you had on hand on December 1, 1920, for the defendant, from your experience in raising and handling and selling corn, as you have detailed, what would you say as to whether this corn was at that time, to wit, December 1, 1920, good, number one marketable milo? A. It was good, marketable, number one marketable Milo maize."

This witness, as shown by his previous examination on the stand, was fully qualified as one experienced in growing and marketing this commodity for a number of years and his knowledge of the grain to testify as to the quality. Inspection of the contract shows it was made in Imperial county, delivery was to be made there, and in all ways the contract was to be performed there. The expression in the contract, "good number one marketable Milo maize," is not defined in the contract, and under section 1646 of the Civil Code "a contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Whether the rejected maize was good number one maize or not presented a simple question of fact. The testimony adduced on the part of plaintiff by several witnesses shows that when examined and measured by the customary methods practiced by buyers and sellers who dealt in such commodity in Imperial valley the quality was that constituting good No. 1 marketable Milo maize. The testimony adduced on the same subject by the defendant tended to establish that when subjected to a certain moisture test the product was not equal to the standard of No. 1 maize according to that established as a government standard, which is also that of the Los Angeles Grain Exchange. Secondary evidence as to this last-mentioned standard was admitted on the part of the defendant at the trial. By the method of interpretation supplied and directed in the Civil Code and followed in Brett v. Vanomar Producers, 45 Cal. App. 286, 187 P. 758, which we believe to be decisive of the question under consideration, we find no error in the learned trial court's ruling admitting testimony as to the customary methods of determining the quality of Milo maize. The contract itself is not so plain and unambiguous as to speak for itself unaided by extrinsic evidence. It therefore was permissible in this action to permit testimony as to the nature and details of ascertaining the quality by proof of the customs prevailing in the community to enable the court to interpret the contract in the sense in which the parties themselves understood it at the time of its execution. The evidence upon the simple issue as to whether or not the maize offered by plaintiff was up to the standard required was determined by the trial court upon conflicting evidence. That finding under elementary and well-established rules cannot be disturbed on appeal.

[7, 8] Complaint is also made of the court's ruling in permitting McCormick, described as a discharged employee of the defendant, to answer certain questions asked by respondent as to the grade of the Calipatria and Rockwood corn, designating Milo maize as corn. At first glance it appears as if the witness had been permitted to say the Calipatria corn was No. 1 over objection, when it is shown by the witness' testimony he had never examined the Calipatria lot of maize. There is no merit in this objection, although technically correct, because it appears fully from the context and the witness' frequent explanation that he had never examined the Calipatria corn and meant to testify only as to the Rockwood corn, and the court could not have misunderstood the witness in this respect or been misled by his testimony. Appellant also claims error when the court sustained the objection asked of the witness Prenot as follows:

"By Mr. Hickcox: (Q.) Did Mr. McCormick have any other or further authority than to buy grain for the Albers Bros. Milling Co.?

"Mr. Brown: Objected to as incompetent, irrelevant, and immaterial and no proper foundation has been laid. It is calling for the conclusion of the witness, and there is no issue raised on that point.

"The Court: Objection sustained to the question asked."

The ruling was obviously correct. Other rulings objected to have been sufficiently covered and need not be further noticed.

The third specification of error, that the findings of fact are not supported by the evidence, cannot be sustained. Under the complaint and answer there was in reality but one essential issue, namely, whether the corn delivered at the required places in Imperial Valley offered to defendant and rejected by it was or was not No. 1 marketable maize. As heretofore indicated, that question was determined by the trial court on conflicting testimony against the contention of the appellant.

[9] As to the fourth specification of error relating to the measure of damages, it will be sufficient to state we think the evidence clearly establishes that Morton upon the rejection of the maize and the refusal to pay therefor within a reasonable time resold the property and obtained the best market value established in Imperial county on December 1, 1920, and at all times thereafter up to and including the date of resale, namely, $29 a ton. There is some conflicting evidence on this point, but the court's finding of fact cannot be disturbed. We believe the proper measure of damages was applied. Section 3311, subd. 1, Civ. Code.

On the former trial of this case a verdict was brought in for the plaintiff for the amount prayed for in the complaint and the judgment on the verdict by the trial court was reversed and the case was sent back to the superior court for a new trial. See Morton v. Albers Bros. Milling Co., 66 Cal. App. 391, 226 P. 809. The theory upon which the case was formerly tried was different from that established in the trial from which this appeal was taken. The judgment in each case, one following the verdict of the jury and the other following trial by the court without a jury, was the same, and we are satisfied, both under the law and the evidence, the plaintiff established a meritorious cause of action.

The judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

97 Cal. App. 757

MERCHANTS' NAT. BANK OF LOS ANGELES v. CLARK-PARKER CO.
(Civ. 6449.)

District Court of Appeal, Second District, Division 2, California. March 25, 1929.

1. Appeal and error ⚷103—Order striking counterclaim and order denying motion for leave to file amended answer and counterclaim held not appealable.

Order striking out counterclaim to action on note and order denying motion by defendant for leave to file an amended answer and counterclaim *held* not appealable.

2. Appeal and error ⚷79(1)—In action involving only two parties, there is no final judgment as regards appeal until all matters in litigation are determined.

Where there are but two parties to action, there is no final judgment as regards appeal until all matters in litigation are determined.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by the Merchants' National Bank of Los Angeles, a corporation, against the Clark-Parker Company, a fictitious firm composed of John Doe and another, in which defendant S. N. Clark filed a counterclaim. From an order striking out the counterclaim and denying a motion for leave to file an amended answer and counterclaim, defendant S. N. Clark appeals. On motion to dismiss the appeal. Motion granted.

William C. Ring, of Los Angeles, for appellant.

Rohe & Freston, of Los Angeles, for respondent.

IRA F. THOMPSON, J. Plaintiff filed an action in the court below on a promissory note to which the defendant S. N. Clark responded by an answer and counterclaim. The only denial in the answer is that any part of the sum demanded by the complaint is due, owing, or unpaid. On October 15, 1928, the court made an order striking out the counterclaim, and on December 10, 1928, made an order denying a motion made by the defendant S. N. Clark, for leave to file an amended answer and counterclaim. The appeal is attempted to be taken from these two orders, the one striking the counterclaim and the other refusing to permit an amended counterclaim to be filed. The respondent has made a motion to dismiss on the ground that the notice of appeal, in so far as it relates to the first order, was filed too late, it having been filed on December 27, 1928, or on the seventy-second day after the order was made, and on the further ground that the orders are not appealable.

[1, 2] We shall determine the latter contention first, for the reason that, if the orders are not appealable, the former assertion is unimportant. The appellant argues that the orders are in effect a final determination of the cause, and he relies very largely upon the case of Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39. That case presented an entirely different situation from the one which confronts us. There complaints were filed for personal injuries against two railway systems, and about 40 fictitious defendants alleged to have been in the employ of one of the defendant corporations. Four of these defendants filed cross-complaints against the other railway company, alleging negligence on the part of that defendant. The cross-complaints were, on motion, stricken from the files, and appeals were taken by the cross-complainants. The court upheld the appeal because in that case the orders were in effect a final disposition of the cause as between each cross-complainant and the cross-defendant. The former adjudications are reviewed, and it is made manifest therein from the discussion that the reason we have stated was the controlling feature, but that where, as here, there are but two parties to the action, there is no final judgment until all the matters in litigation are determined. The instant case is no different from the one which would have been presented if a general demurrer to the counterclaim had been sustained without leave to amend. Surely it could not be seriously argued that the assumed order would have been appealable. We see nothing to take this case out of the general rule.

Motion granted.

We concur: WORKS, P. J.; CRAIG, J.

98 Cal. App. 50

WAKEMAN v. GREEN. (Civ. 5987.)

District Court of Appeal, First District, Division 2, California. April 1, 1929.

1. Attorney and client ⚷166(5)—Burden of introducing proof of payment for attorney's services was on defendant who pleaded payment.

In action for balance due for attorney's services, where defendant pleaded payment, the burden of introducing proof on that subject rested on him.

2. Pleading ⚷250—Allowing amendment of complaint by increasing amount claimed for legal services did not allow addition of new cause of action.

In action for balance due for legal services, in which one count sought agreed value, and another count reasonable value of services, allowing amendment of complaint by increasing amount claimed was not erroneous as allowing addition of new cause of action.

3. Appeal and error 🔑1041(2)—Allowing amendment of complaint, by increasing amount claimed, was harmless, when amount recovered was less than amount originally claimed.

In action for balance due for legal services, order allowing amendment of complaint by increasing amount claimed to be due was harmless, where judgment recovered was for less than amount claimed in original complaint.

4. Pleading 🔑201—Language finding fault with each count is of no force or effect in demurrer to whole complaint.

In demurrer to entire complaint, language finding fault with each count had no force or effect.

5. Pleading 🔑433(7)—Complaint alleging sum was due and owing, but not alleging it was unpaid, held not insufficient after verdict and judgment, where answer alleged nothing was due.

In action for balance for legal services, complaint alleging that amount sued for was due and owing, but not alleging that it was unpaid, was not open to attack after verdict and judgment, where answer alleged affirmatively that no sum was due, owing, or unpaid.

6. Appeal and error 🔑673(2)—Record not showing when action was commenced does not show it was barred by limitation (Code Civ. Proc. § 339).

Where record on appeal, in action for balance due for legal services, does not disclose when action was commenced, it does not show that cause of action was barred by Code Civ. Proc. § 339.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Della Louise Wakeman, executrix of Ernest H. Wakeman, deceased, against M. Green. From a judgment for plaintiff, defendant appeals. Affirmed.

Robert L. Levy, of San Francisco, for appellant.

James M. Thomas, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff is the widow of Ernest H. Wakeman. He was an attorney at law, and as such conducted certain litigation for the defendant. After the death of her husband, the plaintiff, as executrix of his will, made a demand for the balance owing to her husband for services rendered, and upon the defendant's refusal to pay she commenced this action. Her complaint was framed in two counts—one asking for the agreed value of the services and the other count asking for the reasonable value of the services. The defendant appeared and filed a demurrer. The demurrer was overruled, and the defendant answered. A trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff, and the defendant has appealed under section 953a of the Code of Civil Procedure.

The defendant claims that the evidence is insufficient to justify the finding of the court that the deceased rendered the services alleged in the complaint and that such services were of the reasonable value of $2,000. The evidence was all one way on the subject of the rendition of services, and there was an abundance of evidence supporting the finding as to the value of those services.

[1] In his answer the defendant alleged that he had paid for the services rendered during the lifetime of Ernest H. Wakeman. The trial court found that that allegation was not true. At this time the defendant claims that the evidence is insufficient to support the latter finding. The contention is without merit. The burden of introducing the proof on that subject rested with the defendant. Melone v. Ruffino, 129 Cal. 514, 519, 62 P. 93, 79 Am. St. Rep. 127. The defendant was fully heard on the subject, and the strongest evidence he produced was to the effect that he had paid about $566 on a claim which amounted to nearly $3,000. The judgment was for only $2,000, and it is perfectly clear that the court did not err in making the finding.

[2, 3] The day before the trial the trial court allowed the plaintiff to amend her complaint by changing the amount of her claim from $2,500 to $7,500. The defendant attacks the order. He claims that it had the effect of allowing the plaintiff to add a new and distinct cause of action. We think it did not do so. It but changed the earmarks of the existing cause of action. Furthermore, the order was harmless. In her original pleading the plaintiff claimed $2,500. By the judgment she recovered $2,000—a sum less than that claimed in her original pleading.

[4, 5] After the plaintiff filed her amended complaint the defendant interposed a demurrer. By its terms it was not addressed to either count contained in the amended complaint, but was addressed to the entire complaint. By its language it finds fault with each count. Excepting in a demurrer to one certain count, such language has no force or effect. In his brief he does not present any argument showing wherein the complaint as an entirety is defective. Assuming solely for the purpose of this decision that the demurrer was properly drawn, the ruling disposing of the demurrer was not error. The point which the defendant seeks to present is this. The plaintiff's complaint contained the allegation that the money was "due and owing." She did not allege that it was "unpaid." After the demurrer was overruled the defendant answered, and in his answer he did not deny the allegation as made, but alleged affirmatively that "there is no sum whatsoever now

due or owing or unpaid by the said defendant." Whatever there may be in the defendant's point, after judgment or verdict, the point is without merit. 20 Cal. Jur. 950.

[6] In the demurrer it is asserted that the plaintiff's cause of action is barred by section 339, Code of Civil Procedure. The fact does not appear on the face of the record. In the amended complaint it is stated that the decedent rendered the services for which the plaintiff asked compensation within two years prior to June 12, 1924. However, the record does not disclose when the action was commenced. That fact is not to be found in the clerk's transcript nor in the reporter's transcript.

Finally it is claimed that the judgment is excessive. An examination of the evidence discloses that the judgment could have been for a larger sum and still within the estimates made by the witnesses who were called and examined as to the reasonable value of the services rendered.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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98 Cal. App. 101

PEARCE v. ELBE. (Civ. 6652.)★

District Court of Appeal, First District, Division 2, California. April 2, 1929.

Rehearing Denied May 2, 1929. Hearing Denied by Supreme Court May 29, 1929.

1. Automobiles 🔑246(58)—Refusal of instruction on last clear chance, in action to recover for injuries in automobile collision, held not erroneous under evidence.

In action for damages for personal injuries received in collision between defendant's automobile and one in which plaintiff was riding, refusal of instruction on doctrine of last clear chance *held* not erroneous under evidence.

2. Negligence 🔑141(9)—Instruction on last clear chance, failing to include element of negligence in failing to avoid accident, held properly refused.

Requested instruction, on doctrine of last clear chance, failing to include elements as to power of preventing accident having ceased and defendant being thereafter guilty of negligence in failing to avoid it, *held* properly refused.

3. Trial 🔑105(1)—Refusal of instruction that defendant, by failure to deny, had admitted fact contrary to testimony admitted without objection, held not erroneous.

In action for damages for injuries in automobile collision, refusal of instruction that defendant had admitted, by failure to deny, that he had driven or was about to drive automobile across intersection, *held* not erroneous, in that it would have had effect of eliminating all testimony to effect that collision occurred some distance from intersection, which testimony was received without objection and without intimation that any such admission would be claimed.

4. Automobiles 🔑246(57)—Instruction requiring verdict for defendant in case jury could not determine proximate cause of automobile collision held not erroneous under evidence.

In action for damages for injuries received in automobile collision, instruction, requiring verdict for defendant in case jury could not determine proximate cause of accident, *held* not erroneous, in view of evidence eliminating doctrine of last clear chance.

5. Automobiles 🔑246(57)—Instruction on unavoidable accident held not erroneous under pleadings, in action for damages for injuries received in automobile collision.

Where complaint in action for damages for injuries received in automobile collision pleaded negligence in general terms and answer denied it in general terms, instruction on unavoidable accident at request of defendant was not erroneous, since general denial of general allegation of negligence permitted defendant to rely on such defense.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Margaret I. Pearce against Albert Elbe. Judgment for defendant, and plaintiff appeals. Affirmed.

Daniel A. Ryan, of San Francisco (George F. Snyder, of San Francisco, of counsel), for appellant.

J. Hampton Hoge, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff sued for damages for personal injuries received in a collision between an automobile driven by the defendant and one driven by her husband in which she was riding. Trial was by jury and the verdict was for defendant. Plaintiff appeals and assigns as error the giving and refusing to give certain instructions to the jury.

The details of how the collision occurred were differently described by different witnesses. Some placed it at the intersection of Old Homestead road and the State Highway and others placed it 30 or 40 feet north of that point. The chief point relied upon by appellant is the refusal of the court to give any instruction upon the doctrine of last clear chance. To show how this doctrine can be invoked by her, appellant relies upon the version of the accident as narrated by defendant's witnesses rather than upon the version narrated by her own witnesses. It is as follows: Defendant came into the highway from Old Homestead road, he turned to his right at the intersection, and traveled along the highway on his right-hand side of said highway at a moderate rate of speed until he was struck by plaintiff's machine. Plaintiff's automobile was traveling upon the highway ap-

★Rehearing denied. Hearing denied by Supreme Court.

proaching the defendant and approaching the intersection of Old Homestead road at a fast rate of speed. Her husband undertook to overtake and pass a vehicle upon its left-hand side, and this brought him upon the left-hand side of the highway. He applied, released, and again applied his brakes, his car marked a 90-foot trail of rubber on the pavement while it proceeded in a skidding manner towards the point where it collided with defendant's automobile, knocking it over against a stump, then it proceeded 30 or 40 feet further, and lay down on its left side in the highway where Old Homestead road crosses it.

It is claimed that defendant should have moved over further to his right, and thus have allowed plaintiff's automobile to pass without colliding with defendant.

Defendant on cross-examination testified at one place as follows:

"So then, when Mr. Pearce came over on the left-hand side out of the line of travel, you were 110 feet away from him? Yes.

"Why didn't you turn into the dirt? I never expected him to come over as far as I was.

"You assumed he would pull over that way? Not altogether, but to some extent, I hoped he would go back in line.

"And you never pulled off the road at all? I did.

"But you were partly off at the time, you were half off of it, weren't you? When he struck me, yes.

"Why didn't you pull over altogether and go into the dirt? I felt I had a perfect right to my side of the highway and I was off just as far as I could go."

In another place defendant testified as follows:

"Why didn't you pull out of his way and get into the dirt? I did, I did all that I had a chance to do.

"You said you assumed you had a right on the highway and that is one of the reasons you stayed there? I said I had a right on the highway, yes.

"And that was one of the reasons why you stayed there instead of pulling out? I started to pull out.

"But you said a moment ago that you remained on the highway there because that was your right, and you were on your right side and you had a right there. I don't believe I made that statement.

"Do you withdraw that statement, if you made it? If I made it, I do."

Surveyor Ford testified from measurements on the highway map that there was 35 feet from the center of the pavement to the stump beside the road. Appellant deduces from this testimony that defendant had plenty of space to his right in which to turn out and away from plaintiff's automobile, but the same witness testified that there was not 35 feet of traveled roadway between these two points even though there was that much space between them.

The evidence shows that plaintiff's automobile skidded sideways into defendant's automobile and, although it shows that defendant saw plaintiff's automobile start to come into the left-hand side of the highway while over 100 feet distant, there is no evidence pointed out to show that defendant either realized or should have realized from what he saw that plaintiff was in a position of danger from which she could not extricate herself, and none is pointed out to show that defendant had sufficient time after this in which to avoid the collision by the exercise of ordinary care.

[1, 2] We conclude, therefore, that the evidence was not of such a character as to make it error for the court to reject requested instructions upon the doctrine of last clear chance. In addition to this is the fact that the only two instructions requested by appellant upon the subject are defective in themselves for failure to include important elements of the doctrine. Requested instruction B did not state that plaintiff's husband must have ceased to have any power of preventing the accident nor that defendant must have thereafter been guilty of negligence in failing to avoid it. Requested instruction C has all the defects pointed out in Townsend v. Butterfield, 168 Cal. 564, 143 P. 760, and in addition it reads "notwithstanding the negligence of the other," instead of "notwithstanding the *previous* negligence of the other"—an important omission considering that without this omission the phrase was held in the case last cited to exclude the case of the concurring negligence of both parties. That a similar instruction despite its several omissions was held not to be reversible error in the case last cited in view of the testimony and other instructions given in that case does not mean that it is reversible error to refuse to give the same imperfect instruction in this case. As stated by the court in that case, the instruction has many imperfections of brevity.

[3] The court did not err in refusing instruction D requested by plaintiff. It stated that the defendant had admitted, by failure to deny, in his answer, that he had driven or was about to drive his automobile across said State Highway along Old Homestead road. It is true that the answer does not deny the allegation, but the two pleadings are not such that an admission was made as to where or how the collision occurred and evidence was received throughout the trial without objection as though the question of where the collision took place was open to proof. The requested instruction would have been manifestly unfair, as it would have had the effect of eliminating all the testimony to the effect that the collision occurred 30 or 40 feet from

the intersection of the two roads, which testimony was received without objection and without intimation that any such admission would be claimed after the evidence was closed.

[4] Appellant criticizes instruction XX given by the court. It told the jury in substance that, "if you cannot determine what was the proximate cause of the accident your verdict must be for the defendant." It is said that the proximate cause of the accident might be either defendant's negligence without the assistance of plaintiff's contributory negligence or it might be the defendant's failure to avail himself of the last clear chance; that if the jury felt that it was surely one of these two causes without being able to determine which one of the two was the proximate cause, it could still find for the plaintiff. If we are right in our decision that last clear chance was not in the case under the evidence, this instruction is not open to the criticism directed against it by appellant.

[5] It was not error for the court to instruct on unavoidable accident at the request of the defendant. Metcalfe v. Pac. Electric Ry. Co., 63 Cal. App. 331, 218 P. 486, is not authority for appellant's contention that unavoidable accident must be specially pleaded by defendant. The appellant was plaintiff in that case. He was claiming error in the refusal of the court to give his requested instruction, and to meet respondent's reply, he had to contend that the point was material in the case by reason of either the evidence or special pleading. The court holds that it was neither in the evidence nor specially pleaded and so the instruction could properly be refused. That is to say, so long as defendant did not claim that defense, plaintiff was not entitled to have the jury instructed upon it. This is not a holding that this defense must be specially pleaded to be available to the defendant. Because it was not error to refuse it in that case at the request of the plaintiff does not mean that it was error to give it in this case at request of defendant. Here negligence is pleaded in general terms in the complaint. The answer denies it in general terms. The general denial of the general allegation of negligence permits the defendant to rely upon the defense of unavoidable accident. Lehnerts v. Otis Elevator Co. (Mo. Sup.) 256 S. W. 819, 822; 45 C. J. 1141, note 52. The instruction was given by request of defendant, and we cannot see how it could be harmful to the plaintiff, who in any event had the burden of proving that the collision was occasioned solely by the negligence of the plaintiff, which, of course, would exclude unavoidable accident.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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98 Cal. App. 112

JACKSON et ux. v. GORHAM. (Civ. 3509.)

District Court of Appeal, Third District, California. April 4, 1929.

1. Deeds 🔑17(2)—Inadequacy of consideration is not of itself sufficient ground for setting aside deed.

Mere inadequacy of consideration is never of itself sufficient ground for setting aside deed, and amount of consideration, in absence of any imputation of fraud, is immaterial to question.

2. Deeds 🔑211(3, 4)—Evidence held not to show fraud or undue influence asserted by grantees.

In action to quiet title in which defendant filed cross-complaint to set aside conveyance to plaintiffs, evidence *held* not to show any fraud or undue influence asserted by plaintiffs over grantors, so as to warrant consideration of question of inadequacy of consideration.

3. Fraud 🔑6—There must be more than mere confidence in another's integrity to sustain presumption of constructive fraud.

There must be something further than mere confidence in another's honesty and integrity to sustain presumption of constructive fraud.

4. Deeds 🔑211(1)—Record held to show that grantors had independent advice before making conveyance.

In action to quiet title in which defendant filed cross-complaint to set aside conveyance to plaintiffs on grounds of fraud, undue influence, and grantor's incompetency, record *held* to show that grantors had independent advice before making such conveyance.

Appeal from Superior Court, Los Angeles County; H. C. Lucas, Judge.

Action to quiet title by G. N. Jackson and wife against Bird W. Gorham. Judgment for plaintiffs, and defendant appeals. Affirmed.

Benjamin W. Shipman and Henry O. Wackerbarth, both of Los Angeles, for appellant.

Eugene Tincher, of Long Beach, for respondents.

PLUMMER, J. Plaintiffs had judgment in an action to quiet title, from which judgment the defendant appeals. The action was instituted by the plaintiffs to quiet their title to lot 26, in block 53, of the city of Long Beach, as that lot is described in a map recorded in Book 19, at page 91 et seq., miscellaneous records of the county of Los Angeles. The facts, as gleaned from the record, are as follows:

Upon the premises described there is situate one single house and one double house. For a long time prior to any of the transactions referred to herein, J. W. Harris and Mary Harris, his wife, occupied the single house; that for about two years prior to December, 1921, the plaintiffs had occupied one section of the double house as tenants of J. W. Harris and his wife; that during the month of December, 1921, J. W. Harris and Mary Harris executed and delivered to G. N. Jackson and Della Jackson a deed of conveyance transferring all of said property to the plaintiffs in this action; that at the time of the delivery of said conveyance, the plaintiffs in this action executed and delivered to J. W. Harris and Mary Harris an instrument conveying to said J. W. Harris and Mary Harris a life estate in the premises referred to, and also a mortgage thereon in the sum of $3,000, payable ten years after date without interest; thereafter, and on or about the 16th day of January, 1922, an agreement was entered into between the plaintiffs in this action and the said J. W. Harris and Mary Harris, whereby the section of the double house theretofore occupied by the plaintiffs was leased by the said J. W. Harris and Mary Harris to the plaintiffs in this action, for and during the term of the lives of the said J. W. Harris and Mary Harris, and for the life of the survivor of them, the lessees yielding and paying to the said J. W. Harris and Mary Harris, or to the survivor of them, the sum of $15 per month as rental for said premises, and also agreeing to care for and attend to said J. W. Harris and Mary Harris, and the survivor of them, during the remainder of their lives, and the life of the survivor, for which services compensation was also to be paid. At the time of the execution of this agreement, and of the instruments herein referred to, the said J. W. Harris and Mary Harris were of the age of 80 years, or thereabouts. It appears from the record that the plaintiffs did look after and care for the said Harrises until the month of February, 1923, when both J. W. Harris and Mary Harris died.

The defendant is an adopted son of Mary Harris, deceased, and if the conveyance of the property referred to, made by the said J. W. Harris and Mary Harris, his wife, to the plaintiffs in this action, were set aside, would succeed to the whole of said property. In addition to his answer to the plaintiff's complaint, the defendant filed a cross-complaint in which he sought to have the conveyance first referred to herein set aside on the grounds of fraud and incompetency of the said J. W. Harris and Mary Harris, his wife, and also on the further ground that the conveyance made to the plaintiffs was the result of undue influence. The court found the facts contrary to the allegations of the defendant's cross-complaint. The findings are too long to be set out herein, but in substance they are to the effect that while the Harrises were advanced in years, they were not mentally incompetent; that they were not acting under any undue influence of any person whomsoever; that the transactions referred to herein were brought about by their own free will and upon their own inauguration. The court also found that the allegations in the cross-complaint that the deed referred to was made without consideration, was not true. Finding No. 8 of the trial court is in these words and figures: "That the said J. W. Harris and Mary Harris, and each of them, were at all times prior to December 3rd, 1921, and were on the 3rd day of December, 1921, and were subsequent thereto, to the date of their respective deaths, at all times of sound mind and memory capable of transacting any and all business matters pertaining to their estate and affairs and that at no time were they acting under undue influence, duress, fraud or menace from any person, or persons whatsoever."

Upon this appeal the appellant confines himself to the presentation of the following points as grounds for reversal: First, "Inadequacy of consideration, and, second, the relations between the parties being of trust and confidence, respondents were charged with the duty, in the lower court, of proving (a) that the transaction was a fair transaction; (b) that the Harrises received independent advice."

[1-3] As to the consideration, the appellant argues that the records show the property to be of the value of a trifle more than $7,000. Respondents make no contention whatever as to the value of the property, but content themselves with citations from the testimony and the findings of the court to the effect that the Harrises had independent advice; that the proposition was one of their own originating; that there were no confidential relations, as those words are used in law, existing between the Harrises and the plaintiffs in this action. The question of inadequacy of consideration really appears to be foreclosed in this action for, as stated in 9 California Jurisprudence, 140: "Mere inadequacy of consideration is never of itself sufficient ground for setting aside a deed, and the amount of consideration, in the absence of any imputation of fraud, is immaterial to the question"—citing a number of authorities. If there were any imputation of fraud or any testimony whatsoever showing undue influence, or any testimony whatsoever from which the inference of undue influence might be drawn, then the question of inadequacy of consideration might be considered. It stands alone, however, in this case. Our attention has not been called to a word in the testimony indicating that any undue influence, or any influence whatsoever, was exercised by the plaintiffs over the Harrises to induce them to propose and bring about consummation of the execution of the instruments to which we have referred. The record does show that the plaintiffs had lived upon the premises referred to as tenants of the Har-

rises for about two years prior to December, 1921; that during said time the plaintiffs had been very kind and attentive to the Harrises; had looked after their personal wants; but there is no testimony in the record that the plaintiffs in this action had anything to do with the business affairs of the Harrises or ever transacted any business for them whatsoever, or gave any advice in relation thereto. It follows as a necessary conclusion that there is nothing upon which to base constructive fraud, by reason of the relationship in this case. Friendly relations or even intimacy of relationship presents an entirely different question from what is understood as a confidential relation in law. One may have confidence in another's integrity and honesty of purpose, and likewise believe that he will live up to any of his contracts, without having any confidential relations with such person that would void any agreements or transactions entered into between them, on the theory of constructive fraud or undue influence. We think the record shows that the Harrises did have confidence in the honesty and integrity of the Jacksons, and believed that the Jacksons would comply with any agreements into which they entered; but there is absolutely no testimony showing anything further, or that there were any confidential business relationships, or relationships existing between the Jacksons and the Harrises which would constitute a basis for a charge of constructive fraud. There must be something further than mere confidence in another's honesty and integrity to sustain the presumption of constructive fraud. In re Estate of Lavinburg, 161 Cal. 536, 119 P. 915; In re Estate of Higgins, 156 Cal. 259, 104 P. 8. As to what does constitute such relationship is well illustrated in the case of Cox v. Schnerr, 172 Cal. 371, 156 P. 509, where the person charged with fraud had been the confidential business agent, and for a long time transacted business for the one upon whom undue influence was alleged to have been exercised. What constitutes confidential relationship in law is also well illustrated in the case of Piercy v. Piercy, 18 Cal. App. 756, 124 P. 561, where a son had lived in the same house with his mother, managed her property as her agent, and also held a general power of attorney.

[4] While the appellant raises the question, the record shows that the Harrises had independent advice. While the respondents in this case are now represented by the same attorney who acted for the Harrises, the fact is uncontradicted that he had never so acted until after the decease of both of the Harrises. The attorney who attended to the transactions to which we have referred was the attorney for the Harrises only, and had been their attorney for some time prior to the execution of the instruments to which we have referred. The record likewise shows that the Harrises were not very much interested in the amount of money which the Jacksons would pay either to them or to their estate; they were more intent on having some one near by who would look after them during their advancing years. The record further shows that whatever of the estate there was belonging to the Harrises, outside of the sum of $500 bequeathed to a niece, was all given to the church to which the Harrises belonged.

Outside of the points which we have discussed, it is conceded by the appellant that the findings of the court are sustained by the evidence, or at least that they are supported by conflicting evidence which prevents their being attacked upon appeal. While the transactions disclosed by the record in this case are somewhat unusual, we find nothing which would justify our holding that the findings of the trial court are unsupported.

The judgment of the court must therefore be affirmed, and it is so ordered.

We concur: FINCH, P. J.; THOMPSON, J.

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98 Cal. App. 63, 64

PEOPLE v. JOHNSON. (Cr. 1074, 1075.)

District Court of Appeal, Third District, California. April 1, 1929.

Criminal law ⚷1182—Where no brief was filed or appearance made by appellant, judgment will be affirmed (Pen. Code, § 1253).

Where no brief was filed on behalf of appellant and no appearance was made for him when case was called for hearing, judgment will be affirmed pursuant to Pen. Code, § 1253.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Robert Johnson was convicted of burglary in the second degree, and he appeals. Affirmed.

Robert Johnson, in pro. per.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Yolo county of a felony, to wit, the crime of burglary of the second degree.

The transcript on appeal was filed in this court February 20, 1929. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on April 1, 1929. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

98 Cal. App. 119

In re GRIGGS' ESTATE.★

HERDMAN v. BOARDMAN. (Civ. 6461.)

District Court of Appeal, Second District, Division 1, California. April 4, 1929.

Rehearing Denied May 8, 1929. Hearing Denied by Supreme Court June 3, 1929.

Wills 🔑853—Under will leaving income to A, principal to B at A's death, death of A before testatrix did not defeat B's right (Civ. Code, §§ 741, 742, 1344).

Where will left income from certain sum to A for life, and on her death principal sum to be paid B, death of A before testatrix did not defeat right of B, under Civ. Code, §§ 741, 742, 1344.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

In the matter of the estate of N. Belle Griggs, deceased. Petition by Robert Herdman against Louis P. Boardman, administrator with the will annexed. From an order directing partial distribution, the administrator appeals. Affirmed.

Philip C. Boardman, of San Francisco, for appellant.

Walter J. Hartzell, of Redlands, for respondent.

HOUSER, J. This appeal is from an order of partial distribution of an estate and a judgment therein made by the superior court by which the sum of $4,775 was ordered distributed and paid to one Robert Herdman, a legatee in the will of N. Belle Griggs, deceased.

So far as is here material, the will which furnished the authority for the order and the judgment in question provided that the trustee therein named distribute "to Anna Herdman, the income from Five Thousand Dollars ($5,000.00) to be paid to her semiannually during the term of her natural life and upon her death to pay said principal sum of Five Thousand Dollars ($5,000.00) to her son, Robert Herdman."

It appears that Anna Herdman predeceased the testatrix herein.

The basic contention of appellant is that the legacy to Anna Herdman lapsed with her death, and, consequently, that the trial court erred in its order and judgment. Certain authorities, including Estate of Goodfellow, 166 Cal. 411, 137 P. 12, are cited by appellant in support of his position. Without here setting forth the facts upon which either of such authorities is based, it may suffice to state that none of them presents a situation paralleling either the facts or the law applicable to the question here involved. On the other hand, both statutory and judicial authority support the conclusion reached by the trial court. Sections 1344, 741, 742, Civ. Code; Estate of Gregory, 12 Cal. App. 309, 107 P. 566. To the same effect are: Frelinghuysen v. New York Life Ins., etc., Co., 31 R. I. 150, 77 A. 98, Ann. Cas. 1912B, 237; In re Marshall, 80 Misc. Rep. 1, 141 N. Y. S. 540; Ives v. Central Union Trust Co., 110 Misc. Rep. 740, 180 N. Y. S. 343; In re Grinnell's Estate, 115 Misc. Rep. 722, 185 N. Y. S. 909; Payne v. Reece, 297 Mo. 54, 247 S. W. 1006; Allen v. Mayfield, 20 Ind. 293; Richmond v. Vanhook, 38 N. C. 581; Dunlap v. Dunlap, 4 Desaus (S. C.) 305; Coleman v. Hutchenson, 3 Bibb (6 Ky. 209, 6 Am. Dec. 649). See, also, 22 Cal. Jur. 816.

The judgment and order are affirmed.

We concur: CONREY, P. J.; YORK, J.

98 Cal. App. 145

BRADBURY ESTATE CO. v. CARROLL et al. (Civ. 6693.)

District Court of Appeal, First District, Division 1, California. April 5, 1929.

1. Appeal and error 🔑1011(1)—Findings on conflicting evidence held conclusive.

In action to quiet title, determination by trial court on conflicting evidence was conclusive, where it did not appear as matter of law that evidence was insufficient to support findings.

2. Judgment 🔑321—Court has inherent power to correct clerical error in findings or judgment even after six months (Code Civ. Proc. § 473).

Trial court has inherent power to correct clerical error in findings or judgment not only within six months' period mentioned in Code Civ. Proc. § 473, but also thereafter.

3. Judgment 🔑303—In action to quiet title, order correcting judgment to make record show what was in fact determined held proper.

In action to quiet title, order correcting judgment to make record speak truth and show what was in fact determined by substituting words "lot designated as 69.57 acres" for and instead of words "Lot one" *held* proper, where order correcting records was made on motion supported by affidavit and on notice to counsel for appellants.

4. New trial 🔑97—Unless continuance is asked new trial for accident or surprise is properly denied.

Motion for new trial on ground of accident or surprise is properly denied, where no effort was made to secure continuance.

5. New trial 🔑99—Newly discovered evidence must be material, not cumulative, and rendering different result probable, and not available at trial with reasonable diligence, and must be shown by best evidence of which case admits.

To entitle party to new trial for newly discovered evidence, it must appear that evidence,

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★Rehearing denied. Hearing denied by Supreme Court.

not merely its materiality, is newly discovered, that it is not cumulative merely, that it will render different result probable on retrial, that party seeking relief could not with reasonable diligence have discovered and produced it at trial, and that such facts be shown by best evidence of which case admits.

6. New trial ⚿102(8)—Party not seeking continuance on discovering existence or materiality of evidence until during trial cannot have new trial on ground evidence is newly discovered.

Where party fails to move for continuance to enable him to obtain evidence which is not in his possession, existence or materiality of which he first discovers during progress of trial, he is not entitled to new trial on ground evidence was newly discovered.

7. Appeal and error ⚿977(5)—Order refusing new trial will not be disturbed, in absence of plain abuse of discretion.

Unless appellate court can plainly see that discretion has been abused in denying new trial for newly discovered evidence and that showing was of such character as to make it manifest that different result would be reached in view of such evidence, order refusing new trial will not be disturbed.

8. New trial ⚿99—Refusal of new trial for newly discovered evidence held not abuse of discretion.

In action to quiet title, refusal of new trial for newly discovered evidence *held* not abuse of discretion, where affidavits showed evidence was cumulative, and there was no showing that appellants could not with reasonable diligence have produced evidence at trial, nor any suggestion as to how matter set forth could produce different result.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action to quiet title by the Bradbury Estate Company against Joseph H. Carroll and others. From a judgment for plaintiff and orders denying motion for new trial and motion to correct judgment, defendants appeal. Affirmed.

William A. Spill, of Pasadena, for appellants.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, for respondent.

LANDIS, Justice pro tem. In form, this is an action to quiet title.

Plaintiff alleged ownership to two parcels of land, parcel 1 consisting of 93.84 acres and parcel 2 consisting of 69.57 acres, both being portions of the Rancho Azusa de Duarte in Los Angeles county, Cal., and, following the usual allegations that defendants assert an interest adverse to plaintiff and that such claim is without right, plaintiff further alleges that while it was the absolute owner and entitled to possession, defendants Carroll, without right, title, or license from plaintiff, entered into possession, fenced and wrongfully withheld a portion of said land to the damage of plaintiff in the sum of $1,000.

By way of answer defendants Carroll deny plaintiff's ownership and claim an interest in the entire property described in plaintiff's complaint and deny all other material allegations of the complaint.

At the trial it developed, was conceded by the parties, and the case was tried upon the theory, that the sole question or issue in the case was the determination of the location on the ground of part of the Rancho Azusa de Duarte eastern boundary line in order to determine whether the land occupied by defendants was within or outside of the boundaries of the 69.58-acre parcel of said rancho. Judgment went for plaintiff.

The court found that plaintiff was the owner and entitled to the possession of the premises described in the complaint, and that answering defendants had no estate or interest therein; that plaintiff is entitled to a writ of restitution removing defendants from and restoring to plaintiff the possession thereof and awarding to plaintiff damages in the sum of 6 cents; and the findings and judgment recited by metes and bounds a description of the parcel entered into possession of and fenced by defendants by referring to the fence inclosing the same sufficient to permit of its being found and located on the ground.

Thereafter, upon motion made by plaintiff, nunc pro tunc order was made by the court correcting the description of the land as shown in the findings and judgment, and a motion for a new trial was made and received the effect of a denial by not having been determined by the court within the time allowed by law.

Defendants appeal, and in support thereof urge the following three contentions: (1) The trial court was without power to make the order correcting the judgment. (2) The findings of the court were against the weight of the evidence. (3) The court should have granted a new trial because of accident, surprise, or newly discovered evidence.

Although denied under their answer, during the trial appellants did not dispute or question respondent's claim of title to the property described in the complaint.

The claim and contention of appellants is that the land possessed, fenced, and claimed by appellants is located outside of the boundaries of the land described in the complaint; and it is the contention of both the parties that the determination of the question of whether the land fenced and claimed by defendants is within or without the boundaries of the land described in the complaint necessitates the establishment on the ground of the easterly boundary line of the Rancho Azusa de Duarte. Appellants do not claim under any record title, but seek to prevail under the rule that if plaintiff prevails it must prevail by the strength of its own title.

The parcel of land claimed by appellants consists of 6.01 acres, and is described in the corrected findings and judgment as follows:

"Lot designated as 69.57 acres, Section 28, Township 1 North, Range 10 West, S. B. B. & M., of the Rancho Azusa de Duarte, in the County of Los Angeles, State of California, as per map recorded in Book 6, Page 80 et seq., Miscellaneous Records of said County, the westerly line of defendants' fence being approximately 4.46 chains west of the easterly line of said Rancho as shown in said map; said portion consisting of the easterly 6.01 acres of said Lot designated as 69.57 acres, particularly described as follows:

"Beginning at a point in the easterly line of Rancho 0.57 chains South of the northerly line of said lot designated as 69.57 acres, Section 28 and 4.46 East of the westerly line of defendants' fence, thence along fence North 89° 09′ West 4.46 chains; thence along fence South 7° 07′ West 14.05 chains; thence along fence South 82° 34′ East 1.71 chains; thence along fence North 47° 46′ East 4.34 chains to a point on easterly line of said Rancho; thence northerly along the easterly line of said Rancho 11.25 chains to the point of beginning, as shown in Plaintiff's Exhibit 4."

Three surveys are referred to in the testimony: The Hancock survey, upon which the United States government patent to Andres de Duarte was based, was made in 1858. In 1875, Norway made a survey of lands lying to the east of the rancho and coming in from the east ran as far as station 7, but did not make any further attempt to survey the Rancho Azusa de Duarte, and in 1872, Lecouvreur, county surveyor of Los Angeles county, retraced the boundaries of the rancho and subdivided it, establishing what is known as the Lecouvreur lines, his survey being the basis of the County Map Book 6, miscellaneous records of Los Angeles county, p. 82, and the main issue in the case is the location of the easterly boundary of the Rancho Azusa de Duarte either as originally located by Hancock or as subsequently relocated by Lecouvreur.

The two principal witnesses testifying were Mr. L. Friel, a surveyor called by the respondent, and a Mr. J. E. Roberts, called by appellants, both of whom had recently undertaken to relocate the lines and fix and establish on the ground the line in question.

The line adopted by the court as the easterly line of the rancho is designated on a map prepared by Mr. Friel, as line E-F. Mr. Friel testified that this line is a relocation on the ground of the Lecouvreur line, and it was admitted by defendants' witness, Mr. Roberts, that if the Lecouvreur line was a correct relocation of the original boundaries of the rancho, the parcel in question, that is, the 6.01 acres claimed by defendants, is within the boundaries of the plaintiff's land.

It was stipulated that the map prepared by Friel (Plaintiff's Exhibit 7) is a correct retracing of the map shown in Book 6 of Maps, p. 82; and the line adopted by the trial court is shown on the map to be situate between the stations 8 and 9. Friel testified that in undertaking to retrace the Hancock line he began at station 1 (designated on his map as station A) of the Rancho Azusa de Duarte according to the Hancock field notes and ran courses and distances according to such field notes from said station 1 to station 9; station 1 is the common boundary of the Rancho Azusa de Duarte and of the Rancho Santa Anita, and is marked by an old fence; from station 1 he ran courses and distances as called for in the field notes to station 4; from station 4 he ran the called for courses and distances, south 79 degrees 30 minutes east, 119 chains to the point B, station 5, and found the courses and distances to be south 79 degrees 35 minutes east, 119.76 chains; at point B he found a 4 by 4 post and a 2-inch iron pipe. He did not find anything at stations 2, 3, and 4, which would indicate the original posts set by Hancock. From station 5 he ran the courses and distances as called for, north 75 degrees east, 11 chains to station 6, indicated on his map as point C; he found nothing at this point in the way of a monument. He then ran the courses and distances called for, north 68 degrees 30 minutes east, 45 chains, arriving at point D, or station 7, finding the correct course and distance, however, to be north 68 degrees 13 minutes east, 45.46 chains; at this point, station 7, he found an old sycamore tree marked with "B.T." as a witness tree (the Hancock field notes referred to a sycamore tree at this point). From station 7 he ran north 57 degrees 56 minutes east, 46.60 chains, to station 8, where he found a 2-inch iron pipe. Starting again at station 7 he ran to a 4-inch by 4-inch post in a mound of rocks at the southwest corner of lot 1 of section 21, marked *0* on the map and the post being marked S 2 1 L 1 on the north side, S 2 8 L 1 on the south side, and 2 on the west side. He then ran east 35.90 chains and set a point indicated on the map by letter Q; he then ran from point *0* to the southwest corner of lot 1 indicated on his map by letter P, where he found a 2-inch iron pipe set in concrete; thence westerly on a line with the southerly line of lots 2 and 3 to the west and also along the south line of lot 1, 32.90 chains, arriving at point R; thence north 39 degrees *00* minutes east, 1.52 chains, to point indicated F, and thence from F to E, through Q. Friel also testified that he found a granite rock 28 by 29 inches, near station 7, marked S 8 and 29 inches out of the ground.

The dimensions given by Friel in connection with running his lines correspond with the official map dimensions. Hancock's notes call for a blaze on a sycamore tree, and Friel testified that he found a sycamore stump and that its relation to the granite rock agrees with the call in the patent for course and distance.

Respondent contends that the stone found near point 7 was erroneously marked 8 instead of 7, and that appears to be a consistent contention.

Accepting the testimony of Friel as true and considering it in connection with the maps, plats, and field notes offered by respondent and properly admitted in evidence, clearly the showing made by respondent supports the findings of the court, and we adopt the conclusion stated to the trial court by counsel for appellants upon submitting a formal motion for nonsuit, to wit: "I think the plaintiff has certainly made out a prima facie case; no doubt about that."

[1] With respect to the showing made by appellants, it will serve no useful purpose to here recite in full the testimony of Roberts, the surveyor called by appellants and who testified that he surveyed the property in question, for the reason that the conclusion most favorable to appellants that can be reached from a consideration of his testimony and in fact from the entire showing made by appellants, is that it substantially conflicts with the showing made by respondent and brings the case squarely within the rule that findings made upon conflicting evidence are conclusive here, and that an appellate court must view all inferences which the trial court might reasonably have drawn as evidence tending to support a finding assailed. Ryder v. Bamberger, 172 Cal. 791, 158 P. 753; Hallidie v. First Federal Trust Co., 177 Cal. 600, 602, 171 P. 431; Hauger Motors Co. v. Reidy (Cal. App.) 262 P. 46; Southern California, etc., Co. v. Amalgamated, etc., Workers, 186 Cal. 604, 200 P. 1. The determination of the evidence by the trial court is conclusive on appeal unless it shall appear, as matter of law, that it is insufficient to support the findings. In re Herman, 183 Cal. 153, 162, 191 P. 934.

Appellants do not contend that as a matter of law we must from the record before us find that the findings are not supported by the evidence. Their contention is, using their own words, "that the findings are against the weight of the evidence"—in effect urging the contention that the trial court should have accepted their version and evidence rather than that of respondent. The appellate court will not attempt to weigh the evidence with a view either to justifying or discrediting the findings of the trial court. Greer v. Los Angeles Athletic Club, 84 Cal. App. 272, 258 P. 155. The evidence, although conflicting, supports the findings of the court and cannot therefore be disturbed, and a review of the rulings of the court on objections by defendants discloses no prejudicial error.

[2, 3] With respect to appellants' contention concerning the trial court's power to make the order correcting the judgment, it appears that the effect of the order was a substitution in the specific description of the property occupied by defendants of the words "Lot designated as 69.57 acres" for and instead of the words "Lot one." The law appears to be well settled that the trial court has inherent power to correct a clerical error in the findings or judgment entered by it in a case, not only within the six months' period mentioned in section 473 of the Code of Civil Procedure, but also thereafter. The theory upon which such rule has been established is that the court has power to make the findings and judgment entered by it conform to the true judgment rendered in the case. In other words, the court may correct a clerical error in order to make the record speak the truth and show what was in fact determined by the court. Anderson v. Parker, 6 Cal. 197, 202; Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561; Chicago Clock Co. v. Tobin, 123 Cal. 377, 55 P. 1007; Fay v. Stubenrauch, 141 Cal. 573, 75 P. 174; Erickson v. Stockton, etc., R. Co., 148 Cal. 206, 82 P. 961; City and County of San Francisco v. Brown, 153 Cal. 644, 96 P. 281.

In the present case the complaint correctly described the property; in the findings of fact and conclusions of law the court finds that plaintiff is the owner of the property referred to in the complaint, and in paragraph 3 finds that defendants have entered into possession of and fenced * * * property therein described, which clearly was intended to refer to a portion of the property mentioned in the complaint and in the earlier paragraph of the findings. The error is due solely to the insertion of the words "Lot one" before the section 28. In the portion of the property described by metes and bounds reference is made to the easterly line of the Rancho Azusa de Duarte, and to the fenced-in portion of the property occupied by defendants.

In the judgment it appears that the portion of the property sought to be described as occupied by defendants (in which the erroneous reference to "Lot one" appears) was a portion of the property described in earlier portions of the judgment. After correctly reciting in the judgment that plaintiff is the owner of the property described in the complaint, it specifically provided: "That plaintiff have possession of all of said land, including" the 6.01-acre parcel which is then specifically set out. The language in this portion of the judgment definitely shows upon its face that the words "Lot one" are an inadvertence, that the property occupied by defendants was a portion of section 28 and is within the property correctly described in the earlier portion of the judgment.

The order correcting the records was made upon motion by respondent supported by affidavit, and upon notice to counsel for appellants. The original judgment was entered September 28, 1926, and the motion was served and filed December 3, 1926. The correction of the error makes the record speak the truth and show what was in fact determined by the court and the order of the court was a proper one.

Appellants also urge and contend that their motion for a new trial should have been granted, and rely upon the grounds of: (1) Accident or surprise which ordinary prudence could not have guarded against; (2) newly discovered evidence; (3) insufficiency of the evidence to justify the decision and the judgment; (4) that the decision or judgment is against law; (5) errors in law occurring at the trial.

The motion was supported by the record, files, papers, register of actions, reporter's transcript of the trial, and upon affidavits.

[4] The point most seriously urged by appellants is that the introduction in evidence of the maps prepared by Mr. Friel and the Lecouvreur map created a situation of accident or surprise such as to warrant the granting of a new trial. The affidavit of Henry F. Prince, counsel for respondent, filed in opposition to the motion, shows that defendants' counsel and surveyor were familiar with the maps and surveys which were introduced in evidence. No effort was made by appellants to secure a continuance and the rule is well established that a motion for a new trial on the ground of accident or surprise is properly denied where a continuance is not asked. Denvir v. Judson Freight Forwarding Co. (Cal. App.) 260 P. 846; Snodgrass v. Snodgrass, 81 Cal. App. 360, 253 P. 755; Doyle v. Sturla, 38 Cal. 456; Heath v. Scott, 65 Cal. 548, 4 P. 557; Bailey v. Richardson, 66 Cal. 416, 5 P. 910; Schellhous v. Ball, 29 Cal. 608; Turner v. Morrison, 11 Cal. 21; Delmas v. Martin, 39 Cal. 555; Ferrer v. Home Mutual Insurance Co., 47 Cal. 416.

[5-8] With respect to the claim of newly discovered evidence, the rule is stated in 20 California Jurisprudence, 77, as follows: "To entitle a party to a new trial on this ground it must appear: (1) That the evidence, and not merely its materiality, is newly discovered; (2) that the evidence is not cumulative merely; (3) that the evidence is such as to render a different result probable on a retrial; (4) that the party seeking relief could not with reasonable diligence have discovered and produced the evidence at the trial; (5) that these facts be shown by the best evidence of which the case admits."

The matters set forth in affidavits filed in support of the motion do not relate to evidence which was newly discovered, except such as is cumulative. The existence of the sycamore tree referred to in the affidavits was not disputed at the trial; the existence of the fence referred to in the affidavit of J. H. Carroll had been known to appellants for several years, as appears from the affidavit itself. There is no showing that appellants could not with reasonable diligence have produced the evidence at the trial, and in fact four of the affiants were witnesses and testified at the trial, and no continuance was sought for the purpose of obtaining such evidence.

Where a party fails to move for a continuance to enable him to obtain evidence which is not in his possession, the existence or materiality of which he first discovers during the progress of the trial, he is not entitled to a new trial on the ground that the evidence is newly discovered. Klockenbaum v. Pierson, 22 Cal. 160. Further, a new trial will not be granted where it does not appear from the affidavits that a different result would probably be reached upon a retrial.

Appellants have not suggested how the matters set forth in the affidavits could have produced a different result at the trial, and we are not able to say that they would render or produce a different result probable upon a retrial.

It is the established rule in this state that a new trial should be granted on the ground of newly discovered evidence only where the newly discovered evidence is such as to render a different result probable, and it has been said that the question as to the effect upon the case of newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court. People v. Oxnam, 170 Cal. 211, 215, 149 P. 165; Fresno Estate Co. v. Fiske, 172 Cal. 583, 601, 157 P. 1127; Rauer's Law, etc., Co. v. Bradbury, 3 Cal. App. 256, 261, 84 P. 1007.

Unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that it would or should result differently on a new trial in view of the newly discovered evidence, the order of the trial court refusing a new trial will not be disturbed. People v. Sing Yow, 145 Cal. 1, 78 P. 235. It is quite obvious that we are not warranted in disturbing the order of the court denying appellant's motion for a new trial.

The appeal is from the judgment, the order denying the motion for a new trial, and from the order correcting the judgment.

We find no cause for setting aside or disturbing the decision of the court below.

The judgment and the orders appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

98 Cal. App. 87

BRICKER v. BANKS, City Clerk, et al.
(Civ. 3789.)

District Court of Appeal, Third District, California. April 2, 1929.

1. Municipal corporations 🔑159(5)—Petition for recall should state in not over 200 words reasons for demand under charter (Stockton City Charter, art. 28, §§ 2, 5).

Under the Stockton City Charter, art. 28, §§ 2, 5 (St. 1923, p. 1394), providing that petition for recall of officers must contain statement of reasons for the demand, and that published call for election shall contain, in not more than 200 words, reasons for demanding recall, petition should state reasons for recall in not more than 200 words, since it does not appear upon what officer duty of selecting those 200 words falls.

2. Municipal corporations 🔑159(1)—Officer, in determining sufficiency of recall petition, is not required to disregard directory provision of charter requiring reasons for demanding recall in not over 200 words (Stockton City Charter, art. 28, §§ 2, 5).

Though a recall election for city officers in pursuance of a recall petition, stating reasons for recall in somewhat more than 200 words, would not be held invalid on mere ground that published call for election used too many words in stating reasons under Stockton City Charter, art. 28, §§ 2 and 5 (St. 1923, p. 1394), yet in the initial stages of proceeding for recall, in determining sufficiency of petition therefor, law does not enjoin on any officer, as a duty resulting from his office, the disregard of even a directory statute.

3. Municipal corporations 🔑159(1)—Statute relating to recall elections of city officers held to contemplate that each recall petition shall relate to but one officer (Stockton City Charter, art. 28).

Stockton City Charter, art. 28 (St. 1923, p. 1394), relating to recall of city officers, by using the singular number throughout, and providing that recall election may be initiated by a petition signed by qualified electors, equal in number to 20 per cent. of all votes cast at last preceding general municipal election, contemplates that each recall petition shall relate to only a single officer.

4. Municipal corporations 🔑79—Recall of officers in city having special charter providing for recall is not controlled by general laws inconsistent with charter (St. Ex. Sess. 1911, p. 128; Pol. Code, § 4021a).

The recall of officers in a city having a special charter, which provides for such a recall, is a municipal affair, and is not controlled by general laws, such as St. Ex. Sess. 1911, p. 128, or Pol. Code, § 4021a, inconsistent with charter provisions in relation thereto.

Application for writ of mandate by L. H. Bricker against A. L. Banks, as City Clerk of the City of Stockton, and others, to compel certification and filing of recall petitions and the calling of a special election to vote thereon. Application denied.

Stahlman & Bennett, of Stockton, for petitioner.

J. LeRoy Johnson, of Stockton, for respondents.

FINCH, P. J. This is an original application for a writ of mandate to compel the city clerk of Stockton to certify and file two petitions, one for the recall of a city councilman and the other for the recall of four other city councilmen, and to compel the city council to call a special election to determine whether the councilmen named in the petitions shall be recalled. The city clerk refused to certify and file either petition, on the ground that in each of them the statement of the reasons for demanding the recall contained more than 200 words, and one of them on the further ground that it demanded the recall of four city councilmen.

[1, 2] The charter of the city of Stockton provides for the recall of elective officers thereof. Article 28, § 2, relating to recall of officers provides: "The petition must contain a statement of the reasons for the demand." Stats. 1923, p. 1394. Section 5 of the same article provides: "In the published call for the election there shall be printed in not more than two hundred words the reasons for demanding the recall of the officer as set forth in the recall petition." Each petition involved herein contains nearly 300 words in the statement of the reasons for the recall. It is apparent therefore that the reasons for demanding the recall, "as set forth in the recall petition," cannot "be printed in not more than two hundred words." If 200 words are to be selected from the statement contained in the petition, it does not appear upon what officer the duty of selecting those words falls. A writ of mandate issues "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." Code Civ. Proc. § 1085. The principle of law involved is analogous to that in Bennett v. Drullard, 27 Cal. App. 180, 184, 149 P. 368, where it was held that there was no duty specially enjoined upon the city council and city clerk, respondents therein, to segregate the invalid from the valid propositions contained in the initiative petition there under consideration and submit the valid parts to the voters. Counsel for the petitioner herein contends that the provision of the charter limiting to 200 words the reasons for demanding the recall of an officer is directory only. It may be conceded that a recall election held in pursuance of a petition stating the reasons for the recall in somewhat more than 200 words would not be held invalid on the mere ground that the published call for

the election used too many words in stating such reasons, but in the initial stages of a proceeding for the recall of an officer, in determining the sufficiency of a petition therefor, the law certainly does not enjoin upon any officer, as a duty resulting from his office, the disregard of even a directory statute.

[3] Article 28 of the Stockton Charter, relating to the recall of officers, uses the singular number throughout. It provides that a recall election may be initiated by "a petition signed by qualified electors, equal in number to twenty per centum of the entire votes cast at the last preceding general municipal election." This provision contemplates, of course, that the petition shall represent a fair expression of the will of such electors. When a petition for the recall of several officers is presented to an elector for his signature, if he is of the opinion that some, but not all, of such officers ought to be recalled, he is afforded no means of expressing his will. He must either sign the petition demanding the recall of all, some of whom he believes are faithful, or refuse to sign it, although he may know that one or more of such officers are corrupt. It ought not to be held that the law puts a voter to such a choice in the absence of an express provision to that effect. In the language of Chief Justice Angellotti in Wilson v. Blake, 169 Cal. 449, 454, 147 P. 129, 131 (Ann. Cas. 1916D, 205) "the provisions of the charter specially applicable to the matter of recall, clearly show, in my opinion, that the recall proceeding contemplated is necessarily one against a single officer." In the discussion of a similiar petition in State ex rel. Brown v. Howell, 134 Tenn. 93, 183 S. W. 517, L. R. A. 1916D, 1097, it is said: "The impropriety and injustice of proceeding against a number of persons in one petition are manifest. It is subject to objection on the ground that a voter, when presented with the petition, must judge as to the question of whether he shall ask for a removal of a number of men or else submit to the retention in office of all. He is not given the clear-cut right to pass on each individual and exercise his own individual judgment as to that particular person. The fact that the petition stated the same cause of removal against all does not cure it of this objection. The voter ought to have the right to judge singly against each officer if he so desired. The legislature evidently so intended. The same right to exercise independent judgment on each separate official must exist in the initiatory step of removal, as effectively as that the voter may so exercise at the ballot box his right and duty to elect a new official or recall an old one. As well might it be said that the voter shall be compelled to vote for a number of men jointly and be denied the right to vote as to each one singly, as to say he may not judge of the propriety of holding in office each individual official who had been previously elected. The initial step in the removal is quite as important as the final vote in the recall. The official also should have the right to be judged alone by his fellow citizens as to his own merits or demerits. That the law-making body so intended in providing the recall we have no doubt. To construe it otherwise would be to attribute to the legislature the enactment of an unwise and intolerable law."

In McCush v. Pratt, 113 Wash. 7, 192 P. 964, it is said: "From the standpoint of the citizen, there is a good reason why separate petitions should be filed against each officer who is sought to be recalled. If the officers are covered jointly in a petition, the voter, when it is presented to him, must either sign to recall all or none. He may desire a recall of one and feel that it is his duty to so sign. He may believe that the charges against the other or others are not well founded and that the petition for their recall should not be signed. In order to exercise his judgment in one respect he must go counter to his conviction in another. * * * There is also a reason, so far as the officer sought to be recalled is concerned, why the petition should be separate and not joint. The official should have the right to be judged by his fellow citizens as to his own merits or demerits. He should not be recalled because of the shortcoming of some other officer."

[4] An act to provide for the recall of elective officers of incorporated cities and towns (Stats. 1911, Extra Sess., p. 128) provides: "One petition is sufficient to propose the removal and election of one or more elective officials." Section 2 of the act, however, provides: "This act is not intended to apply to those cities having a freeholders' charter, adopted under the provisions of section 8 of article XI of the constitution, and having in such charter provision for the recall of elective officials by the electors." The city of Stockton has such a charter with such a provision for the recall of officers. Section 4021a of the Political Code contains the same language as that quoted from the statute of 1911. That section is limited, however, to the recall of officers "of any county or of any township or supervisor district thereof." The recall of officers in a city having a special charter which provides for such a recall is a municipal affair and is not controlled by general laws inconsistent with the charter provisions in relation thereto. Schaefer v. Herman, 172 Cal. 338, 155 P. 1084. Of course, the question of recalling several officers may be submitted at the same election, where separate petitions are presented. In such an election the electors are not denied the right to vote for the recall of some of such officers and the retention in office of others.

There is some discussion in the briefs respecting the form of the ballot in a recall election under the charter. That question, however, is not properly before the court for decision and any discussion thereof or expression of opinion in relation thereto would serve no useful purpose.

The alternative writ of mandate issued herein is discharged, and the petition for a peremptory writ is denied.

We concur: THOMPSON, J.; PLUMMER, J.

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98 Cal. App. 40

PEOPLE v. ANDERSON. (Cr. 1753.)

District Court of Appeal, Second District, Division 1, California. March 29, 1929.

1. Criminal law 🔑814(3)—Instruction that defendant could not be convicted for grand theft of hay, unless value was shown to exceed $200, held properly refused, in absence of evidence of lesser value.

In prosecution for grand theft of hay, instruction that, unless by evidence jury was convinced beyond reasonable doubt that value of hay exceeded $200, even though all remaining elements of crime were established, defendant was entitled to an acquittal on charge of grand theft, and could be convicted of no greater offense than petty theft, *held* properly refused, where no evidence was introduced by either party which tended to prove that hay was worth less than $200.

2. Criminal law 🔑829(1)—Refusing instructions substantially covered by those given held not error.

In prosecution for grand theft, refusal of instructions as requested by defendant *held* not error, where they were substantially covered by instructions given to jury at request of prosecution.

3. Criminal law 🔑1169(2)—In grand theft prosecution, admitting in evidence bills of lading to establish shipment of hay stolen held not prejudicial, where material facts in bills were established by other competent evidence.

In prosecution for grand theft of hay, admission in evidence of bills of lading to establish shipment of hay *held* not prejudicial error, where it appeared by transcript of proceedings had on trial that at time bills were offered in evidence district attorney stipulated that specification of weights, or where weights came from, or various other things on bills of lading, are not matters of evidence, but that bills were introduced merely for purpose of showing bills of lading of cars as shipped by defendant, and where material facts contained in bills were established by other competent evidence.

4. Criminal law 🔑1001—Defendant cannot complain because court pronounced judgment after defendant's application for probation and then stayed execution pending hearing on application (Pen. Code, § 1203).

In prosecution for grand theft, where defendant's motion for new trial was denied and defendant made application for probation immediately thereafter, after which court pronounced judgment and at same time for purpose of hearing further evidence on application for probation stayed execution, defendant *held* in no position to complain, since trial court was vested with authority to pronounce judgment and stay execution pending investigation, under Pen. Code, § 1203.

5. Criminal law 🔑982—That application for probation was denied defendant affords no ground for reversal of conviction of grand theft.

In prosecution for grand theft, mere fact that in discretion of trial court leave to file an application for probation was denied defendant, convicted thereof, affords no ground for reversal of judgment.

6. Larceny 🔑65—Conviction for grand theft of hay held not error, where evidence was ample to show its market value exceeded $200 (Pen. Code, § 487).

Where evidence in prosecution for grand theft of hay was ample to show that its market value exceeded sum of $200, as provided by Pen. Code, § 487, conviction of defendant for grand theft should stand.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

John M. Anderson was convicted of grand theft, and he appeals. Affirmed.

See, also, 272 P. 755.

Ault & MacKinnon, of Calexico, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and Edward B. Patterson, Deputy Dist. Atty., both of El Centro, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of grand theft and from an order denying his motion for a new trial.

Briefly, the facts relating to the transaction upon which the prosecution of defendant was predicated were that defendant falsely represented to a foreman of the owner of certain hay that defendant was acting as a purchasing agent for "F. F. Fuller & Co." and thereby induced the owner of the hay to deliver its possession unto defendant, and thereupon, acting for himself, defendant sold the hay to a third person and refused to pay the original owner therefor.

[1, 2] Appellant's first specification of error relates to the refusal of the trial court to give to the jury certain instructions requested by defendant, among which was one to the effect that, unless by the evidence the jury was convinced beyond a reasonable doubt that the market value of the hay in question exceeded the sum of $200, even though all the remaining elements of the crime were established, defendant was entitled to an acquittal on the charge of grand theft, and could be convicted

of no greater offense than that of petty theft. In that connection, it satisfactorily appears that the only evidence in the case relating to the value of the hay showed that it was reasonably worth at least the sum of $250. Since no evidence was introduced by either party which tended to prove that the hay was worth less than $200, the proposed instruction had no application to the facts, and hence was properly refused. The point is illustrated in the case of People v. Comyns, 114 Cal. 107, 110, 45 P. 1034, 1035, where the court said: "* * * If, for example, but a single article had been stolen, a diamond, and the only evidence in the case was that the diamond greatly exceeded in value the sum of fifty dollars [as then provided by statute], some force would appear in the argument that the defendant, if the jury believed he stole that article, was guilty of the crime of grand larceny, and some reason would appear in justification of the court's refusal under such circumstances to submit to their consideration the lesser offense. * * *" Although not in identical terms in principle the other instructions which were requested by defendant and refused by the court were substantially covered by instructions given to the jury at the request of the prosecution. It follows that in that regard appellant has no cause for complaint.

[3] Appellant predicates prejudicial error in that, over the objection of defendant, the trial court admitted in evidence the bills of lading by which shipment of the hay was sought to be established. By the transcript of the proceedings had on the trial of the action it appears that at the time the bills of lading were offered in evidence the district attorney in charge of the prosecution stipulated that "the specification of the weights, or where the weights came from, or various other things on the bills of lading, are not matters of evidence, it is merely introduced for the purpose of showing the bills of lading of the cars as shipped to San Diego." Moreover, all of the material facts contained in the bills of lading were established by other competent evidence. It is therefore clear that no prejudicial error was committed by the trial court in receiving the bills of lading in evidence.

[4, 5] Appellant presents the further specification of error, "that the court erred in passing sentence on defendant on October 13, 1928, and in staying execution of sentence pending hearing on probation."

The facts in connection with the point urged by appellant are that on October 13, 1928, defendant made a motion for a new trial, which motion was denied. Immediately thereafter, and before judgment was pronounced, defendant made application for probation. The trial court then pronounced judgment and at the same time, for the purpose of hearing further evidence on the application for probation, stayed execution of the judgment until October 19, 1928. It is contended by appellant that the effect of the action by the trial court was either that defendant was thereby admitted to probation, or that he was denied the right to apply for probation. But even assuming the correctness of either of such conclusions, it is not inevitable that the judgment should be reversed or a new trial ordered. It would seem too clear for argument that following the conviction of defendant the trial court was vested with authority to pronounce judgment, and, if at the same time the trial court should see fit to stay the execution of the sentence for a few days pending an investigation with reference to the advisability of admitting defendant to probation by way of suspending "the execution of the sentence" (section 1203, Pen. Code), defendant is in no position to complain. The mere fact (assuming such to be the case) that in the discretion of the trial court leave to file an application for probation was denied defendant affords no ground for a reversal of the judgment. 8 Cal. Jur. 454.

[6] Reverting to the matter of the market value of the hay in question, appellant insists that it was not proved that it exceeded the sum of $200, and hence, under the terms of the statute (section 487, Pen. Code), that the conviction of defendant of the crime of grand theft should not be permitted to stand. However, an examination of the record herein satisfactorily shows that the evidence was ample to sustain the verdict in that regard.

Finally, appellant contends that the evidence fails to establish that the fraud committed by the defendant caused the owner of the hay to part with his property and that no actual fraud was committed. It would serve no useful purpose to herein set forth the evidence introduced on the trial of the action by which the owner of the hay was induced to deliver it into the possession of defendant and by reason of which act the owner of the hay was defrauded of its value. Suffice it to say that on consideration of the evidence this court is convinced that it sufficiently meets all legal requirements included within the specifications to which reference has been had.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

98 Cal. App. 108

WARD v. McKINSEY. (Civ. 6699.)

District Court of Appeal, First District, Division 1, California. April 3, 1929.

1. Appeal and error 🔑920(3)—It must be presumed there was legal reason for dissolving temporary restraining order, in absence of contrary showing in record (Code Civ. Proc. § 953a)

It must be presumed on appeal that there was legal reason for dissolving temporary restraining order, in absence of anything to contrary in record, appeal being taken on judgment roll without bill of exceptions or transcript provided by Code Civ. Proc. § 953a, other than clerk's transcript of papers constituting judgment roll, since every presumption not inconsistent with record must be indulged in favor of judgment.

2. Appeal and error 🔑900—Rule of presumption favoring judgment supplies what is necessary to correctness, but nothing indicative of error.

Rule of presumption in favor of judgment on appeal supplies what is necessary to validity and correctness of action of trial court, but supplies nothing indicative of error.

3. Injunction 🔑164—Court granting preliminary injunction ex parte to continue until further order may dissolve it of its own motion, if satisfied order was improvidently made.

Court which has granted preliminary injunction ex parte, which by its own terms is to continue until further order of court, may dissolve or modify it of its own motion whenever it becomes satisfied that order was improvidently or erroneously made.

4. Appeal and error 🔑616(2)—Affidavit by plaintiff's attorney, if not authenticated, cannot be considered by reviewing court.

On appeal, affidavit made by attorney of record for plaintiff cannot be considered, where it was not authenticated in manner required by law.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Suit by L. A. Ward against Ed. McKinsey. From an order dissolving a temporary restraining order, plaintiff appeals. Affirmed.

A. G. Reily, of Los Angeles, for appellant.
Nathan M. Dicker and Abe Richman, both of Los Angeles, for respondent.

LANDIS, Justice pro tem. This is an appeal by plaintiff from an order of the superior court dissolving a temporary restraining order.

Briefly stated, it is averred in the amended complaint "that defendant, Ed. McKinsey, as plaintiff in an action No. 104448 in the Superior Court of Los Angeles County, was given judgment against plaintiff herein and one H. E. Putnam for the sum of $645.34 on December 1, 1922;" that "said H. E. Putnam as plaintiff in another action in said court, action No. 103337, was given judgment against said Ed. McKinsey for the sum of $1,200 on March 15, 1923; that it was agreed between all the parties to said actions that no execution was ever to be issued against either of the defendants in action No. 104448; and that the judgment in action No. 104448 would be offset by the judgment rendered in action No. 103337; that on October 1, 1925, said H. E. Putnam, for a valuable consideration, sold and transferred all his interest in said judgment in action No. 104448 to plaintiff who is now the owner thereof; that in violation of said agreement, said Ed. McKinsey caused an execution to be issued and levied upon certain real property belonging to plaintiff and after due proceeding had, the Sheriff of said Los Angeles County sold said property to said Ed. McKinsey and issued his certificate of sale thereof to said Ed. McKinsey and unless restrained by order of Court said Ed. McKinsey will sell said Certificate of Sale to an innocent purchaser or said Sheriff will after one year has elapsed execute a deed to said Ed. McKinsey; that said Ed. McKinsey is insolvent and if he is allowed to sell said Certificate of Sale, plaintiff will suffer irreparable loss and injury and that plaintiff has no other adequate remedy at law;" and prays for an order restraining defendant from taking any further proceedings in said action No. 104448 and from selling or in any way disposing of said certificate of sale, for an order requiring defendant to show cause why said restraining order should not continue during the pendency of this action, and for an order making such injunction perpetual, and that the said sheriff be restrained from issuing a deed on account of said sale, and that the cloud placed upon the property on account of said sale be removed.

The amended complaint was filed January 28, 1927, and on the same date an order to show cause and restraining order was made by the trial court and filed February 4, 1927. Said order directed both the said Ed. McKinsey and said sheriff to show cause on February 7, 1927, why an injunction should not be granted restraining them from the threatened acts complained of; further ordered that they be restrained in the meantime and forbidden to commit or permit to be committed any of said acts until the further order of the court; and further ordered that this order shall be effective upon plaintiff executing a good and sufficient bond in the sum of $1,000.

The next step in the proceeding is the making of the following order by the court, to wit:

"Good cause appearing therefor, it is hereby ordered that the temporary restraining order be and is hereby dissolved. Dated this 17th day of February, 1927.

"Hartley Shaw, Judge."

It is from this order that the appeal is prosecuted.

The contention of respondent as urged in his brief is that there is only one question of law involved in this appeal: That in handing down his decision the judge of the superior court found that the appellant had no judgment as alleged in his complaint and therefore was not entitled to offset one judgment against the other, which is substantially what he was attempting to do, and that the trial court's ruling on this one question decided all points raised by appellant's application for an injunction.

[1-4] The appeal was taken on the judgment roll without a bill of exceptions or the transcript, provided by section 953a of the Code of Civil Procedure, other than the clerk's transcript of the papers constituting the judgment roll.

The record does not show what proceedings were had or that no evidence was adduced before the court at the time the order was made and entered. So far as disclosed by the record before us, the court may have made the order after and upon having become satisfied that the preliminary restraining order granted ex parte, which by its terms is to continue until the further order of the court was improvidently or erroneously made (Wolf v. Board of Supervisors of Santa Clara County, 150 Cal. 285, 89 P. 85); may have, as contended by respondent, become satisfied that plaintiff did not in fact have a judgment as claimed by respondent, or may have based its act upon one or more of the many other available grounds unnecessary to here enumerate. In any event, whatever may have been the true facts, they do not appear from the record, and are not before us.

The rule is well established that every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the judgment (Kovacevich v. Fischer Motor Body Co. [Cal. App.] 271 P. 351; Throop v. Weaver, 180 Cal. 335, 181 P. 55), and, notwithstanding that no reason appears for the entry of the order dissolving the temporary restraining order, it must be presumed that there was a legal one in the absence of anything to the contrary (Woods v. Diepenbrock, 141 Cal. 55, 74 P. 546).

The rule of presumption supplies what is necessary to the validity and the correctness of the action of the trial court, but supplies nothing indicative of error. Myers v. Canepa, 37 Cal. App. 556, 562, 174 P. 903, 906.

It seems, on principle and authority, that the court which has granted a preliminary injunction ex parte, which by its terms is to continue until further order of the court, may dissolve or modify it of its own motion wherever it becomes satisfied that the order was improvidently or erroneously made. Wolf v. Board of Supervisors of Santa Clara County, supra.

Lastly, with respect to the mention made in the briefs on file, of an affidavit made by A. G. Reily, attorney of record for plaintiff, suffice it to say that its use and consideration by us could not have changed the result of our conclusions reached herein, and in any event, it not having been authenticated in the manner required by law, we cannot consider it. Columbia Crude Oil Co. v. Deyo, 25 Cal. App. 268, 143 P. 243.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

98 Cal. App. 121

KELLY et al. v. McDONALD et al.

(Civ. 3711.)

District Court of Appeal, Third District, California. April 4, 1929.

1. Damages 🔑150—Complaint held not to raise issue of liquidated damages, where there was no allegation that it was impracticable or difficult to fix actual damages, or that any damages resulted (Civ. Code, §§ 1670, 1671).

Complaint in action for termination of lease and for liquidated damages for failure of defendants to commence sinking of oil well within time, which merely recited nonperformance of lease and that no part of liquidated damages had been paid, and prayed for judgment for sum of liquidated damages, *held* insufficient to raise issue of liquidated damages, under Civ. Code, §§ 1670, 1671, because of failure to allege that it was impracticable or difficult to fix actual damages, and for failure to state that any damages whatever resulted from breach of lease.

2. Damages 🔑150—Prayer for judgment in specified sum does not amount to allegation that damages were suffered, and mere use of term "liquidated damages" does not characterize detriment as such.

Prayer for judgment in specified sum is not equivalent to an allegation that damages were suffered as regards plaintiff's recovery of liquidated damages, and use of term "liquidated damages" does not necessarily characterize detriment as such.

3. Appeal and error 🔑832(17)—Plaintiffs could not complain on appeal that trial court failed to find that no damages resulted, where complaint failed to allege damges or facts entitling plaintiffs to liquidated damages (Civ. Code, §§ 1670, 1671).

Where there was no allegation in complaint as to damages and no recitation of facts entitling plaintiffs to liquidated damages under Civ. Code, §§ 1670, 1671, plaintiffs could not complain on appeal that court had failed to specifically find that no damages resulted from breach of lease for which suit was brought.

4. Appeal and error 🔑907(3)—Every presumption is in favor of judgment, where record is not presented on appeal.

Where record is not before reviewing court, every presumption is in favor of judgment.

5. Damages 🔑79(5)—Parties may agree for liquidated damages on failure to drill oil wells within prescribed time (Civ. Code, § 1671).

Failure to drill oil wells within prescribed time is proper subject authorizing agreement for payment of liquidated damages under Civ. Code, § 1671.

6. Damages 🔑157(3)—Liquidated damages may be recovered only upon pleading and proof of impracticability or difficulty of ascertaining actual damages (Civ. Code, §§ 1670, 1671).

Liquidated damages may be recovered under Civ. Code, §§ 1670, 1671, only upon pleading and proof that it would be impracticable or extremely difficult to estimate actual damages.

7. Damages 🔑163(3)—Amount of actual damages need not generally be shown to permit recovery of "liquidated damages," if some damage resulted.

Upon proof of breach of contract which specifies amount of liquidated damages, amount of actual damages need not generally be shown, provided some damage resulted; "liquidated damages" being amount of compensation to be paid in event of breach of contract, which is fixed and certain by agreement, and which may not ordinarily be modified or altered, when damages actually result from nonperformance of contract.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Liquidated Damages.]

8. Damages 🔑163(3)—Presumption that liquidated "damages" represents amount which will compensate for breach of contract may be rebutted by proof that no detriment resulted (Civ. Code, §§ 1670, 1671).

Presumption under Civ. Code, §§ 1670, 1671, that amount of liquidated damages agreed on is the figure which will adequately compensate for breach of contract may be rebutted by proof on defendant's part that no detriment whatever resulted from breach, term "damages" contemplating injury sustained or detriment resulting from breach of contract or nonperformance of duty.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Damage; Damages.]

9. Appeal and error 🔑907(3)—Reviewing court assumes that plaintiffs suffered no damages, where trial court refused judgment for liquidated damages and evidence was not presented on appeal (Civ. Code §§ 1670, 1671).

Where evidence in action for termination of lease and liquidated damages for failure of defendants to commence sinking of oil well within specified time was not before reviewing court, and trial court specifically found that plaintiffs were not entitled to judgment for any sum as liquidated damages, reviewing court must assume, under Civ. Code, §§ 1670, 1671, that record adequately showed plaintiffs were not injured and suffered no damage on account of the breach of the lease.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by John J. Kelly and another against J. A. McDonald, individually and as trustee, and another. From the judgment, plaintiffs appeal. Affirmed.

J. A. Chase, of Visalia, for appellants.

H. B. McClure, of Visalia, for respondents.

THOMPSON, J. This is an appeal from a judgment in favor of plaintiffs, terminating a lease of real property, but refusing to allow liquidated damages for failure on the part of the defendants to commence the sinking of an oil well within a specified time. The appeal is from the judgment roll alone. The evidence is not before this court.

May 24, 1926, the plaintiffs leased to the defendants 320 acres of land for the purpose of sinking oil wells thereon. The lease contained a provision to the effect that if the lessees failed to "begin actual operations toward the drilling of a well on or before the expiration of June 30, 1926, * * * he agrees to pay lessors as liquidated damages the sum of $1,000." The court found that the lessees failed to commence the drilling of the oil wells within the prescribed time, or at all; that they were, therefore, guilty of a breach of the agreement, and thereupon terminated the lease, but further found as a conclusion of law that the lessors were not entitled to any sum whatever as liquidated damages.

[1, 2] The pleadings fail to raise the issue of liquidated damages. It is true that the lease containing the provision respecting liquidated damages was made a part of the complaint as an exhibit thereto. There was, however, no allegation that it was "impracticable or extremely difficult to fix the actual damages," nor was there a statement that any damages whatever resulted from the breach of the lease. The complaint merely recites the nonperformance of the lease, and that no part of the liquidated damages had been paid. The prayer merely demands judgment "for the sum of $1,000 and interest * * * from June 30, 1926." A prayer for judgment in a specified sum is not equivalent to an allegation that damages were suffered. Bradbury v. Higginson, 162 Cal. 602, 610, 123 P. 797. The mere use of the term "liquidated damages" does not necessarily characterize the detriment as such. Indeed, the pleadings in the present case indicate that the appellants considered the stipulated amount as a penalty rather than liquidated damages, for they seem to have assumed the amount would automatically be-

come due as a necessary presumption that damages would inevitably follow a breach of the contract. Manifestly, this is not true. Damages may or may not result from the breach of a contract. Hence the wisdom of the rule which requires the pleader to allege not only that he has been damaged, but also facts from which it may be ascertained that the claim presents a proper case for stipulated damages. It has therefore been held that a claim for stipulated damages must be accompanied by appropriate allegations showing that it is impracticable or extremely difficult under the circumstances to estimate actual damages. 8 Cal. Jur. 891, § 128; Dyer Bros., etc., v. Central Iron Works, 182 Cal. 588, 593, 189 P. 445.

[3, 4] Since the pleadings in the present case lack an allegation of damages and omit a recitation of facts entitling the appellants to liquidated damages, they may not complain because the court has failed to specifically find that no damages resulted from the breach of lease. These omissions in the pleadings may have been cured by the respective litigants having tried the case upon the theory that liquidated damages was a proper issue. However, since the record is not before this court, and every presumption is in favor of the judgment, we must assume just the contrary.

[5] It is established as the law of California that the failure to drill oil wells within a prescribed time is a proper subject authorizing an agreement for the payment of liquidated damages. Section 1671, Civ. Code; Escondido Oil & Dev. Co. v. Glaser, 144 Cal. 494, 77 P. 1040; Allen v. Narver, 178 Cal. 202, 172 P. 980; McComber v. Kellerman, 162 Cal. 749, 124 P. 431; Starr v. Lee (Cal. App.) 263 P. 376. There is no question in the present case that the parties intended to and did contract for the payment of $1,000 as liquidated damages for failure on the part of respondents to commence drilling the wells before June 30, 1926. The court has specifically so found, and also that the respondents defaulted in the performance of the covenant.

[6-8] The provisions of a contract attempting to specify in advance the amount of damages to be paid in the event of a breach thereof are void (section 1670, Civ. Code), except that when the circumstances which exist at the time of the execution of the contract make it impracticable or extremely difficult to estimate actual damages, the parties may agree to an amount which will be presumed to represent the damages sustained on account of a breach of the contract (section 1671, Civ. Code).

The decisions of California are in accord with the great weight of authority which holds that liquidated damages may be recovered only upon pleading and proof of facts which bring the contract within the provisions of the exception to the general rule as announced in section 1671 of the Civil Code. 8 Cal. Jur. 891, § 128; Hanlon Drydock Co. v. McNear, 70 Cal. App. 204, 215, 232 P. 1002; McInerney v. Mack, 34 Cal. App. 153, 156, 166 P. 867; Thomas v. Anthony, 30 Cal. App. 217, 220, 157 P. 823; Sunmaid Raisin Growers v. Mosesian (Cal. App.) 265 P. 828; Dyer Bros. G. W. Iron Works v. Central Iron Works, 182 Cal. 588, 593, 189 P. 445. The difficulty of ascertaining actual damages, so as to maintain a suit for breach of contract under the provisions of the exception to the general rule as it is expressed in section 1671, supra, is not presumed, but must be established by proof. Green v. Frahm, 176 Cal. 259, 262, 168 P. 114; Long Beach Dist. v. Dodge, 135 Cal. 401, 404, 67 P. 499. Upon proof of the breach of a contract which specifies an amount of liquidated damages, the general rule is that the amount of actual damages need not be shown. 17 C. J. 965, § 264. The term "liquidated damages" is used to indicate an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement, and which may not ordinarily be modified or altered when damages actually result from nonperformance of the contract. United States v. U. S. Fidelity & Guaranty Co. (C. C.) 151 F. 534, 536. While the term "liquidated damages" does imply that the parties have ascertained and agreed upon a sum which they assume will adequately compensate for a breach of the contract, this does not necessarily mean that the amount specified must be paid whether damages result from the breach or not. The very term of "damages" contemplates an injury sustained or detriment resulting from the breach of a contract or the nonperformance of a duty. As the court says in Starr v. Lee, supra: "We find authorities holding that recovery cannot be had when the evidence shows that no damage at all resulted from the breach." The exception to the general rule to the effect that the predetermined amount of damages for the breach of an obligation is void, as that exception is expressed in section 1671 of the Civil Code, does not purport to declare that an amount of liquidated damages agreed upon shall be *conclusively* presumed to be the exact figure which will adequately compensate for the breach of contract. This section merely asserts that it is "presumed to be the amount of damage sustained." This presumption may be rebutted by proof that no detriment whatever resulted from the breach. After the contract providing for stipulated damages, together with the breach thereof, has been established, the burden shifts to the defendant to show, if it be true, that no damage resulted.

[9] In the present case, since the evidence is not before this court and the trial court specifically found that "Plaintiffs are not entitled to judgment in the sum of $1,000 or

any other sum as provided in said lease, as liquidated damages," this court must assume that the record adequately shows that the appellants were not injured and that they suffered no damage on account of the breach of lease.

The judgment is, therefore, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. STADELMAN et al. (Civ. 6620.)★

District Court of Appeal, First District, Division 2, California. March 23, 1929.

Rehearing Denied April 22, 1929. Hearing Granted by Supreme Court May 21, 1929.

1. Insurance 🔑435—Workman's compensation policy held not to cover a son of the employer.

Where workman's compensation policy provided that it should not apply to members of employer's family, except those named in declarations, with disclosures of amounts of wages, etc., a son of the employer was not covered by the terms of the policy.

2. Statutes 🔑184—Regard is to be had to general tenor and scope of legislative scheme in construing statute.

In construing a statute, regard is to be had not so much to exact phraseology as to general tenor and scope of the entire legislative scheme embodied in the act.

3. Insurance 🔑435—When workmen's compensation policy excluding members of employer's family did not comply with statute as to limitations of liability, the limitation was invalid (Workmen's Compensation Act, § 31(a).

In view of Workmen's Compensation Act, § 1 (St. 1917, p. 832), as to purpose of the statute, and section 6 (St. 1917, p. 834, as amended by St. 1919, p. 912, § 2), § 8, subd. a (St. 1917, p. 835), § 29, subd. a (St. 1917, p. 857, amended by St. 1919, p. 921, § 9, and St. 1925, p. 494), § 29, subd. c (as added by St. 1925, p. 495), and section 30, subds. b–d (St. 1917, pp. 858, 859), as to liability for injuries and insurance of such liability, section 31, subd. a (St. 1917, p. 860), requiring limitation of compensation payable by policy to be printed in boldface type and words "limited compensation policy" to be printed in such type at top of the policy, applied to policy excluding injuries to members of employer's family, and, when policy did not comply with such section, such limitation was invalid.

4. Insurance 🔑372—Provisions of statute cannot be waived by parties (Workmen's Compensation Act; Civ. Code, § 1667).

Provisions of Workmen's Compensation Act as to insurance contracts cannot be waived in whole or in part, directly or indirectly, by the parties concerned, in view of Civ. Code, § 1667.

5. Statutes 🔑219—Departmental construction has weight, but court must consider whether statute is ambiguous, length of time construction continued, and whether it was uniform.

If statute is ambiguous, contemporaneous construction by department having duty of administering it has weight, but court should consider length of time the departmental construction continued, whether usage was uniform, and whether statute was ambiguous.

Proceeding under the Workmen's Compensation Act by Pete Stadelman, claimant, for compensation for injuries, opposed by Peter C. Stadelman, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurer. From an order of the Industrial Accident Commission, awarding compensation, the insurer brings certiorari. Affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioner.

Daniel W. Burbank, C. F. Laumeister, and Orrick, Palmer & Dahlquist, all of San Francisco, amici curiæ.

G. C. Faulkner, of San Francisco, for respondents.

STURTEVANT, J. This is a proceeding under title 1, part 3, Code of Civil Procedure. The case presents two questions regarding the construction of an insurance policy.

Peter C. Stadelman was the owner of a dairy farm located near Tulare in this state. At times there were working for him several laborers, including, among others, some of his sons, one of whom was Pete V. Stadelman. The latter was an adult of the age of 28 years. While so working for his father, Pete V. Stadelman was in an accident which resulted in some serious injuries to his right hand by reason of his hand being drawn into an ensilage cutter which he was operating. He applied for compensation. At the time of the injury the petitioner was the insurance carrier of Peter C. Stadelman. The respondents made an award against the carrier, and in this application the carrier insists that the award was beyond the jurisdiction of the respondents, because, as it claims, under the terms of the policy, it did not cover any of the members of the family of the employer. The respondents make two major replies. They contend that when properly construed the policy did cover the son. They also contend that, if by the terms of the policy the carrier attempted to exclude from its provisions the members of the employer's family, then and in that event the attempt was futile, because the carrier did not comply with the statute, subdivision a of section 31 of the Workmen's Compensation Act (St. 1917, p. 860); that is, it did not indorse on the policy "limited compensation policy."

[1] In the body of the policy proper nothing is said whether members of the family

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★Hearing granted. 280 P. 687.

of the insured are covered or not covered. A part of one of the riders is as follows: "(d) It is agreed upon the delivery and acceptance of this Policy, that if this Employer is an individual and has a family (meaning husband, wife, son, daughter, brother, sister or parent residing within this Employer's household), this Policy shall not apply to any member or members of such family except those named in the Declarations with disclosures of the annual amounts of wages, salaries, emoluments, or profits of each, but not less than $2,700.00 for each. The amounts so stated shall be considered the remuneration of such members of the family subject to audit as respects any increase thereof as in the Policy provided. The proper premium rate for the hazard to which such member of the family is exposed shall apply to this remuneration." It is clear the policy attempted to exclude the son.

It is next asserted by the respondents that the attempt was invalid. Skuey v. Bjerkan, 173 Minn. 354, 217 N. W. 358; Northwestern Casualty & Surety Co. v. Doud (Wis.) 221 N. W. 766; Buckhorn Coal & Lumber Co. v. Georgia Casualty Co., 222 Ky. 683, 2 S. W.(2d) 383; Aioss v. Sardo, 223 App. Div. 201, 227 N. Y. S. 708. Those cases were decided on statutes different in material respects, and are not controlling, but they are, nevertheless, helpful in certain respects. In this state there have been decisions construing covenants similar to the one in the policy which is before us, but in every instance the language of the policy was not challenged as being invalid. Pacific Coast C. Co. v. Industrial Acc. Com., 176 Cal. 24, 26, 27, 167 P. 539; Worswick Co. v. Industrial Acc. Com., 181 Cal. 550, 185 P. 953; Western Indemnity Co. v. Industrial Acc. Com., 43 Cal. App. 487, 185 P. 306; State Comp. Ins. Fund v. Industrial Acc. Com., 70 Cal. App. 650, 234 P. 116. The policy recited, among other things: "It is agreed that all of the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they apply to compensation or other benefits for any personal injury or death covered by this policy, while this policy shall remain in force." By one of the riders, chapter 176 (Stats. of 1913, p. 279), chapter 607 (Stats. of 1915, p. 1079), chapter 586 (Stats. of 1917, p. 831), chapter 471 (Stats. of 1919, p. 910), with one exception not involved here, are all adopted.

Before we proceed further we call particular attention to the general nature of the instrument that is before us. In the first place it is an indemnity contract in which, in advance, the indemnity is not fixed and cannot be fixed; the employees are not named and generally cannot be named; the operations of the employer at the date the contract was executed can be and sometimes are named, but are subject to change, and if changed, the contract remains in force and the premium is altered to fit the change; no "compensation payable" is fixed or can be fixed until the happening of the event and then, and in that event, the factor "compensation payable" is measured and estimated by the rules enumerated in the statute; and no premium is fixed, or can be finally fixed, until the end of the term and after it has been ascertained what operations have in fact been performed and what employees have, in fact, been employed in performing them and the total wages paid to all. In the meantime, each of these factors is necessarily open, necessarily undetermined, and therefore not limited.

[2, 3] In construing a statute regard is to be had not so much to the exact phraseology in which the intent of the Legislature has been expressed, as to the general tenor and scope of the entire legislative scheme embodied in the act. Palache v. Pacific Ins. Co., 42 Cal. 418, 430; People ex rel. Attorney General v. Eichelroth, 78 Cal. 141, 143, 20 P. 364 (2 L. R. A. 770); Abbey v. Board of Directors, 58 Cal. App. 757, 762, 209 P. 709; Endlich's Interpretation of Statutes, § 76. The purpose in enacting the Workmen's Compensation Act is stated: "This act and each and every part thereof is * * * intended to make effective and apply to a complete system of workmen's compensation the provisions of section seventeen and one-half of article twenty and section twenty-one of article twenty of the constitution of the State of California. A complete system of workmen's compensation includes adequate provision for * * * any and all employees * * * to the extent of relieving from the consequences of any injury incurred by employees in the course of their employment, irrespective of the fault of any party; * * * full provision for adequate insurance coverage against the liability to pay or furnish compensation, full provision for regulating such insurance coverage in all its aspects * * * full provision for otherwise securing the payment of compensation, * * * all of which matters contained in this section are expressly declared to be the social public policy of this state, binding upon all departments of the state government." Section 1 (St. 1917, p. 832). That purpose, in brief, was, among other things, to impose a liability upon the employer for injuries sustained by his employees in the course of their employment, irrespective of the fault of any party, and to strengthen that liability by provisions for adequate insurance coverage against liability to pay such awards. Having ascertained the intent and purpose of the Legislature, the court will have regard to the carrying of that purpose into effect and will not be hampered by the particular phraseology used. "The language will be so interpreted, if possible, as

to aid the design and intent of the legislature, and to effectuate the evident objects and purposes of the law." 23 Cal. Jur. 139. These rules are peculiarly applicable to the question before us by reason of a mandate contained in the statute which we are called upon to interpret. Section 69, subd. a, thereof (St. 1917, p. 877) provides: "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment."

The son, working for his father under a written contract of employment, was an employee under the terms of the Workmen's Compensation Act. Section 8, subd. a (St. 1917, p. 835). (That section, and all other sections hereinafter used, unless otherwise stated, will be understood as referring to the Workmen's Compensation Act.) The father, as employer, was liable to his son, as such employee, for injuries sustained in the course of his employment. Section 6 (St. 1917, p. 834, as amended by St. 1919, p. 912, § 2). But he was entitled to protect himself by insurance: "Every employer * * * shall secure the payment of compensation: * * * 1. By insuring and keeping insured against liability to pay compensation in one or more insurance carriers duly authorized to write compensation insurance in this state." Section 29, subd. a (St. 1917, p. 857, as amended by St. 1919, p. 921, § 9, and St. 1925, p. 494). The father was under the imperative duty to take out insurance on all employees, including his son, and if he failed to do so he committed a misdemeanor. Section 29, subd. c (as added by St. 1925, p. 495). Into each policy, it is provided (section 30, subd. c [St. 1917, p. 859]), there must be written: "Every contract * * * must contain a clause to the effect that the insurance carrier shall be directly and primarily liable to the employee * * * to pay the compensation, if any, for which the employer is liable; * * * and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer under the provisions of this act." The employer, having insured himself under the act, the employee had the right to make his claim directly and solely against the carrier by filing a separate application, against the carrier, which may, in whole or in part, have insured against liability for such compensation. Section 30, subd. b (St. 1917, p. 858). When that policy was written it was "*conclusively presumed to contain all the provisions required by this act.*" Section 30, subd. d (St. 1917, p. 859). In 1917 the Legislature added section 31, subd. a (St. 1917, p. 860): "If any insurance policy shall be issued covering liability for compensation, which policy shall contain any limitation as to the compensation payable, such limitation shall be printed in the body of such policy in bold-face type and in addition thereto the words 'limited compensation policy' shall be printed on the top of the policy in bold-face type not less than eighteen point in size. Failure to observe the foregoing requirement shall render such policy unlimited." Here there was no such indorsement.

Section 31, subd. a, supra, was not addressed to the factor of dollars and cents to be paid to an injured employee. This is so, because that subject was already covered by the provisions of the statute (section 9 [St. 1917, p. 836]) and the covenants in the policy adopting the provisions of the statute. It was not addressed to any other one of the several factors above named for the reasons hereinabove shown. However, by fundamental rules of statutory construction, some force and effect must be given to the provisions of every part of a statute, and, if possible, to every word contained therein. The excerpts quoted above show that the Legislature contemplated that the employer might have at one and the same time two or more policies written by two or more different carriers. That contingency may possibly arise with reference to an employer having several places of business and perhaps as many different occupations. When an employer obtains a contract of insurance such as we are considering, it is obvious that, if there is nothing in the contract to the contrary, the insurance runs in favor of every employee. That being the fact, it is patent that no employer would at one and the same time buy two contracts, one of which would duplicate the other. It follows that the only possible application of the provisions of section 31, subd. a, supra, is this: When, and only when, a policy purports to cover only a part of the employees whether they are limited by number, by occupation, by location, by kinship, or otherwise, then and in that event the policy is a limited policy within the meaning of that term as expressed in section 31a, supra.

The employee is not to be punished. The lawmaking power has taken from him all of his common-law rights and all of his previous statutory rights, and has given him new rights. He does not, and cannot, have a hand in writing the insurance. He is entitled to rest secure that the Legislature has protected him, and that those on whom the duty rests have so acted as to protect him and protect themselves; in other words, that the employer has taken out insurance and that the insurance company has collected or will collect the full amount of its premiums. Before the enactment of these statutes the injured employee could sue for any sum designated in his complaint. Now he can apply for the statutory allowance which is secured by insurance. Without any act on his part the Legislature has taken from the employee all of his rights, and has substituted a new one. Under all proper rules we are bound to assume that the new one is, and was intended to be, full and complete in every respect. It may be conceded that an employer may insure under one policy those employees who are of his kith and kin, and under another policy those who are not of his kith and kin. But he is bound to insure all or he commits a misdemeanor. By the same token a carrier can write such a policy as the insured may request; but, if it is limited in any respect, as hereinabove indicated, then, and in that event, it must be written as section 31a commands; and, if the carrier does not do so, the purported limitation is ineffective. This is no imposition on the carrier. It has full protection. It is in the business of collecting premiums. It collects an initial premium which is tentatively correct; but, under the terms of its policy, the premium is subject to correction when the final account is settled and the carrier can fully protect itself.

[4] We have shown above that by the express provisions of the statute the employer's insurance contracts cover, and must cover, each and all of his employees. That statute provides for, and commands the making of, certain contracts, and prohibits the making of certain other contracts. The provisions of such a statute cannot be waived, in whole or in part, directly or indirectly, by the parties concerned. Civ. Code, § 1667; 6 Cal. Jur. 101–106. If the employer could make a contract whereby he expressly excepted from the risk one employee, he could likewise except all of them. If he did so, then he would have no insurance. But that contingency is not only prohibited, it is penalized. Section 29, subd. c. Again, if the statute is so construed that, as to one employee, the employer has not and need not have insurance, then the right given to such employee by the Constitution and the statute is materially diminished, if not altogether taken away.

[5] The petitioner relies on the principle of departmental construction, and cites a ruling, made by the respondents on October 17, 1923, which it is contended was against the position now taken by respondents. The award in the instant case was made June 18, 1928. Neither before nor after October 17, 1923, was any other ruling made by the respondents on the subject. That was the only ruling. The time elapsing between that ruling and the ruling in the instant case was less than five years. If a statute is ambiguous, the contemporaneous construction by the department whose duty it is to administer the statute has weight. In applying that rule, the court should consider (1) the length of time the departmental construction has continued (Riley v. Thompson, 193 Cal. 773, 778, 227 P. 772; 23 Cal. Jur. 776; State ex rel. Fishback v. Globe Casket & Undertaking Co., 82 Wash. 124, 143 P. 878, L. R. A. 1915B, 976, 980); (2) whether the usage has been uniform (O'Donnell v. Glenn, 9 Mont. 452, 467, 23 P. 1018 (8 L. R. A. 629); and (3) whether the statute is ambiguous (Fairbank v. U. S., 181 U. S. 283, 311, 21 S. Ct. 648 [45 L. Ed. 862]). Under the facts we think the principle is not helpful in this case.

Finally, it is said the construction claimed by respondents will require the rewriting of 150,000 policies. That result does not follow; but, on the other hand, the policy charges between employers and carriers will be increased or decreased as the facts may appear from the examinations made by the examiners of the carriers as provided in the policies.

The award is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

MARYLAND CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.★

(Civ. 6639.)

District Court of Appeal, First District, Division 2, California. March 23, 1929.

Rehearing Denied April 22, 1929. Hearing Granted by Supreme Court May 21, 1929.

1. Insurance ⟹437—Workmen's compensation policy held at most ambiguous and to be construed as covering persons illegally employed; "employee" (Workmen's Compensation Act, § 8).

In view of Workmen's Compensation Act, § 8 (St. 1917, p. 835), defining "employee" as including persons lawfully or unlawfully employed, policy purporting to cover only employees legally employed, but in another paragraph, and in a rider making the compensation law part thereof, was at most ambiguous and to be construed against insurer as covering those illegally employed.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Employé.]

2. Insurance ⟹437—Limitation of workman's compensation policy to employees legally employed was futile when statute as to limited policies was not complied with (Workmen's Compensation Act, § 31(a).

Limitation of liability under workmen's compensation policy to those legally employed was futile, where policy did not comply with Workmen's Compensation Act, § 31, subd. a (St. 1917, p. 860), as to form of policy containing any limitation as to compensation payable.

Proceeding under the Workmen's Compensation Act by Tony Mazzina, claimant, by Wil-

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★Hearing granted. 280 P. 690.

liam Mazzina, his guardian ad litem, for compensation for injuries, opposed by Alfred Michelotti, employer, and the Maryland Casualty Company, insurer. From an order of the Industrial Accident Commission, awarding compensation, the insurer brings certiorari. Affirmed.

R. P. Wisecarver and W. G. McKeen, both of San Francisco, for petitioner.

Daniel W. Burbank and C. F. Laumeister, both of San Francisco, amici curiæ.

G. C. Faulkner, of San Francisco, for respondents.

STURTEVANT, J. This is a proceeding under title 1, part 3, Code of Civil Procedure. The case presents two questions regarding the construction of an insurance policy.

[1] Tony Mazzina, a lad 12 years of age, was employed by Alfred Michelotti in his butcher shop at Los Banos. While so engaged Tony suffered an injury which was the subject-matter of the award complained of. At the time the injury occurred Tony was illegally employed, and the work to which he was assigned was illegal. At the time the injury was incurred the petitioner was the insurance carrier of Tony's employer. On an application made to it in due time the Industrial Accident Commission made an award in favor of the employee, and the petitioner has applied for a writ of review for the purpose of having it declared that under the terms of its policy no liability attached to the petitioner. In this behalf it calls attention to paragraph VII of the policy, which, among other things, provides: "This policy shall cover such injuries, including death resulting therefrom, sustained by any employee or employees *legally* employed by this employer * * *." The respondents make two major replies. They contend that, if by the word "legally" the carrier attempted to limit its liability, the attempt was futile, because the carrier did not comply with the provisions of subdivision a of section 31 of the Workmen's Compensation Act (St. 1917, p. 860). The second reply is that, taking up the policy by its four corners, it appears that the carrier did not attempt to limit its liability, but by the terms of its policy became liable for injuries to employees whether legally or illegally employed. That by the terms of the policy the carrier became responsible for injuries to employees legally employed is conceded by both parties, as, indeed, it must be by virtue of the language hereinabove quoted from paragraph VII of the policy. It remains to be ascertained whether the carrier, by the terms of its policy, assumed any liability for injuries to employees "*unlawfully*" employed.

The policy was executed on the 4th day of March, 1927. The first paragraph, among other things, provides: "* * * It is agreed that all of the provisions of the Workmen's Compensation Law cited and described in endorsements attached to this policy shall be and remain a part of this contract as fully and completely as though written herein, so far as they apply to compensation while this policy shall remain in force * * *." The policy is partly printed and partly in typewriting. Attached to it are two riders. The first is dated March 4th, but no year. The second is dated March 4, 1927, and is attached by metallic fasteners on top of the first rider. The first paragraph of the second rider is as follows: "It is hereby understood and agreed that the California Workmen's Compensation Law, and all additions thereto and amendments thereof, is a workmen's compensation law within the meaning of insurance clause one of the policy to which this endorsement is attached." Section 8 of the Workmen's Compensation Act (St. 1917, p. 835) provides: "Sec. 8 (a) The term 'employee' as used in sections six to thirty-one, inclusive, of this act shall be construed to mean: Every person in the service of an employer * * * whether lawfully or unlawfully employed. * * *" Conceding solely for the purpose of this case that there is any conflict between paragraph VII, which is limited to employees legally employed, and paragraph I of the rider, together with that part of section 8 of the statute read in connection with paragraph I of the second rider, then and in that event it is the settled law of this state that the provisions of paragraph VII must give way in favor of the provisions of the rider. Royal Ins. Co. v. Caledonian Ins. Co., 182 Cal. 220, 223, 187 P. 748. It follows that under terms of the policy Tony Mazzina was covered. The utmost that can be claimed is that the policy, together with its riders and the statutes incorporated by reference, is slightly ambiguous as to liability for injuries sustained by one illegally employed. However, the ambiguity, if any, will be resolved in favor of the insured and against the carrier. 14 Cal. Jur. p. 445. We think it is quite clear that the respondents did not exceed their jurisdiction in construing the policy as covering those illegally employed.

[2] The terms of the policy are such that it has not been necessary for us to take up the first contention made by the respondents. If it were necessary to discuss the contention, we should hold, for the reason stated in Zurich General Accident & Liability Insurance Co., Ltd., v. Stadelman et al. (Cal. App. No. 6620) 276 P. 407, this day filed, that the contention is well founded.

The award is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 6640.)★

District Court of Appeal, First District, Division 2, California. March 23, 1929.

Rehearing Denied April 22, 1929. Hearing Granted by Supreme Court May 21, 1929.

1. Insurance 🔑435—Workman's compensation policy held to cover employees of mining company engaged at place where it was preparing to operate mine.

In view of various provisions of workman's compensation policy, showing that premium was to be based on wages of all employees, and that various employees were covered though not engaged at place where employer was operating mine, *held* that employee working at different location where company was preparing to operate a mine was covered by the policy.

2. Insurance 🔑435—Limitation of liability under workman's compensation policy to employees at particular place held ineffective when statute as to limited policies was not complied with (Workmen's Compensation Act, § 31(a).

Limitation of liability under workman's compensation policy to employees at a particular place was ineffective, where policy did not comply with Workmen's Compensation Act, § 31, subd. a (St. 1917, p. 860), as to form of policies containing limitations on compensation payable.

Proceedings under the Workmen's Compensation Act by William Jones, claimant, for compensation for injuries, opposed by the American Mercury Corporation, employer, and the Ocean Accident & Guarantee Corporation, Limited, insurer. From an order of the Industrial Accident Commission awarding compensation, the insurer brings certiorari. Affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioner.

Daniel W. Burbank, O. F. Laumeister, and Orrick, Palmer & Dahlquist, all of San Francisco, amici curiæ.

G. C. Faulkner, of San Francisco, for respondents.

STURTEVANT, J. This is a proceeding under title 1, part 3, Code of Civil Procedure. The case presents two questions regarding the construction of an insurance policy. The American Mercury Corporation is a corporation engaged in operating mines. Prior to October, 1927, it had a contract on a mining property located in Kern county. By the terms of that contract it was to install certain machinery and thereafter operate the mine. It is clear that the machinery had not been installed and that the mine had not been operated, but some surface work was done. In the month of October, William Jones, with some others, was engaged in removing the surface covering so as to expose the vein. At other times the employees were engaged in making alterations and repairs to some roads appertaining to the mine. While so engaged William Jones was in an accident and suffered a broken leg. On that date the petitioner was the insurance carrier of American Mercury Corporation. On an application made to it, in due time the Industrial Accident Commission made an award in favor of William Jones, and the petitioner has applied for a writ of review for the purpose of having it declared that under the terms of its policy no liability attached to the petitioner. Before proceeding further it should be stated that American Mercury Corporation was also operating the Oceanic mine three miles from Cambria, San Luis Obispo county, Cal. The petitioner calls to our attention certain passages contained in the policy, and thereupon it contends that it insured the employees of American Mercury Corporation who might be in its service at Oceanic mine in San Luis Obispo county, but did not insure employees working for that corporation in any other county. The respondents make two major replies. They contend that, if the policy attempted, by any provision therein contained, to limit the liability of the carrier to employees serving the employer at Oceanic mine, then and in that event the limitation was ineffective, because the carrier did not comply with the provisions of subdivision (a) of section 31 of the Workmen's Compensation Act (St. 1917, p. 860). The second reply is that, taking up the policy by its four corners, it appears that the carrier did not attempt to limit its liability, but by the terms of its policy the carrier became liable for injuries to employees working at Oceanic mine, and also to those working at the mine in Kern county. We will discuss the second contention first.

[1] The policy consists of one sheet which when folded makes four pages of the size of foolscap. To the policy there are attached six separate riders. The first two pages purport to be the covenants and conditions on the part of the carrier. The third page purports to be the covenants on the part of the insured. The covenants of the carrier include, among other things, the following (all italics below are ours):

"1. (a) To pay promptly to *any* person entitled thereto, under the Workmen's Compensation Law and in the manner therein provided the entire amount of any sum due. * * *

"(d) The obligations of paragraph 1 (a) foregoing are hereby declared to be the direct obligations and promises of the company to any injured employee covered hereby. * * *

"1. (b) To indemnify this employer against loss by reason of the liability imposed upon him by law for damages on account of such

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★Hearing granted. 280 P. 690.

injuries to such of said employees as are legally employed *wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada.* * * *

"5. This agreement shall apply to such injuries sustained by *any person or persons* employed by this employer and entire remuneration shall be included in the total actual remuneration for which provision is hereinafter made, *upon which remuneration the premium for this policy is to be computed and adjusted.* * * *

"6. This agreement shall apply to such injuries so sustained by reason of the *business operations described in said declarations* which, for the purpose of this insurance, shall include all operations necessary, incident or appurtenant thereto, or connected therewith, whether such *operations are conducted at the work places defined* and described in said declarations or elsewhere in connection with, or in relation to, such work places.

"7. This agreement shall apply only to such injuries sustained by reason of accidents occurring during the policy period limited and defined as such in Item 2 of said declarations.

"This agreement is subject to the following conditions:

"A. The premium is based upon the *entire remuneration earned*, during the policy period, by *all* employees of this employer engaged in the business operations described in said declarations. * * * If any operations as above defined are undertaken by this employer but are not described or rated in said declarations, this employer agrees to pay the premium thereon at the time of the final adjustment of the premium in accordance with condition (C) hereof at the rates and in compliance with the rules of the manual of rates in use by the company upon the date of issue of this policy.

"C. The company shall be permitted at all reasonable times during the policy period, to inspect the plants, works, machinery and appliances covered by this policy, and to examine this employer's books at any time during the policy period, and any extension thereof, and within one year after its final expiration, so far as they relate to the remuneration earned by *any* employees of this employer while this policy was in force."

The rider, "Monthly Premium Adjustment Endorsement" provides: "It is hereby understood and agreed that on or before the 10th day of each calendar month, * * * the assured shall state to the company in writing the amount of remuneration earned by employees during the preceding calendar month, or such part thereof as is within the policy period and pay to the company the *entire premium* earned upon such remuneration at the rate or rates named in the policy.

"Declarations

"Item 1. Name of this employer American Mercury Corporation Post Office Address Crocker Building, San Francisco, California.

"Item 2. The period during which the policy shall remain in force, unless cancelled as in the policy provided, shall be from October 26, 1927, at 4 p. m. to October 25, 1928, at 12:01 a. m., standard time as to each of said dates at the place where any operation covered hereby is conducted, as respects that operation, or at the place where any injury covered hereby is sustained as respects that injury.

"Item 3. Location of * * * work places of this employer * * * Oceanic Mine, three miles from Cambria, San Luis Obispo, California. All business operations including the operative management and superintendence thereof, conducted at or from the locations and premises defined above as declared in each instance by a disclosure of estimated remuneration of employees under such of the following divisions as are undertaken by this employer are divided into

"(1) All industrial operations upon the premises.

"(2) All office forces.

"(3) Operations not on the premises."

(1) Here follows specific enumeration under general heads of Mining, Smelting, Road Construction, and Commissary Work, with the rate set opposite each item.

(2) Clerical office employees (no statement regarding place of service).

(3) (a) Outside salesmen, collectors, and messengers wherever engaged.

(b) Drivers and driver's helpers wherever engaged, chauffeurs and chauffeur's helpers wherever engaged.

"Item 4. * * * The company shall be permitted to examine the books of this employer at any time during the policy period and any extension thereof and within one year after its final termination so far as they relate to the remuneration earned by *any* employee of this employer while the policy was in force.

"Item 5. This employer is conducting no other business operations at this or any other location not herein disclosed—except as herein stated: There may be but not covered hereunder."

That the liability of the company is limited to accidents happening within one year from 4 p. m., October 26, 1927, to 12:01 a. m., October 26, 1928, is tersely and clearly stated in two short paragraphs.

That every single employee on the pay rolls of the employer must be reported and a premium on his wages must be paid to the carrier is equally clear.

That industrial operations other than those mentioned in the policy may be conducted at Cambria, whether extra hazardous or otherwise, is expressly authorized by the policy, and the only condition is that premiums on the additional pay roll must be paid.

That injuries suffered at Cambria are not the sole injuries falling within the terms of the policy cannot be gainsaid. The clerical force was at least in part employed at San Francisco and in part at Los Angeles—nevertheless the clerical force is expressly covered. Item 3, subd. 2. Traveling employees wherever engaged are expressly covered by the policy. Item 3, subd. 3. It is not claimed that there is any language contained in the policy which expressly provides that an employee working in Kern county is not included in the terms of the policy. The sole contention in this behalf is the language contained in item 5: "This employer is conducting no other business operations at this or any other location not herein disclosed—except as herein stated: 'There may be, but not covered hereunder' ". The latter part of that statement is typewritten. It is patently the language of the carrier and not the language of the insured. Whatever may be its meaning, it is not of such force as to warrant us in saying that the policy did not cover the claim of William Jones.

[2] The terms of the policy are such that it has not been necessary for us to take up the first contention made by the respondents. If it were necessary to discuss the contention, we should hold, for the reasons stated in Zurich General Accident & Liability Insurance Co., Ltd., v. Stadelman et al., No. 6620 (Cal. App.) 276 P. 407, this day filed, that the contention is well founded.

The award is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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98 Cal. App. 45

MATTESON et al. v. McCARTY et al.★ (Civ. 3709.)

District Court of Appeal, Third District, California. March 29, 1929.

Rehearing Denied April 27, 1929. Hearing Denied by Supreme Court May 27, 1929.

Navigable waters 🔑37(4)—Deed conveying land to meander line of river held to evidence intention to make meander line and not river the boundary.

Where one of deeds in defendants' chain of title described property as "thence south 36.84 chains to the northerly bank of a" certain river, and as containing 99.90 acres, but subsequent deed recited "thence south 31.91 chains to a point on the United States meander line, thence north 69 degrees 30 minutes east along said U. S. meander line a distance of 19.903 chains to the U. S. meander corner," and recited that tract contained 92 acres, *held* that change in subsequent deed manifested a definite intention to use meander line and not the river as boundary of tract conveyed.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by D. D. Matteson and others against Alex. D. McCarty and others. From an adverse judgment, defendants appeal. Affirmed.

Joseph C. Meyerstein, of San Francisco, and Brown & Chamberlain, of Modesto, for appellants.

A. J. Carlson, of Modesto, for respondents.

MONCUR, Justice pro tem. This is an appeal from a judgment declaring that respondents are the owners and entitled to the possession of certain real property described in the complaint herein. There is no substantial controversy as to the facts.

The action was commenced on the 3d day of June, 1926. It appears that on and prior to the 20th day of July, 1917, Lewis W. Mustoe and Polly J. Mustoe were the owners of certain described real property in the county of Stanislaus, state of California, bounded and particularly described as follows, to wit:

"Beginning at a point bearing north 11.94 chains from the northeast corner of section six (6) in township four (4) south, range eleven (11) east Mount Diablo base and meridian; running thence west 20.00 chains to the north and south quarter quarter line, thence south 20.00 chains; thence east 1.36 chains, thence south *36.84 chains to the northerly bank of the Tuolumne River; thence following the northerly bank of the Tuolumne River up stream north 82-¼° east 0.60 chains; north 67° east 7.57 chains; north 56-¾° east 13.26 chains to section line between sections 5 and six;* thence north on section line 46.40 chains to the point of beginning, *containing ninety-nine and 90/100 (99.90/100) acres.* * * *"

On said day said Lewis W. Mustoe and Polly J. Mustoe executed a conveyance to Charles Lampley, appellants' predecessor in interest, describing the lands hereinbefore specifically described, excepting particularly as follows:

"* * * *Thence south 31.91 chains to a point on the U. S. meander line; thence north 69 degrees 30 minutes east along said U. S. meander line a distance of 19.903 chains to the U. S. meander corner on the section line between sections 5 and 6, township 4 south,* * * * *and containing 92.99 acres of land all north of the U. S. meander line.*"

This conveyance was recorded July 23, 1917, in the office of the recorder of Stanislaus county. On July 25, 1917, said Lewis W. Mustoe and Polly J. Mustoe executed a conveyance to G. E. Brinkerhoff, respondents' predecessor in interest; the description therein material to this decision, being as follows:

"Commencing at the *United States meander*

★Rehearing denied. Hearing denied by Supreme Court.

corner on the section line between sections 5 and 6 in township 4 south range 11 east, said meander corner being 33.00 chains south of the northeast corner of said section 6; thence south 69° 30′ west along the U. S. meander line a distance of 19.903 chains to the west boundary of the land now or formerly owned by Lewis W. Mustoe; thence south a distance of 4.93 chains; thence north 82¼° east 0.60 chains; thence north 67° 00′ east 7.57 chains; thence north 56-¾° east 13.26 chains to a point on the section line between said sections 5 and 6; thence north 1.46 chains to the United States meander corner, or the point of beginning, *containing 7.067 acres of land all south of the United States meander line.*"

This conveyance was recorded on the 27th day of July, 1917, in said recorder's office. As shown by the evidence, the following is the course and distance of the United States meander line running through sections 5 and 6 of said township:

"On the north side beginning at meander post on north boundary of township on right bank; thence downstream in section 5, south 37½° west, 16.50 chains; south 51¼° west, 17.00 chains; south 41° west, 12.20 chains. In section 6, south 69½° west, 33.60 chains; south 86½° west, 19.00 chains; north 79-¾° west, 32.00 chains."

A recent survey of the lands in controversy shows that the portion south of the United States meander line consists of 7.078 acres and the portion north of said meander line contains 92.984 acres. The property consisting of about 7.65 acres lying between the Tuolumne river and the United States meander line is the parcel the Mustoes attempted to convey to Brinkerhoff, and which plaintiffs through mesne conveyances now claim.

Defendant Alex. D. McCarty acquired the land in controversy February 23, 1922, and has been in possession of the land to the bank of the Tuolumne river since that time.

It is the contention of the appellants that the description "to and along the U. S. meander line," contained in the deed from the Mustoes to Lampley, conveyed to Lampley and his successors in interest (appellants) all the land above and below the said meander line and to the Tuolumne river, and in support of this contention urge that a "meander line" represents "the border line of [a] stream, and shows, to a demonstration, that the water course" which it meanders, "and not the meander line, as actually run on the land, is the boundary." St. Paul & Pac. R. Co. v. Schurmeier, 7 Wall. 272, 19 L. Ed. 74; Hardin v. Jordan, 140 U. S. 384, 11 S. Ct. 808, 838, 35 L. Ed. 428; Curtis v. Upton, 175 Cal. 322, 165 P. 935; Foss v. Johnstone, 158 Cal. 119, 110 P. 294; Hendricks v. Feather River Canal, 138 Cal. 423, 71 P. 496; Kirby v. Potter, 138 Cal. 686, 72 P. 338.

In the case of St. Paul & Pac. R. Co. v. Schurmeier, supra, it is said: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser."

It is further claimed by appellants that, the land acquired by Lampley having a natural boundary on the south, to wit, the Tuolumne river, the natural boundary is all controlling, and the other descriptions of courses, and distances and acreage must yield to the natural boundary. Hostetter v. Los Angeles Terminal R. Co., 108 Cal. 42, 41 P. 330; Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111; De Arguello v. Greer, 26 Cal. 615; Hunt v. Barker, 27 Cal. App. 776, 151 P. 165.

However, it is not always true that the meander line does not furnish a description as to the true boundary intended. "In the surveys of the public lands of the United States, the meander lines are generally considered as following the windings of streams; but the question whether they do so or not is a question of fact to be determined by evidence aliunde." Bissell v. Fletcher, 19 Neb. 725, 28 N. W. 303.

Observing particularly in this case the apparent intention contained in the description of the lands as it had been conveyed to the Mustoes, which particular description reads, "thence south 36.84 chains to the northerly bank of the Tuolumne River," with the description in the deed from the Mustoes to Lampley, wherein the call reads as follows: "Thence south 31.91 chains to a point on the U. S. meander line; thence north 69 degrees 30 minutes east along said U. S. meander line a distance of 19.903 chains to the U. S. meander corner," etc., and the further description, "containing 92.99 acres of land all north of the U. S. meander line"—it must be apparent that there was a definite intention in making this change not to convey the portion of the land south of the meander line, and between said meander line and the Tuolumne river. In this connection it seems clear that the grantor, in so designating the questioned boundary and in changing the acreage from substantially 99 acres to 92 acres, manifested a definite intention to use the meander line as the boundary for the tract conveyed.

In the case of Hostetter v. L. A. T. R. Co., 108 Cal. 38, 42, 41 P. 330, 331, it is said: "While a statement in a deed or upon a map as to the acreage of a certain tract of land is not at all conclusive or controlling as to the quantum of land in the tract; and while, as a matter of description, it must go down when coming in conflict with metes, bounds, and monuments, yet cases are presented where a statement of acreage renders most valuable aid in fixing boundary lines. If the description of tracts of land by monuments, distances, or otherwise is vague and indefinite by reason of conflicting lines, or by the omission of a line, or from any other cause, then a statement of the acreage sheds valuable light upon the issue, and often serves as the acting, moving cause for the conclusion reached. Such was the result in Hicks v. Coleman, 25 Cal. 142, 85 Am. Dec. 103; and in Hall v. Shotwell, 66 Cal. 381 [5 P. 683], it is said: 'Now, it is well settled, where there is not a sufficient certainty and demonstration of the land granted expressed in the other terms of its description, the number of acres is an essential part of the description.' "

We hold that under the conveyance of July 20, 1917, by Lewis W. Mustoe and Polly J. Mustoe to Charles Lampley and the mesne conveyances whereby title was vested in the appellants, the tract of land south of the said meander line was not intended to be and was not conveyed, and that by the conveyance by the Mustoes to Brinkerhoff and the subsequent conveyances, plaintiffs herein were vested with title to the said 7-acre tract.

We are satisfied that the judgment is correct, and it is therefore affirmed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

FRESHOLTZ et al. v. BOARD OF TRUSTEES OF CULVER CITY et al.★

(Civ. 6330.)

District Court of Appeal, Second District, Division 2, California. April 2, 1929.

As Modified on Rehearing May 18, 1929. Hearing Granted by Supreme Court July 15, 1929.

1. Appeal and error 🔑110—Order denying motion for new trial in civil proceedings is not appealable.

No appeal can be taken from order denying motion for new trial in civil proceedings.

2. Mandamus 🔑141—Mandamus may issue from any court, except justice's or police court, to compel performance by tribunal, corporation, board, or person of official act.

Writ of mandamus may be issued by any court, except justice's or police court, to inferior tribunal, corporation, board, or person to compel performance of act which is specially enjoined by law as an official duty.

3. Mandamus 🔑141—Superior Court held to have jurisdiction of proceeding against city board of trustees for mandamus to require them to call special election on petition for consolidation with another city (St. 1913, p. 577, § 2).

Superior Court *held* to have jurisdiction of proceeding against board of trustees of city to require board to call special election under Deering's Gen. Laws 1923, Act 5166 (St. 1913, p. 577) § 2, where petition was presented by qualified electors of city for consolidation thereof with larger municipality.

4. Municipal corporations 🔑33(3)—Persons registering on day of signing petition for consolidation of municipalities, but several hours after signing, held disqualified. "Registered, qualified electors" (St. 1913, p. 577, § 2; Pol. Code, § 1083a as amended in 1915).

Persons who had not registered at time of signing petition for consolidation of city with another larger city under Deering's Gen. Laws 1923, Act 5166 (St. 1913, p. 577) § 2, were not "registered, qualified electors" at time of affixing their signatures under Pol. Code, § 1083a, as amended in 1915, though such persons registered on the same day several hours after signing the petition.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Registered Qualified Elector.]

5. Mandamus 🔑168(3)—Evidence that petitioners at time of signing petition for consolidation of municipalities were not registered held admissible, though registry disclosed that registration occurred on same day as signing (St. 1913, p. 577, § 2; Pol. Code, § 1083a as amended in 1915).

Evidence that persons signing petition for consolidation of municipalities under Deering's Gen. Laws 1923, Act 5166 (St. 1913, p. 577) § 2, were not in fact registered at the time, as required by Pol. Code, § 1083a as amended in 1915, but registered several hours later in same day, *held* admissible, though registry disclosed that date of signing and registration was the same, inasmuch as clerk and registrar are ministerial officers who are not empowered to receive or to weigh evidence.

Thompson, J., dissenting.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Proceeding by Henry L. Fresholtz and others for writ of mandamus to be directed to the Board of Trustees of the City of Culver City and others. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Appeal from order denying new trial dismissed, judgment reversed and cause remanded with directions.

John J. Dillon, of Culver City, and M. Tellefson, of Los Angeles, for appellants.

L. V. Meloy, of Los Angeles, for respondents.

CRAIG, J. On May 14, 1928, a petition was filed with the clerk of the board of trustees of the city of Culver City, appellants herein, asking that said city be consolidated with the city of Los Angeles. No election was called; certain of the petitioners, respondents above named, filed a complaint in the superior court of Los Angeles county, praying a writ of mandamus "compelling the [trustees] to cause notices to be given of such election by publication of a notice thereof in a newspaper of general circulation, in ac-

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★Hearing granted 282 P. 501.

cordance with subdivision 2 of said Municipal Annexation Act of 1913, and its amendments thereto, or to show cause why they should not do so." Appellants answered, alleging as reasons for their inaction that the petition did not contain sufficient names of qualified electors to constitute a good and sufficient petition to require the calling of an election. As affirmative defenses, it was further alleged that certain of the signatures were obtained by fraud, and that the petition did not contain a sufficient number of names to warrant the calling of an election if the alleged illegal signatures be eliminated.

The trial court found from evidence adduced upon the trial that on said date there were 2,175 qualified electors in the city of Culver City, and that the petition had been signed by 566 qualified electors. As to the special defenses, it found that the petition was valid, and that the allegations of each of said special defenses were untrue. Conclusions of law and judgment were accordingly rendered in favor of the respondents, and directing that the trustees call a special election and submit to the electors the question as to whether or not Culver City should be consolidated with the city of Los Angeles. A motion for new trial was presented, which was denied and the respondents below appeal from the judgment and from the ruling upon such motion.

[1] There is no appeal from an order denying a motion for new trial in civil proceedings, and the defendants' appeal therefrom is dismissed.

[2, 3] It is contended by appellants that the decision of a board of trustees declaring a petition for consolidation to be insufficient is final and conclusive, and that the superior court was without jurisdiction to entertain the proceeding. In support of this theory, the statutes authorizing such proceedings are compared with those regulating recall elections, wherein it is provided that the petition therefor shall be filed with the county clerk. Act No. 5166 of Deering's Gen. Laws 1923 (Stats. 1913, p. 577), § 2, providing for the consolidation of municipalities, requires that: "Whenever a petition, signed by not less than one-fourth in number of the qualified electors of any municipal corporation, as shown by the registration of electors of the county in which such municipal corporation is situated, is filed with the legislative body thereof, asking that such municipal corporation and any other municipal corporation contiguous thereto, designated in such petition, and having a greater population, be consolidated, such legislative body must, without delay, call a special election and submit to the electors of such municipal corporation the question whether such municipal corporations shall be consolidated."

It is therefore apparent at a glance that these statutes are not similar in the respects contended for by appellants, since the provisions last quoted vest with the board of trustees a power and duty, and as to the latter they are mandatory, even though it be conceded that the functions of the board are quasi judicial. The writ of mandamus "may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, *board*, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." Hence, it follows that, the board having failed and refused, apparently without a canvass to hold an election as required by the statute, the superior court in the exercise of its mandatory powers had jurisdiction to entertain a petition for the relief prayed.

[4] We think, however, that the court erred in its rulings excluding certain offered evidence tending to disqualify a sufficient number of signers to render the petition insufficient. The county registrar of voters, as a witness in court, canvassed the names upon the petition by comparison with the great register, and testified that more than one-fourth, to wit, 566 of the registered qualified electors of said city had affixed their signatures thereto. Counsel for appellants thereupon attempted to show, by calling 40 of the petitioners as witnesses, that, while in all other respects they were qualified electors, they were not in fact registered at the time of signing the petition, having registered several hours after becoming signers, but on the same day. Objections to such evidence were sustained.

Section 1083a of the Political Code, as amended in 1915, provides as follows: "Whenever, by the constitution or laws of this state, any initiative, referendum, recall or nominating petition or paper, or any petition or paper, is required to be signed by qualified electors, only an elector who is a registered qualified elector at the time he signs such petition or paper shall be entitled to sign * * * any such petition or paper on or after the first day of January of an even-numbered year unless he shall, on or since said first day of January, have made an affidavit of registration as required by law."

Clearly, the petition here involved is within the purview of this section. It is equally apparent that, if certain persons had not registered when they signed the petition, they were not "registered qualified electors at the time" they so affix their signatures. The expression "at the time" means coincidentally, or immediately before. Seattle Lumber Co. v. Richardson & Elmer Co., 66 Wash. 671, 120 P. 517; Barnes v. Provoost, 4 Johns. [N. Y.] 61, 4 Am. Dec. 249; Brown v. Wilkinson, 15 Mees & W. 391; Gourley v. Countryman, 18 Okl. 220, 90 P. 427; Lake Shore & M. Ry. Co. v. Ouska, 151 Ill. 232, 37 N. E. 897.

[5] But it is contended that, since it is conceded that in each case an inspection of the register disclosed that on the date of the signing the signer was registered, no evidence extraneous of the register is admissible to show the order in which the signing and registering occurred. The respondents herein rely upon Beecham v. Burns, 34 Cal. App. 754, 168 P. 1058, and Minges v. Board of Trustees etc., 27 Cal. App. 15, 148 P. 816. The former relates to a recall election, and merely holds that the *clerk* must confine his canvass to the great register, and may not receive extraneous evidence as to the qualifications of signing electors. The clerk and the registrar are ministerial officers. They are not empowered to receive or to weigh evidence. Their sole duty and authority, in proper cases, are to inspect the official record and to report its condition and what it discloses to other officers. Decisions limiting the scope of the inquiry conducted by the clerk or the registrar to the register, and forbidding them or the city trustees to receive extraneous evidence, furnish no precedent or authority for us to hold that the superior court may not in an appropriate judicial proceeding receive evidence tending to show the falsity of the register and fraud in its entries. In Sidler v. City Council of Bakersfield, 43 Cal. App. 352, 185 P. 194, and Watts v. Superior Court, 36 Cal. App. 692, 173 P. 183, it was said that, although the clerk's certificate is final as to matters comprehended within the proper scope of his examination, the forgery of signatures and unauthorized additions thereto are not matters which could become apparent to the clerk in the course of his examination of the register, and would not be included in the matters passed upon by him in determining the sufficiency of the petition. Again, it is held in Koehler v. Board of Trustees etc., 83 Cal. App. 648, 257 P. 187, that the forgery of names to a petition, and additions made to signatures which might not be evidenced by comparison with the records of registration, are not matters as to which the clerk's certificate is final. Similarly, the registrar's inspection of the register would not disclose that a signer of the petition was not registered when he signed, provided he registered on the same date that he signed, although subsequently thereto. The determination of such fact, if it be one, would not be within the scope of duty of the clerk or registrar, and so the certificate of either officer would not be conclusive as to that matter.

We have discussed the subject from the standpoint of the admissibility of the evidence offered, and have concluded that objections based upon that theory should have been overruled. Nor do we think it is the intent of the Legislature, as evidenced by the code provisions bearing upon the question, to make valid the signature of an elector to an annexation petition, if that elector had not registered when he signed. The language of section 1083a of the Political Code above quoted would seem clear and conclusive on that point. Section 2 of Act 5166 makes it incumbent upon the legislative body to act upon a petition bearing not less than one-fourth of the qualified electors "as shown by the registration of electors of the county," yet in the light of the provisions of section 1083a of the Political Code it cannot be thought that it was the legislative intent that such a showing on the register should compel the legislative body to put in action the machinery for an election to bring about a consolidation, even though the registration might be forged, or added to, or placed upon the petition subsequently to the signing of the petition for consolidation. Any of these irregularities and illegalities would amount to a fraud, for they would cause the register to make a false showing.

It appears that one-fourth of the qualified electors of the municipality on May 14, 1928, was about 543. If it were true that 40 of the 566 signatures were illegally affixed to the petition because the petitioners were not registered and had no right to sign it, it would result that but 526 legal signatures, or 17 less than the requisite number, would remain. We think the offered evidence was competent and material, and that it was error to exclude it.

The judgment is reversed and the cause remanded to the superior court, and it is directed to receive such evidence as may be offered to show as to each signer the relative time of his signing the petition and registering wherever it appears that the signing and registering occurred on the same day; and it is ordered that if, upon the taking of the testimony as above indicated, it shall be found that there were 543 or more qualified electors who, according to the views herein expressed, were legal signers of the petition when they so signed, the superior court shall direct the trustees of the city of Culver City to call the special election as prayed in the petition. However, if it shall appear that there were not as many as 543 qualified electors who were, at the time they signed, legal signers to said petition, said superior court shall deny the petition for the writ of mandate as prayed. The trial court is directed to take evidence on this issue only, and otherwise it is ordered that the findings of fact and conclusions of law remain undisturbed and in full force and effect.

I concur: WORKS, P. J.

IRA F. THOMPSON, J. (dissenting). I cannot bring myself to the interpretation of section 1083a of the Political Code announced in the prevailing opinion. We should approach the problem with the thought in mind that a liberal construction is to be given to the enactments in order to allow a free expression of the will of the electors. Magoon v. Heath, 79 Cal. App. 632, 250 P. 583. Section 2 of the act, providing for the consolidation of municipal corporations (Stats. 1913, p. 577), provides that whenever a petition signed by not less than one-fourth of the qualified electors of the municipal corporation "*as shown by the registration of electors of the county,*" etc. (Italics ours.) It is patent that the records of registration constitute the only source from which to determine the total number of qualified electors in the municipality. Why then, if they are determinative of the dividend, should not the information therein contained also establish the divisor, assuming that the desired quotient is not less than four? Or, to phrase it differently, if the registration records give us the total number of qualified electors, why should they not also give us the number of signers who are registered? That this is the construction which should be given to the portion of section 1083a of the Political Code quoted in the majority opinion, is indicated by the concluding sentence of that section: "Wherever, by the Constitution or laws of this state, the county clerk or registrar of voters is required to determine *from the records of registration* what number of qualified electors have signed such petition or paper, he shall determine that fact with respect to the purported signature of any person from the affidavit of registration, and records relating thereto, current and in effect at the date of such signing of such petition or paper." (Italics ours.) In my opinion section 2 of the act providing for the consolidation of municipal corporations and section 1083a of the Political Code should be read together, and as so construed the latter section would mean that only an elector who is a registered qualified elector at the time he signs such petition, "as shown by the registration of electors of the county," shall be entitled to sign the same. Suppose a deputy registrar of voters were accompanying the circulator of the petition and the citizen desired to register and to sign the paper, certainly it would not be in keeping with a liberal construction of the law to say that his signature should not be counted if he inadvertently attached his name first to the petition, followed by the affidavit of registration.

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98 Cal. App. 69

In re DAVID et al.

McDOWELL v. DAVID et al.

(Civ. 6693.)

District Court of Appeal, First District, Division 1, California. April 1, 1929.

1. Newspapers 🔑1(5)—Superior court's finding on sufficient evidence that publication is newspaper of general circulation is conclusive (Pol. Code, § 4460).

Superior court's determination from evidence that publication is newspaper of general circulation within Pol. Code, § 4460, is conclusive on appeal, unless evidence is insufficient, as matter of law, to support finding.

2. Newspapers 🔑1(5)—Admission of issues after commencement of proceeding to establish publication as newspaper of general circulation held not reversible error, in view of prior issues properly admitted (Pol. Code, § 4460 et seq.).

Admission of evidence of issues of paper subsequent to commencement of proceeding under Pol. Code, § 4460 et seq., to have it established as newspaper of general circulation, *held* not reversible error; such evidence being merely cumulative of what was shown by prior issues properly received in evidence.

3. Newspapers 🔑1(3)—News in paper devoted to particular class must be such that general reading public might well look to it therefor to entitle it to establishment as newspaper of general circulation (Pol. Code, § 4460 et seq.).

News published in paper, devoted more or less to particular class, profession, trade, or calling, must be such that general reading public might well look to it for news of passing events, to entitle it to establishment as newspaper of general circulation, under Pol. Code, § 4460 et seq., purpose of which was to require publication of legal notices in newspaper which would reach general reading public.

4. Process 🔑103—Notice by publication must be reasonably likely to bring pendency and purpose of proceeding to attention of those interested.

Notice by publication is valid, where necessary, but must be such as would be reasonably likely to bring fact of pendency and purpose of proceeding to attention of those interested.

5. Newspapers 🔑1(3)—Newspaper publishing only local items of particular interest to building industries held not "newspaper of general circulation" (Pol. Code, § 4460).

Newspaper publishing no telegraphic, social, or political news, but only local news items of particular interest to building and construction industries, and reporting only such disasters as destruction of buildings, bridges, etc., *held* not a newspaper of general circulation, but one devoted to interests, entertainment, and instruction of particular class, within Pol. Code, § 4460.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Newspaper of General Circulation.]

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Application by C. M. David and others, a copartnership doing business under the firm name of "Journal of Commerce," to have such Journal established as a newspaper of general circulation, contested by A. McDowell. Judgment for applicants, and contestant appeals. Reversed.

Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for appellant.

Rohe & Freston and Harold P. Curtis, all of Los Angeles, for respondents.

LANDIS, Justice pro tem. This is an application under section 4460 et seq. of the Political Code to have the standing of the "Journal of Commerce" as a newspaper of general circulation, as that term is defined in section 4460, ascertained and established.

The material allegations of the petition are as follows:

"That the applicants, namely, C. M. David, O. J. David, and M. F. Brown, at all the times herein mentioned have been and now are a copartnership doing business under the fictitious name of Journal of Commerce, and have complied with all the requirements of sections 2466 and 2468 of the Civil Code. That applicant is the publisher of the newspaper known as Journal of Commerce, and said newspaper is a newspaper of general circulation, printed and published at regular intervals, to wit, daily except Sunday, in the city and county of Los Angeles, California, for the dissemination of local news and intelligence of a general character and has a bona fide subscription list of paying subscribers; that said newspaper has been established, printed and published as a daily newspaper, except Sunday, at regular intervals in said city, county and state for a period of more than one year last past, to wit, from on or about December 11, 1925, to the date hereof."

Thereafter and prior to the time fixed for the hearing, the contestant, A. McDowell, a citizen, resident, and taxpayer of the city of Los Angeles, filed a contest to said petition, alleging "that said newspaper was not published for the dissemination of local news or intelligence of a general character, but, on the contrary, said newspaper was devoted to the interest and published for the entertainment and instruction of a particular class, profession, trade, or calling or for a number of such classes, professions, trades or callings, to wit, to the interest and for the entertainment and instruction of persons engaged in or connected with the construction and building industry of Southern California, and that such was the avowed purpose of such newspaper and of the publishers thereof, and the contestant further alleges that the newspaper did not disseminate local news or intelligence of a general character." The court thereafter heard the matter and made its findings in favor of the applicants.

The sole question presented and urged on this appeal is whether or not the evidence was sufficient to support the findings of the court that the newspaper in question was published for the dissemination of local news and intelligence of a general character, and that such newspaper was not devoted to the interest and published for the entertainment and instruction of a particular class, profession, trade, or calling, or for a number of such classes, professions, trades or callings, and that said newspaper was not published for the avowed purpose of entertaining and instructing persons engaged in or connected with the building industries of Southern California, within the meaning of section 4460 of the Political Code.

[1] The superior court having determined from the evidence that the publication is a newspaper of general circulation as that term is defined in section 4460, such determination of the evidence is conclusive on appeal unless it shall appear, as a matter of law, that it is insufficient to support the finding.

In the instant proceeding the evidence adduced on the part of the applicant at the hearing, as shown by the bill of exceptions, consisted of the testimony of C. M. David, a member of the applicant copartnership, and E. J. Davis, circulation manager for applicant, and introduction in evidence of several issues of the paper in question.

[2] Appellant urges as error the fact that, under objections made by contestant, in addition to two issues of the paper that were dated prior to the date of the commencement of this proceeding, four issues dated subsequent to such date were admitted in evidence. Assuming, without holding, that they were not admissible, for the reason that such evidence was cumulative of what was shown by the issues that concededly were properly received in evidence, no substantial injury resulted therefrom.

An examination of the copies of the paper in evidence shows that the publication is made up principally of stereotyped matters under the headings of "subbids wanted," "subcontracts let," "today's bid calls," "commercial news flashes," "Los Angeles Permits," "bond bids," "bond elections," "bids wanted in Southwest," "credit information," "mechanics liens," "notices of completion," "attachments," "notices of actions," "building contracts," "release of attachments," a number of advertisments almost all of which relate to building and construction industries, and a number of items claimed to be news items, but almost all of which involve or are in some manner connected with the building and construction industries and which appear to be of particular interest to persons connected with such industries. The following headlines of the so-called news items indicate the contents and character and are a fair sample of such items, to wit: "Approve Plans for Subdivision"; "Water System Contract Let"; "Quantities for Don Pedro Dam"; "Residence Plans are Completed"; "Lacy Avenue Bids Received"; "Morrow Water Contract Let"; "Draws Chinese Church Plans"; "Water Board Receives Bids"; "Glass Company to Build Plant"; and "Garden Court Lease is Taken." In addition thereto, we find the following items: "Markets at a Glance," showing stock market conditions, quotations of Liberty bond values, and rates of bank notes.

C. M. David testified "that when they reported disasters they were generally of the type which might interest the construction industry, such as the destruction of buildings and bridges; that they had not carried any report of political matters; that their subscribers were interested in building construction news, and that all matters which would have anything to do with building industries would be of interest to their subscribers; that their subscribers would be interested in weather particulars, credit information where bids are to be awarded, where bond issues have been voted for public improvements, financial news, bond issues, new business concerns, moves and fire reports; that all of the editorials which were published were connected with business matters, and none had anything to do with social conditions or political situations, and in the majority of cases the editorials related to building construction industries, and that they carried no report of social news."

Respondent appears to rely on In re Green, 21 Cal. App. 138, 131 P. 91; but a comparison of these two publications shows a marked difference in purpose and contents. The paper under consideration in that case, in addition to certain stereotyped matter, contains news accounts of courts and other official proceedings, including the activity of the California members of congress, review of court decisions, general advertisements, personal notices, and many items of local current events of a diversified character.

In the case of In re Herman, 183 Cal. 153, 191 P. 934, it was found by the court that the Daily Bulletin was a newspaper of the following description: A few telegraphic items were contained therein, although these telegraphic items had been copied from other newspapers; the current "news" was court calendars, without any description of court proceedings, list of suits filed, marriage licenses and building permits issued, matters of stereotyped nature, tables of temperature and rainfall, altitudes at various points in that section of the state; the names and locations of churches, hospitals, asylums, orphan homes, and clubs; the names and addresses of clergymen, location of fire alarm boxes, directories of public offices and officials and such like matters. In holding that the newspaper involved in that case was not a paper of general circulation, the court said: "It is clear to us that the purpose of this paper was not 'the dissemination of local or telegraphic news and intelligence of a general character,' and that the contents did not come within this description."

[3] While the rule has been laid down to the effect that, even though a newspaper is devoted more or less to a particular class, profession, trade, or calling, it will not be deprived of its character as a newspaper of general circulation if, in fact, the newspaper does publish intelligence of passing events and news items of interest to the general public, together with news of interest to such particular class of persons. In re Green, 21 Cal. App. 138, 131 P. 91; In re Labor Journal, 190 Cal. 500, 213 P. 498. But the news published in such newspaper must be of such a character that the general reading public might well look to such paper to learn the news of passing events, and should not be of such a character that the general public would not be at all interested in it. Hanscomb v. Meyer, 60 Neb. 72, 82 N. W. 114, 48 L. R. A. 411, 83 Am. St. Rep. 509; Crowell v. Parker, 22 R. I. 51, 46 A. 35, 84 Am. St. Rep. 815.

The undoubted purpose of the statutory requirement was to require the publication of legal notices to be published in newspapers which would reach the general reading public, and which would consequently give notice to the public generally and not notice merely to a particular class of the public. In re Herman, 183 Cal. 153, 191 P. 934.

[4] It should be borne in mind that notice by publication is at best a poor substitute for actual or personal notice, and while undoubtedly valid in cases where necessary, still, where it is permissible at all, it must be such as would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199, 11 Ann. Cas. 465.

[5] In this case no telegraphic news is published; the local news items hereinbefore mentioned are limited to such items as are of particular interest to the building and construction industries. Applicant admits that the only disasters reported consist of the destruction of buildings, bridges, railroads, and the like, and that they are reported so as to get knowledge to the construction industry of the needs of the industry. No social or political news is reported, and there is no account of local events, casualties, hotel arrivals or departures, personal items and the like, such as might be expected would be found in a newspaper undertaking to publish intelligence of passing events and news items of interest to the general public.

We are constrained to agree with appellant that the paper in this case is one that falls within the rule laid down in the case of In re Herman, supra. Clearly the publication involved in this case is not a newspaper of general circulation but is a newspaper devoted to the interests and published for the entertainment and instruction of a particular class, as those terms are defined in section 4460 of the Political Code. It follows that it must be held that the finding is not supported by the evidence.

Judgment reversed.

We concur: TYLER, P. J.; CASHIN, J.

98 Cal. App. 92

JOHN BREUNER CO. v. ALLRED.★

(Civ. 6503.)

District Court of Appeal, First District, Division 2, California. April 2, 1929.

Rehearing Denied May 2, 1929. Hearing Denied by Supreme Court May 29, 1929.

1. Principal and agent ⇨137(1), 173(3)—Evidence that defendant's agent made contract on defendant's behalf, and of defendant's conduct amounting to ratification or estoppel, supported judgment for plaintiff, in action for goods sold and delivered.

In action for goods sold and delivered, evidence showing that defendant's agent agreed on defendant's behalf to pay for goods, and that defendant's conduct amounted to ratification or estoppel, *held* sufficient to support judgment for plaintiff.

2. Principal and agent ⇨194(2, 3)—In action for goods sold, instructions on ratification and ostensible agency held not erroneous under evidence showing defendant's agent contracted on defendant's behalf.

In action for goods sold and delivered, instructions as to ratification and ostensible agency *held* not error under evidence showing defendant's agent contracted on defendant's behalf, since it was not necessary that evidence actually demonstrate defendant had full knowledge; it being sufficient that there was substantial evidence from which jury could infer that such full knowledge existed.

3. Principal and agent ⇨194(2)—In action for goods sold, instructions on ostensible agency held not erroneous under evidence.

In action for goods sold and delivered, court did not err in instructing on ostensible agency from lack of care under evidence showing defendant, in presence of plaintiff's agent, commended his agent for making contract.

4. Principal and agent ⇨194(3)—In action for goods sold, instruction concerning ratification by implication held supported by evidence.

In action for goods sold and delivered, instruction concerning ratification by implication *held* supported by evidence showing defendant commended agent who made contract, in presence of plaintiff's agent.

5. Trial ⇨260(1)—Requested instruction covered by other instructions held properly refused.

In action for goods sold and delivered, instruction requested by defendant *held* properly refused, where substance of law contained in it was given in other instructions.

6. Trial ⇨253(7)—In action for goods sold, defendant's requested instruction directing verdict held erroneous for omitting to state what jury should do if plaintiff had made absolute sale to defendant.

In action for goods sold and delivered, instruction requested by defendant directing verdict for defendant *held* properly refused, being faulty and confusing for omitting to state what jury should do if they found plaintiff had made absolute sale of goods to defendant as part of their arrangement.

7. Trial ⇨267(1)—Striking parts of instruction assuming facts and telling jury to consider proven fact immaterial held not error.

Before giving requested instruction, court did not err in striking parts which assumed facts and told jury to consider, as immaterial on main issue, fact which was part of evidence, where given part of instruction was complete on subject.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the John Breuner Company against Clifford S. Allred. Judgment for plaintiff, and defendant appeals. Affirmed.

I. M. Peckham, of San Francisco, for appellant.

Ernest L. Brune, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff obtained judgment upon a jury's verdict for $811.75 for draperies and floor covering furnished and installed in a model home. It was one of a number of new homes which defendant had built upon land owned by himself for the purpose of sale. The points raised by defendant as appellant here are: First, the sufficiency of the evidence to show that C. W. Pearce, who made the agreement of purchase of the goods, was the agent of defendant either by authorization or by ratification; and, second, claimed errors in giving instructions said not to have support in the evidence and in refusing requested instructions which also involves only a consideration of the evidence. The sufficiency in law of none of the instructions is argued. At the end of plaintiff's case in chief defendant's motion for a nonsuit and a motion to strike out the evidence were denied. The defendant thereupon proceeded with his evidence, and now contends that the adverse judgment appealed from is not supported by the evidence.

[1] There is sufficient substantial evidence to support the judgment. Disregarding denials and contradictory evidence offered in behalf of the defendant, there was evidence to support the following narrative: Pearce was a real estate salesman or broker. He had and occupied a desk in the office of appellant. That office contained a number of desks for appellant's salesmen, one for his sales manager, Sibbald, and another for his bookkeeper. Pearce approached Hauer, an outside salesman of the respondent, stating that appellant wanted the respondent to lend the necessary furniture to furnish the model home. After several meetings between these two men, at the model home, at appellant's office and at respondent's store, the agreement was made between them to lend the furniture and sell to appellant the draperies and floor coverings. Later Pearce and appellant's

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★Rehearing denied. Hearing denied by Supreme Court.

sales manager Sibbald called at respondent's store and talked with said Hauer and John Breuner, Jr., who consented to give a certain amount of advertisement to the model home. Sibbald and Pearce asked Breuner how much the draperies and floor coverings were to cost, and he replied that it would be cost plus 15 per cent. because of the advertising in it, and that, because he could not use them after being cut for the home, he expected them to buy them. Later Pearce, in the presence of Hauer, met appellant. He told him about the advertising, that the draperies would cost about $650; and that carpet and linoleum would be extra. Appellant replied, "That is fine, go ahead," and further told Pearce to keep on the job, as he did not want to spend all that money for nothing. This was before the installation of the goods. Appellant ordered his painter to decorate the house in harmony with the colors planned by respondent's salesman. After the model home was completely finished and furnished, the hostess placed in charge was instructed to quote one sale price of $13,500 for the house, lot, draperies, carpet, and linoleum, and not to quote any price for the home without the said furnishings nor for the furnishings without the home. Appellant himself personally instructed a salesman of respondent to quote the above price, stating that that included the drapes and floor covering. There was testimony that the price of the house before it was furnished was $12,500, but none is pointed out regarding what was to be done with the balance of the extra $1,000 after paying the $811.75 for the costs of the drapes and floor covering. On the last day of the period for which respondent had agreed to lend the furniture, a purchaser for the home was secured, but only for the home, and not for the drapes and floor coverings, price $12,500. When appellant was personally presented with a bill for the goods, he stated that he did not intend to pay the bill, because the said respondent had not lived up to its promises to give certain newespaper advertisement, and so he would not live up to his promise. He did not at that time deny having bought the goods nor state that he was not liable therefor. At the trial appellant as a witness admitted having authorized Pearce to have respondent install furniture and furnishings in the house, but denied knowing that it would cost him anything.

We have stated enough of the evidence to show that the verdict is supported by substantial evidence tending to prove that appellant's authorized agent or agents agreed on his behalf to pay for the goods, and that appellant's authorization could also be inferred from conduct amounting to ratification of estoppel or from his conduct in holding Pearce or Sibbald out as an ostensible agent.

The motion for nonsuit and to strike the evidence were therefore properly denied. The appellants claim that the jury must have disregarded certain sound instructions given on the law of agency in order to arrive at their verdict is also the same point stated in a different manner. 24 Cal. Jur. 796, and cases cited.

[2] From what we have said about the nature and sufficiency of the evidence, it follows that it was not error for the court to instruct upon ratification or to modify defendant's requested instruction upon authorization of an agent by his principal by interpolating phrases about ratification and ostensible agency. It was not necessary that the evidence actually demonstrate that appellant had full knowledge before instructions on ratification could be given; it was sufficient that there was substantial evidence from which the jury could infer that such full knowledge actually existed.

[3, 4] It is claimed that the court erred in instructing on ostensible agency from lack of care, because it is said the evidence showed a want of ordinary care on the part of respondent, and did not show the want of it on the part of defendant. The contrary of both assertions is supported by the evidence, notably the conversation in which appellant commended Pearce, and told him to keep on the job, after being informed of the purchase and cost of the drapes and floor coverings—all this in the presence of the agent of respondent. The same evidence supports instruction No. XXXI concerning ratification by implication. The evidence by no means compels the conclusion that defendant had no knowledge of the acts of Pearce and Sibbald until after respondent had completely performed its part of the bargain. The conversation last referred to is shown in the evidence in one place to have taken place one and one-half months before the exhibit was opened.

[5, 6] The instructions requested by defendant, and shown on pages 29 and 30 of appellant's opening brief, were properly refused. They both undertook to direct a verdict for defendant in case of certain findings of the jury. The first did so in case the jury found that defendant only authorized Pearce to use his house without consideration being given to the evidence of ratification. The substance of the law contained in it was given in other instructions shown on pages 23 and 24 of respondent's brief. The second of these two refused instructions directing a verdict for defendant was faulty and confusing for omitting to state what the jury should do if they found that plaintiff had made an absolute sale of the goods to defendant as a part of their arrangement. Owing to this defect, the instruction directed a verdict for the defendant in case plaintiff failed to perform a certain part of whatever the arrangement was between the plaintiff and defendant, without stating what the terms of that ar-

rangement would have to be in order that the defendant should be entitled to a verdict on account of plaintiff's not performing such part of it.

The two general instructions requested about the inability of an agent to define his agency were given in substance by the court in instructions VIII and IX.

[7] Before giving the requested instruction on page 31 of appellant's opening brief, the court did not err in striking the parts inclosed in brackets. The given part is complete upon the subject, and the excluded part has the vice of assuming facts and also of telling the jury to consider as immaterial on the main issue the fact that Pearce was authorized by appellant to sell houses. This was a part of the evidence of the case which was in the record, not stricken out, nor subject to other infirmity. The jury must consider all the evidence of the entire case before deciding the issues. The relationship of all kinds existing between Pearce and Allred as shown in the evidence could be considered by the jury in drawing inferences respecting all the issues in the case so far as it appealed to their minds as rational men.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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98 Cal. App. 138

DAWSON v. TULARE UNION HIGH SCHOOL DISTRICT et al.★

(Civ. 3701.)

District Court of Appeal, Third District, California. April 5, 1929.

Rehearing Denied May 4, 1929. Hearing Denied by Supreme Court June 3, 1929.

1. Trial 🔑163—Motion for nonsuit on ground of plaintiff's failure to prove case for jury must point out grounds upon which it is based (Code Civ. Proc. § 581, subsec. 5).

Motion for nonsuit under Code Civ. Proc. § 581, subsec. 5, permitting dismissal upon plaintiff's failure to prove sufficient case for jury, must point out to the court and counsel precise grounds on which it is made, and it is not sufficient to state generally that there is no evidence justifying granting of relief, or that plaintiff has failed to prove case, but motion must show wherein failure consists.

2. Trial 🔑165—Only evidence most favorable to plaintiff need be considered in determining motion for nonsuit (Code Civ. Proc. § 581, subsec. 5).

Only evidence most favorable to plaintiff need be considered in determining motion for nonsuit on ground of plaintiff's failure to prove sufficient case for jury under Code Civ. Proc. § 581, subsec. 5.

3. Schools and school districts 🔑122—Negligence of school district in permitting piano used in connection with physical education in high school to remain in insecure position on dolly held for jury in action for injuries to student.

Negligence of school district in permitting piano used in school gymnasium to rest in insecure position on dolly *held* question for jury, in action for injuries to high school student caused by fall of piano while she was engaged in playing jumping game as part of school instruction in physical education, under evidence of previous accident resulting from fall of piano and knowledge thereof on part of physical director.

4. Appeal and error 🔑997(2)—That evidence may justify inference against plaintiff is immaterial on appeal from judgment of nonsuit (Code Civ. Proc. § 581, subsec. 5).

It is immaterial on appeal from judgment of nonsuit under Code Civ. Proc. § 581, subsec. 5, that there may be sufficient evidence to justify inference contrary to plaintiff's recovery as well as inference in favor of plaintiff.

5. Schools and school districts 🔑89—Long-continued defective condition of its property may establish constructive notice on part of school district, rendering it liable for injuries if it fails to remedy defect (St. 1923, p 675).

Long-continued existence of defective condition of its property may establish constructive notice thereon on part of school district, so as to render it liable to person injured for failing to remedy such condition within reasonable time after notice under St. 1923, p. 675.

6. Schools and school districts 🔑89—Neglect of duty by school district cannot be made basis of exemption from liability for injuries resulting from defective condition of its property (St. 1923, p. 675).

Neglect of duty on part of school district cannot be made basis of exemption from liability under St. 1923, p. 675, rendering counties, municipalities, and school districts liable for injuries resulting from defective conditions of their property which are not remedied within reasonable time after notice thereof.

7. Schools and school districts 🔑62—School trustees held not personally liable for injury to student in high school resulting from fall of piano during physical exercises (Pol. Code, § 1623).

Members of board of trustees of school district *held* not personally liable for injuries sustained by student from fall of piano while playing game in high school as part of instruction in physical education, under Pol. Code, § 1623.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Mary Dawson, a minor, by her guardian ad litem, L. G. Dawson, against the Tulare Union High School District and others. Judgment for defendants, and plaintiff appeals. Reversed in part, and affirmed in part.

★Rehearing denied. Hearing denied by Supreme Court.

Joseph A. Brown and F. A. Anderson, both of San Francisco, for appellant.

LeRoy McCormick, Dist. Atty., and Leslie A. Cleary, Deputy Dist. Atty., both of Visalia, Glenn Moran, of Tulare, and H. B. McClure, of Visalia, for respondents.

FINCH, P. J. [1] The plaintiff brought this action to recover damages caused by an upright piano falling upon and crushing one of her ankles while she was engaged in school work as a student in the Tulare union high school. The trial court granted defendants' motion for a nonsuit, made on the ground set forth in "section 581 of the Code of Civil Procedure, subsection 5, which reads to the effect that 'An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.'" No other ground was specified in the motion. The plaintiff has appealed from the judgment. "It is * * * settled law that a motion for a nonsuit must point the attention of the court and counsel to the precise grounds upon which it is made. * * * It is not sufficient to state generally that there is no evidence before the court justifying it in granting any relief to the plaintiff, or that plaintiff has failed to prove a sufficient case. The motion should show wherein the plaintiff failed to prove its case or why he is not entitled to recover." 9 Cal. Jur. 548; Masero v. Bessolo (Cal. App.) 262 P. 61; Henley v. Bursell, 61 Cal. App. 511, 215 P. 114.

[2-4] There is no dispute as to the injuries received by the plaintiff or the serious nature thereof. Under the settled rules governing the determination of a motion for nonsuit, only the evidence most favorable to the plaintiff need be considered. There is evidence in the record from which the facts herein stated may be inferred. The piano in question was the property of the defendant district. It was frequently moved from one room to another. To facilitate the moving thereof, it was kept upon what the witnesses referred to as a dolly. This dolly consisted of a skeleton structure, rectangular in form, of the same size as the bottom of the piano, and made of two by four inch lumber. Near either end, between the side pieces of the framework, was a wooden roller about four inches in diameter and twelve in length, through which there was a metal rod forming the axis of the roller and supporting the frame. The piano was not fastened to the dolly, but merely rested upon it, with no stays to keep it in place. The bottom of the piano, when on the dolly, was five or six inches above the floor. It was "awfully wobbly." "It seemed to be on a very unsteady platform. Oh, just like the wheels in it were loose." "It was shaky." "When the girls would play the piano, it would rock backwards and forwards." "It seemed to go backwards more than forwards." "When you press on the pedals, * * * that caused the piano to tip." "It was plain and marked, the shaking of the piano." "Different times in our gym class we noticed the piano shook; * * * about every time we used the piano." "We used it once a week." "I think it was the vibration from the different jumping games" that caused the piano to fall. The piano had been kept upon the dolly for more than a year before the injury to the plaintiff. About a year before the accident it fell backwards upon the leg of a student who was endeavoring to move it. The physical director, employed by the school and who had charge of the gymnasium at the time of the accident last referred to, was present when it occurred. The student who was injured in that accident was unable, by reason thereof, to attend school for about two weeks. On his return he made a report as to the reasons for the accident. The principal of the school, who was also district superintendent, testified that he had no knowledge of that accident. He knew, however, that the piano was kept upon the dolly, but made no examination as to its stability. He did not know whether it shook or rocked. The dolly was not used after the injury to the plaintiff. The "director of girls' physical education" had charge of the piano and the room in which it was used during their class period. This teacher and the physical director had the same opportunity as the students to observe the instability of the piano on the dolly.

At the time of the accident the plaintiff and several other girls were playing a game as a part of their instruction in physical education. While they were "all jumping up and down on the floor" the piano "fell without warning," going over backwards and crushing the plaintiff's "ankle to the floor."

It may be inferred from the facts stated that the vibration resulting from the "jumping game" caused the piano to slip backwards until its unstable equilibrium on the dolly was destroyed, and that, therefore, the keeping of the piano on the dolly in the manner shown was the proximate cause of the accident. The evidence is clearly sufficient to warrant the inference that it was negligence to maintain such defective condition, and it is wholly immaterial, on this appeal from the judgment of nonsuit, that there may be sufficient evidence to justify a contrary inference.

[5, 6] "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and

failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Stats. 1923, p. 675.

In a similar case it was held by this court that a school district is liable for injuries to a pupil, caused by the maintenance of a dangerous condition of which the district superintendent has notice and which he neglects to remedy within a reasonable time. Huff v. Compton City Grammar School Dist. (Cal. App.) 267 P. 918. The statute does not provide that actual notice is a prerequisite to recovery in such a case. The long-continued existence of a defective condition may establish constructive notice thereof. Wurzburger v. Nellis, 165 Cal. 48, 53, 130 P. 1052; 43 C. J. 1043 to 1057. It may be inferred from the circumstances in evidence that the principal had constructive notice of the defective condition and he certainly had "authority to remedy such condition." To hold that actual notice is required in such a case would be to place a premium on indifference and neglect of duty. "Neglect of duty cannot be made the basis of exemption from liability." Kramer v. City of Los Angeles, 147 Cal. 668, 681, 82 P. 334, 339.

[7] Under the provisions of section 1623 of the Political Code, a judgment in a case such as this is a charge against the school district, but the members of the board of trustees are not "personally liable for accidents to children * * * in connection with school work." The judgment of nonsuit in favor of the trustees personally, therefore, should stand, notwithstanding the insufficiency of the motion therefor, because it appears that the plaintiff will be unable to prove a cause of action against them.

The judgment in favor of the defendant Tulare union high school district against the plaintiff is reversed. The judgment in favor of the other defendants is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

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97 Cal. App. 782

PEOPLE v. WALTON. (Cr. 1773.)★

District Court of Appeal, Second District, Division 1, California. March 26, 1929.

As Modified on Denial of Rehearing April 10, 1929.

1. Criminal law ⚷603(11)—Denying continuance where motion was made on day of trial held not error; diligence not being shown on absent witnesses' testimony.

In prosecution for forgery, denial of defendant's motion for continuance made on day of trial, and based on want of preparation and the absence of material witnesses, *held* not error, where there was no showing of reasonable diligence on part of defendant in his affidavit in support of motion and affidavit failed to state facts to which witnesses would testify if present.

2. Criminal law ⚷597(1), 603(11)—Refusing continuance held not error; reasonable diligence to discover new testimony and probability of different verdict not being shown.

Refusal to grant motion of defendant in prosecution for forgery for new trial on ground of newly discovered evidence, consisting of testimony of defendant, his father, and friend, as to whereabouts of defendant on certain date, and that he did not wear certain clothing on that date, *held* not error, where defendant was witness at trial, his father assisting him, and there was no showing of reasonable diligence to discover testimony before verdict or that, if evidence were introduced on retrial, different verdict would be probable.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

M. K. Walton, also known as Kelly Walton, was convicted of forgery, and he appeals. Affirmed.

William Christensen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

CRAIL, Justice pro tem. [1] Defendant was convicted of the crime of forgery. It is his first contention that the trial court erred in denying his motion for a continuance, made on the day of trial, and based on the want of preparation and the absence of material witnesses. However, there is no showing of reasonable diligence on the part of defendant in his affidavit in support of the motion (People v. Ponchette, 30 Cal. App. 399, 158 P. 338; People v. Winters, 125 Cal. 325, 57 P. 1067); and the affidavit fails to state the facts to which the witnesses would testify if present (People v. Fountain, 170 Cal. 460, 150 P. 341).

[2] The only other contention of defendant is that the trial court committed prejudicial error in refusing to grant appellant's motion for a new trial on the ground of newly discovered evidence. The newly discovered evidence consisted of the testimony of the defendant, his father, and a friend, as to the whereabouts of the defendant on a certain date, and also that he did not wear certain clothing on that date. The defendant was a witness at the trial, and, as shown by his affidavit, made on the day of the trial, his father was assisting him in marshaling the evidence in his defense. There is no showing of reasonable diligence to discover this testimony before the verdict was returned,

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★Rehearing denied.

and it does not appear that, if the evidence were introduced on a retrial of the cause, a different verdict would be probable. People v. Froehlich, 65 Cal. App. 502, 224 P. 471; People v. Oxnam, 170 Cal. 211, 149 P. 165. There was no abuse of discretion with regard to either order.

Judgment and order affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

207 Cal. 70

BLOOM v. BLOOM. (S. F. 12759.)

Supreme Court of California. April 16, 1929.

1. Mortgages 🔑608½—Judgment requiring reconveyance on defendant's payment of indebtedness secured by deed held inadequate as not requiring payment within reasonable time.

In action to quiet title where defendant alleged that deed under which plaintiff claimed was given as security for indebtedness, judgment refusing to quiet plaintiff's title, and directing that plaintiff reconvey property to defendant on payment of amount found to be due, *held* erroneous as inadequate to protect plaintiff's rights; no time being fixed for defendant's payment of indebtedness.

2. Mortgages 🔑608½—Defendant held to have waived equity of redemption and objections to decree quieting title, unless indebtedness be satisfied within reasonable time.

In action to quiet title, where defendant alleged that plaintiff's deed was merely security for indebtedness and prayed accounting and reconveyance on payment of indebtedness and filed no brief on plaintiff's appeal from judgment fixing no time for defendant to pay such indebtedness, he must be held to have waived any equity of redemption and any objection to decree requiring him to pay indebtedness within reasonable time or suffer plaintiff's title to be quieted.

3. Mortgages 🔑608½—Decree quieting title under deed securing indebtedness, unless defendant pays indebtedness within specified reasonable time, held appropriate.

In action to quiet title where court found that plaintiff's deed was given as security for indebtedness, decree requiring defendant to pay such indebtedness within specified reasonable time, in default of which plaintiff's title will be quieted, *held* appropriate.

In Bank.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action to quiet title by W. R. Bloom against Irvin T. Bloom, also known as Irwin T. Bloom. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Stanford G. Smith, of Santa Cruz, and Lucas F. Smith, of Los Angeles, for appellant.

Rittenhouse & Snyder, of Santa Cruz, for respondent.

SHENK, J. The plaintiff filed a complaint in the usual form to quiet his title to three parcels of land in the county of Santa Cruz. The defendant answered, denying absolute title in the plaintiff, and alleged that the plaintiff's interest was founded upon a deed conveying to him the title to the three parcels of land described in the complaint and two other parcels described in the answer, which deed, although absolute in form, was alleged to be in fact a conveyance of the title to the plaintiff upon the trusts resulting from an agreement of the parties and evidenced by a letter exchanged between them whereby the title was to be held by the plaintiff as security for loans and advances, reconveyance to be had upon payment to the plaintiff of the amount of such loans and advances. The defendant prayed that an accounting be had as to all five parcels, and that, upon the ascertainment of the amount due from the defend-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ant to the plaintiff, the plaintiff be required to reconvey the three parcels described in the complaint upon the payment or tender to the plaintiff of the amount so found to be due.

Prior to the commencement of the action the plaintiff had conveyed the two parcels described in the answer to innocent third parties for value without notice of the defendant's claims. The accounting was had, and the amount of the loans and advances from the plaintiff to the defendant was found to be the sum of $8,930.24 with interest at the legal rate from June 9, 1925. The court found that the deed was as and for the purposes alleged in the answer and adjudged that the plaintiff's title be not quieted but that the plaintiff execute a deed conveying to the defendant the title to the property described in the complaint upon the payment to the plaintiff of the amount found to be due in accordance with the agreement of the parties.

The plaintiff appeals from the judgment on the ground that the evidence is insufficient to support the findings and that the judgment is uncertain and incomplete in that no time was fixed within which the defendant was required to pay the amount found to be due the plaintiff as a condition upon which the defendant would be entitled to a reconveyance.

[1, 2] The evidence is sufficient to support the findings, but it is clear that the judgment did not adequately protect the plaintiff's rights nor completely dispose of the controversy. By the judgment in its present form the burden of further advances by way of taxes and maintenance charges is placed upon the plaintiff and the defendant is permitted to delay indefinitely the payment of the amount found to be due. If the judgment be permitted to stand, the plaintiff's title is not quieted, notwithstanding the defendant may never pay the amount found to be due. On the other hand, the defendant may wait indefinitely and gamble on the increase or decrease in value of the property. In any event, further litigation would seem to be inevitable unless this controversy be settled in this action. The plaintiff in his brief suggests that the proper method to have been pursued was that an interlocutory judgment should have been rendered directing that a reconveyance be executed upon the payment by the defendant of the amount found to be due from the defendant to him and that a time should have been fixed within which the defendant should be permitted and required to make such payment, in default of which the plaintiff's title should be quieted. Or, the plaintiff further suggests, the court should have ordered the property sold, subject to the right of the defendant to redeem as in foreclosure. Under the contract of the parties and the allegation of the defendant's answer and the form of his prayer for affirmative relief, he has consented to the procedure first suggested by the plaintiff. The defendant has filed no brief and has stipulated that the appeal be determined on the record and plaintiff's opening brief. On the record the defendant must be deemed to have waived any equity of redemption which he might otherwise have had and to have consented to the procedure first suggested by the plaintiff.

[3] Under the circumstances here shown, the trial court should have entered an appropriate interlocutory judgment requiring the defendant to pay the amount found to be due the plaintiff within a specified reasonable time; that upon such payment within the time specified the defendant would be entitled to a reconveyance and that in default of payment within such time the plaintiff would be entitled to a decree quieting his title. Such a procedure was outlined and an interloctory judgment was by the trial judge actually ordered to be prepared in accordance with a memorandum opinion filed in the case. This procedure, however, was not followed, but a final judgment was signed and entered with the infirmity above indicated.

The situation of the parties under their contract and the pleadings is such as to indicate that the plaintiff, in order to protect his interest in the property, probably has been required to make further advances or to assume further financial burdens to protect his interest in the property since the close of the accounting already had, or at least since the entry of the judgment on June 1, 1927.

The judgment is reversed, and the cause is remanded for further proceedings consistent with the views herein expressed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

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207 Cal. 60

HARMAN v. CABANISS, Judge.
(S. F. 13288.)

Supreme Court of California. April 15, 1929.

Divorce ⚷186—Trial court to correct clerical errors may vacate interlocutory decree entered pursuant to Supreme Court's mandate and order judgment on corrected findings.

The entry of an interlocutory decree of divorce pursuant to mandate of the Supreme Court on appeal does not preclude the trial court from subsequently on proper motion setting aside interlocutory decree, correcting clerical error in findings, and ordering judgment in accordance with corrected findings.

In Bank.

Original mandamus by Jessie Harman against George H. Cabaniss, Judge of the Superior Court of the State of California in

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and for the City and County of San Francisco. Writ granted.

H. H. McPike and Alan H. Critcher, both of San Francisco, for petitioner.

Walter A. Dold, of San Francisco, for respondent.

SHENK, J. This is a proceeding in mandamus to compel respondent, as judge of the superior court in and for the city and county of San Francisco, to pass upon a motion to set aside an interlocutory decree of divorce, correct an alleged clerical error in the findings in the action, and then render judgment on the findings so corrected.

In October, 1924, Claude H. Harman commenced an action for divorce against his wife, the petitioner herein. In paragraphs VI and VII of the complaint certain acts of extreme cruelty on the part of the defendant therein were alleged. The answer denied the alleged acts of cruelty, prayed that the divorce be denied, and affirmatively sought relief by way of separate maintenance. After trial the court denied the divorce, made no award for maintenance, but ordered the plaintiff to pay to the defendant $100 as and for counsel fees and $10 costs. The plaintiff appealed, and the judgment was reversed on the ground that the record showed that the trial court had found that all of the allegations of the complaint were true and that the plaintiff was therefore entitled to a divorce. By the judgment of this court the trial court was directed to enter an interlocutory decree of divorce in favor of the plaintiff. Harman v. Harman, 198 Cal. 695, 247 P. 194. Upon the going down of the remittitur the trial judge, pursuant to the mandate of this court and not otherwise, signed and filed on January 27, 1927, an interlocutory decree of divorce in favor of the plaintiff. Thereafter on due notice the defendant moved the court for an order setting aside said interlocutory decree, correcting an alleged clerical error in the findings, and ordering judgment in accordance with the corrected findings. On the hearing of the motion the court recognized the merit of the defendant's position, declared his belief that all of the facts alleged by the defendant were true, and that in the interests of justice the motion should be granted, but felt that he could not do so in view of the mandate of this court to enter judgment for the plaintiff. The trial court continued the matter for decision until its power in the premises should be defined. Accordingly this proceeding was commenced to compel action on the motion and to grant the same.

There would seem to be no impropriety in entertaining and passing upon the motion. The mandate of this court on the determination of the appeal had been complied with by the entry of a judgment as directed. What occurred thereafter was new matter not presented nor involved on the appeal from the judgment and was first made to appear on the presentation of the motion. The return alleges that the sole ground of the refusal to hear and pass upon the motion was the opinion of the respondent that said superior court was without jurisdiction in the premises in this, that having been directed by this court on the determination of the appeal to enter a judgment for the plaintiff, all authority to set aside the judgment entered in accordance with the direction had ceased.

Unquestionably the court, under the circumstances here presented, had and has the power to entertain and pass upon the motion. It has full power to determine whether the alleged error was clerical or judicial in character, and, if clerical, to set aside the interlocutory decree, correct the error, and enter judgment on the findings as corrected and conclusions of law to be drawn therefrom. See Biaggi v. Ramont, 189 Cal. 675, 209 P. 892. The form of the return has narrowed the issue to one of jurisdiction only. Consequently we do not feel justified in deciding, as urged by the petitioner, whether the showing made on the motion would require us to compel the granting of the same.

The peremptory writ should issue commanding the respondent to hear and pass upon the motion in question.

It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

207 Cal. 1

SAN FRANCISCO SULPHUR CO. v. CONTRA COSTA COUNTY. (S. F. 12806.)

Supreme Court of California. April 8, 1929.

1. Counties 🔑150(3)—Street improvement bonds issued by county, made payable out of fund of road district exclusively, held not to create county indebtedness beyond constitutional limit (Street Improvement Law 1907 as amended by St. 1921, p. 312; Const. art. 11, § 18; St. 1921, p. 326, § 22).

Street pavement and improvement work by county, under Street Improvement Law (St. 1907, p. 806) as amended by St. 1921, p. 312, *held* not to involve indebtedness of county over limit of indebtedness under Const. art. 11, § 18, in connection with county's bond issuance, so as to entitle property owner to enjoin levy and collection of special tax to supply bond retirement fund, since section 22 of 1921 Act makes bonds payable exclusively out of road district improvement fund, without liability on part of county, and provides for levy of special assessment tax in amount sufficient to pay principal and interest.

2. Dedication ⚿19(1), 35(3)—Making and recordation of maps showing streets, constituted dedication to public, which was impliedly accepted by supervisors ordering improvement work.

Making and recordation of maps on which streets were shown constituted offer of dedication to the public, which was impliedly accepted by the public by ordering of improvements and paving work by board of supervisors, and completion thereof before offer of dedication had been withdrawn.

3. Highways ⚿135—Assessment for street improvements held valid, though assessment was equal to market value of property (Street Improvement Law 1907 as amended by St. 1921, p. 312).

County's assessment against property of special tax to supply fund for retirement of bonds maturing under street improvement proceeding, pursuant to Street Improvement Law (St. 1907, p. 806), as amended by St. 1921, p. 312, *held* valid, though assessment was not only equal to assessed value of property, but equal to its market value; defects in proceeding being no defense in view of sections 19, 20, 23 of 1921 act.

4. Highways ⚿148—Property owner could not, in injunction suit, assert county's favoritism in fixing boundaries of assessment district, or attack amount or inequality of assesssment, where all jurisdictional steps were followed (Street Improvement Law 1907, as amended by St. 1921, p. 312; St. 1921, p. 312, §§ 19, 20, 23).

Where all jurisdictional steps were followed by county in levying special assessment under Street Improvement Law (St. 1907, p. 806), as amended by St. 1921, p. 312, property owner could not, in injunction suit, assert favoritism in fixing boundaries of the district, or attack the amount or inequality of the assessment under sections 19, 20, 23 of 1921 act.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by the San Francisco Sulphur Company, substituted in the place of the Pacific Sulphur & Chemical Company, against the County of Contra Costa. From a judgment of dismissal, plaintiff appeals. Affirmed.

Marvin C. Hix, of San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe, of San Francisco, A. B. Tinning, of Martinez, and F. Whitney Tenney, of San Francisco, for respondent.

Morgan V. Spicer and Vincent Surr, both of San Francisco, amici curiæ.

PRESTON, J. The second amended complaint filed February 20, 1926, shows this action to be one by plaintiff as a property owner against the county of Contra Costa to enjoin the levy and collection of a special tax designed to supply a bond fund to retire a quota of the bonds maturing under a street improvement proceeding begun by the said county under the Street Improvement Law of 1907, as amended by the statutes of 1921, p. 312, c. 232. To said complaint, which was supplemented by additional allegations, a demurrer was interposed by said county. Thereafter a hearing upon the said demurrer was had, and the court sustained the same without leave to amend, and on the 26th day of August, 1927, judgment of dismissal passed in favor of said county, from which plaintiff has appealed.

Appellant assigns three grounds of error. First, that the action of the board of supervisors of said county in creating an assessment district and in causing the improvement to be made therein and in issuing the bonds in payment therefor violated section 18, article 11, of the state Constitution; second, that the action of the county in this behalf was also void, because a large portion of the improvement made was upon private property and not upon public thoroughfares; and, lastly, that said tax was so discriminatory in its operation as to be void for this reason.

Appellant meets at the outset the provisions of sections 19 and 20 of the act (Stats. 1921, p. 324, 325) to the effect that, failing to protest at the time of the completion of the work, the "decision and determination of said board of supervisors * * * shall be final and conclusive as to all matters determined at said hearing and as to all errors, informalities, irregularities, or omissions which said board of supervisors might have avoided or remedied during the progress of the proceedings, or which it can at that time remedy, upon all persons entitled to be heard before said board on said matters, and no bonds and assessment or tax thereafter levied for the payment of the bonds to be issued for said work and expenses shall be held invalid by any court for any error, informality, omission or other defect in the proceedings where the resolution of intention has been actually published as in this act provided, before the said board shall have ordered the work to be done."

And appellant must meet also section 23 of the act (Stats. 1921, p. 327), which reads as follows: "Said bonds by their issuance shall be conclusive evidence of the regularity of all proceedings prior thereto under this act, and after the same are issued, no tax levied or collected for the purpose of paying the principal or interest on said bonds shall be held to be illegal or set aside or refunded by reason of any informality, irregularity, omission or defect in any of the proceedings prior to the issuance of said bonds, nor shall any action or proceeding be thereafter commenced or maintained to cancel or set aside said bonds, or to prevent the payment thereof, or the levy or the collection of a tax for such payment."

[1] Appellant's points will now be consid-

ered in the order named. Section 18 of article 11 of the Constitution, so far as here involved, reads as follows: "No county * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year. * * *" Without the assent of the electors voting at an election to be held for that purpose. Admittedly, if the tax here in question may be said to be an indebtedness or liability of the county of Contra Costa, such liability will exceed the current income and revenue for the year in question. But it is our view that the said provision is in no sense applicable to paving and other improvement work done under said act of 1907 as amended in 1921. Under the interpretation as claimed, a vote of the electors would be required in every undertaking of any considerable extent.

It will be noted that the plan provided for in said act is that the supervisors of the county shall act legislatively and as agents of the property owners benefited by the proposed work. The board fixes the boundaries of the district comprising the property believed to be benefited, and takes the lead in securing plans and specifications for the paving, the awarding of the contract, the superintendence of the construction, the acceptance of the work when completed, and the issuance of the bonds to pay for same. But in all these proceedings the county incurs no liability whatsoever, unless it specifically agrees to donate to the cost of the work. The cost of the proceedings is borne by the property benefited. The resolution of intention provides that, for the costs and expenses of the work, bonds will be issued, and that a certain portion of the principal will be payable annually, and that a special fund for the payment of said bonds will be created by the levy of special assessment taxes upon the land in the district described in said resolution.

Section 22 of the act (Stats. 1921, pp. 326, 327) provides the form of the bond, and, so far as material here, the provision is as follows: "* * * This bond is payable out of road district improvement fund number * * * exclusively, * * * and neither said county nor any officer thereof shall be holden for its payment otherwise; but in accordance with said act the Board of Supervisors * * * will annually, at the time of levying other taxes, levy upon all the land in said road improvement district a special assessment tax in an amount clearly sufficient to pay the principal and interest of said bonds as the same shall become payable. * * *" Under a fair construction of this provision of the Constitution not only is a debt or liability in excess of the current revenue not incurred, but no debt or liability is in point of fact incurred by the county. While there is no express California authority on the question, this construction was evidently conceded by the court and parties litigant in the recent case of City of Pasadena v. McAllaster (Cal. Sup.) 267 P. 873, wherein it is said: "It is admitted by the parties that if no municipally owned property be included in the assessment district no questions may arise concerning the constitutional debt limit or the charter tax limit." See the principle considered in People v. Pacheco, 27 Cal. 175, 207.

This question, however, has been the subject of discussion in many of the other states of the union, where the rule appears to be practically uniform as follows: "Contracts by a municipality for local improvements, the cost of which is to be borne by the property benefited, form no part of the indebtedness of the municipality within a constitutional limitation thereof. Therefore the municipality has a right to contract for the improvements although their cost, added to existing indebtedness, exceeds the debt limit." Note 33 A. L. R. page 1415, where decisions from many states are cited. A later note to the same effect is found in 41 A. L. R. p. 797.

Counsel cites Schuster v. City Council of City of Oakdale, 180 Ky. 760, 203 S. W. 715, to the contrary, but in this he is mistaken, for in that case the city actually pledged its credit to the payment of the bonds. The decisions of the state of Kentucky are in point of fact in line with the holding here announced, as will appear from examination of the following cases: German Nat. Bank v. Covington, 164 Ky. 292, 175 S. W. 330, Ann. Cas. 1917B, 189; Tartar v. Skaggs, 184 Ky. 58, 211 S. W. 203. A case exactly parallel with the case at bar is City of Bainbridge v. Jester, 157 Ga. 505, 121 S. E. 798, 33 A. L. R. 1406. See, also, Quill v. City of Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681. The case of Chester v. Carmichael, 187 Cal. 287, 201 P. 925, is not in conflict with these views.

[2] We next pass to the contention that the improvements were made upon property not in fact public thoroughfares, because not dedicated to the public use. We have no hesitancy whatever in holding that under the allegations of said complaint appellant is in no position to attack the sufficiency of the evidence to sustain the action of the board of supervisors in improving these thoroughfares as public streets. The contention of appellant is that, as to some of the subdivisions described in the district, the recorded maps of such subdivisions which named streets and thoroughfares were not accepted by the board of supervisors, but, on the contrary, acceptance had been denied, and that, as to others thereof accepted, the acceptance though granted was not indorsed upon the maps. It is plain that the making and recordation of these maps was an offer of dedication to the public of these spaces as thoroughfares and public streets. It is also clear from the complaint that no withdrawal of said offer of dedication has ever been made. The mere ordering of the work "done" and the completion thereof by the board of supervisors is, therefore, an

implied acceptance of the offer of dedication. Neither party could thereafter successfully contend that the thoroughfares were anything other than public streets. While it is true that the statutory proceedings for express dedication were not literally complied with, ample appears to show that an implied acceptance of dedication offer was made by the board. Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 P. 1094; People v. County of Marin, 103 Cal. 223, 227, 37 P. 203, 26 L. R. A. 659; Davidow v. Griswold, 23 Cal. App. 188, 137 P. 619. In the case of Spaulding v. Wesson, 115 Cal. 444, 47 P. 249, relied upon by appellant, there was no offer of dedication on behalf of the property owner and nothing to show that either an express or implied offer to dedicate had ever been made. In the case of County of Inyo v. Given, 183 Cal. 415, 191 P. 688, the offer of dedication was withdrawn before the act claimed as an acceptance occurred, and moreover said act was not one that legitimately tended to show acceptance.

[3, 4] The last point made by appellant that the discrimination against plaintiff is so great that the proceeding is void for that reason is untenable under the recent holding of this court in Municipal Imp. Co. v. Thompson, 201 Cal. 629, 637, 258 P. 955, where in a situation almost exactly parallel with this, to wit, where the assessment was not only equal to the assessed value but equal to the market value of the property, the assessment district was sustained, and this too before a contract to let the work had been entered into. See authorities cited in said case. Moreover, inasmuch as all jurisdictional steps were followed, appellant may not be heard now collaterally upon such questions as favoritism in fixing the boundaries of the district or the amount or inequality of the assessment. See Noyes v. Chambers & DeGolyer, 202 Cal. 542, 544, 261 P. 1006; Blake v. City of Eureka, 201 Cal. 643, 258 P. 945; Watkinson v. Vaughn, 182 Cal. 55, 58, 186 P. 753; Chase v. Trout, 146 Cal. 350, 357, 80 P. 81.

The judgment of the court below is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

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206 Cal. 769

BELLEW v. BELLEW. (L. A. 11106.)

Supreme Court of California. March 30, 1929.

1. Divorce 🔑181—Filing of notice of appeal 70 days after entry of divorce decree, without service of notice thereof, held timely (Code Civ. Proc. §§ 660, 939).

Filing of notice of appeal 70 days after entry of interlocutory divorce decree was timely, where no notice of entry of judgment was served on defendant; such failure extending time for decision on motion for new trial and filing of notice of appeal far beyond such time, under Code Civ. Proc. §§ 660, 939.

2. Appeal and error 🔑345(1)—New trial proceedings were duly initiated, though memorandum was not served and filed within 10 days after filing notice of intention (Code Civ. Proc. §§ 660, 939; Superior Court Rule 20, subd. 5).

New trial proceedings were duly initiated, so as to extend time for filing notice of appeal 30 days from termination thereof, under Code Civ. Proc. §§ 660, 939, though appellant failed to serve and file memorandum of points and authorities within 10 days after filing notice of intention to move for new trial, as required by Superior Court Rule 20, subd. 5.

3. New trial 🔑128(1)—Rule that memorandum be served and filed within 10 days after filing notice of intention to move for new trial held merely directory (Superior Court Rule 20, subd. 5; Superior Court Rule 19, subd. 4).

Superior Court Rule 20, subd. 5, requiring that memorandum of points and authorities be served and filed within 10 days after filing notice of intention to move for new trial, without prescribing penalty for violation thereof prior to its amendment (rule 19, subd. 4), was directory only.

In Bank.

Action by Maude C. Bellew against J. D. Bellew. Decree for plaintiff, and defendant appeals. On motion to dismiss the appeal. Motion denied.

J. D. Bellew, in pro. per.

Kemper Campbell and Chas. L. Nichols, both of Los Angeles, for respondent.

SHENK, J. The respondent has moved to dismiss the appeal herein on the ground that the appeal was not taken within the time prescribed by law. The action is one for divorce. An interlocutory decree of divorce was granted to the plaintiff and was entered on August 16, 1928. No notice of entry of judgment was ever served on the defendant. The defendant served his notice of intention to move for a new trial on August 21, 1928, and said notice was filed on August 22, 1928. The memorandum of points and authorities required by subdivision (5) of rule 20 of rules regulating business of the superior court, effective August 1, 1928, to be served and filed within 10 days after the filing of notice of intention to move for a new trial, was not served or filed. On October 25, 1928, without any further steps in the new trial proceedings, the defendant filed his notice of appeal.

[1] The respondent contends that the effect of a noncompliance with the provisions of said subdivision (5) of rule 20 was that the new trial proceedings were not duly initiated, and therefore that the time within which the

appeal might have been taken was not extended 30 days from any termination in the trial court of the new trial proceedings, and that the notice of appeal should have been filed within 60 days from entry of judgment. Code Civ. Proc. § 939.

If, nothwithstanding the rule, the new trial proceedings were duly initiated, then the notice of appeal was unquestionably filed in time, for the failure to serve notice of entry of judgment had the effect of extending the time within which the trial court might pass on the motion for a new trial and of extending the time for the filing of the notice of appeal far beyond the time when it was actually filed. Code Civ. Proc. §§ 660, 939; Gross v. Hazeltine (Cal. Sup.) 273 P. 550.

[2, 3] We think the existence of the rule and noncompliance with the requirement thereof, as shown, did not have the effect contended for by respondent. Under the rule in force at the time no penalty was prescribed for its violation and its provisions must be deemed to have been directory only. As amended (rule 19, sub. 4, effective February 1, 1929), the rule provides as a penalty for its violation an abandonment by implication of the right to argue the motion.

We conclude that the new trial proceedings were duly initiated within the meaning of the decisions in Estate of Bergland, 177 Cal. 227, 228, 170 P. 400, and Gross v. Hazeltine, supra.

The motion to dismiss the appeal is denied.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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206 Cal. 772

MELVIN v. CARL et al. (L. A. 11035.)

Supreme Court of California. March 30, 1929.

1. Appeal and error 🔑783(2)—Failure to file memorandum supporting motion for new trial held not ground for dismissing appeal (Superior Court Rule 20, subd. 5; Code Civ. Proc. § 939).

Failure to file memorandum of points and authorities, required by Superior Court Rule 20, subd. 5, to be filed within 10 days after filing notice of intention to move for new trial, *held* not ground for dismissal of appeal for failure to file notice thereof within 60 days after entry of judgment, as required by Code Civ. Proc. § 939, where new trial proceedings have not been duly initiated.

2. New trial 🔑155—Failure to set motion for new trial for hearing within 50 days after service of notice of judgment entry would not prevent ruling on motion within two months (Superior Court Rule 20, subd. 5; Rule 19, subd. 4; Code Civ. Proc. § 660).

Noncompliance with superior court rule 20, subd. 5, readopted as rule 19, subd. 4, requiring that motion for new trial be set for hearing within 50 days after service of notice of entry of judgment, would not divest trial court of jurisdiction to pass on motion at any time within two-months period prescribed by Code Civ. Proc. § 660; penalty implied by rule being to permit denial of motion by operation of law.

3. Courts 🔑92—Opinion that notice of motion for new trial, which was found sufficient, must substantially comply with statute, held dicta (Code Civ. Proc. § 659).

Declaration in Supreme Court opinion that trial court has no jurisdiction to entertain motion for new trial, unless notice of intention is given substantially as prescribed by Code, *held* dicta, not determinative of question whether appeal should be dismissed, because such notice did not state whether motion would be made on affidavits, court minutes, or both, as provided by Code Civ. Proc. § 659, where notice involved in such case was found sufficient.

4. Appeal and error 🔑783(2)—Failure of notice to state whether motion for new trial would be made on affidavits or court minutes held not ground for dismissing appeal (Code Civ. Proc. §§ 659, 939).

That notice of intention to move for new trial did not state whether motion would be made on affidavits, court minutes, or both, as provided by Code Civ. Proc. § 659, *held* not ground for dismissal of appeal; proper course being for trial court to deny motion or dismiss proceedings, which would constitute termination thereof, within section 939.

In Bank.

Action by Martha E. Melvin against Ida M. Carl, executrix of the estate of Fred W. Carl, deceased, and others. Judgment for defendants, and plaintiff appeals. On motion to dismiss the appeal. Motion denied.

Robert Shippee and C. C. Caswell, both of Los Angeles, for appellant.

Lucian J. Clarke, of Los Angeles, for respondents.

SHENK, J. The respondents filed a motion to dismiss the appeal herein on the ground that the same was not taken within the time prescribed by law. Judgment in the action was entered on July 23, and notice of entry of judgment was served on July 27, 1928. Plaintiff served and filed her notice of intention to move for a new trial on August 1, 1928. The motion was noticed to be heard on September 26, 1928, and was called for hearing on that day. The motion was opposed on the grounds (1) that the notice of intention to move for a new trial was defective because it did not state whether the same would be made upon affidavits or the minutes of the court or both, as provided by section 659 of the Code of Civil Procedure; (2) that the motion was not set to be heard in compliance with subdivision (5) of rule 20 of the rules regulating business of the superior court, effective August 1, 1928, which required that the motion shall be set for hearing not later than 50 days after service of notice of entry of judgment; and (3) that the memorandum of points and authorities required by said subdivision (5) of rule 20, as then in force, to be filed within ten days after the filing of the notice of intention to move for a new trial had not been filed. The trial court denied the motion for a new trial, and on October 5, 1928, the plaintiff served and filed her notice of appeal.

The respondents contend that the grounds of opposition to the granting of the motion for a new trial made to the trial court are sufficient grounds for the dismissal of the appeal for the reason, as contended, that the requirements of the statute and rule are mandatory, and unless complied with the trial court had no jurisdiction to entertain the motion; that the new trial proceedings therefore have not been duly initiated; and that the time within which the notice of appeal should have been filed was the 60-day period, commencing from the entry of judgment, as provided by section 939 of the Code of Civil Procedure.

[1, 2] The third ground for the motion to dismiss the appeal is disposed of by our decision in the case of Bellew v. Bellew (L. A. No. 11106) 276 P. 573, this day filed. As to the second ground, it will be noted that in the rule as originally adopted and effective August 1, 1928, and as readopted (rule 19, subdivision 4, effective February 1, 1929, and applicable only to counties having nine or more judges), no specific penalty was or is provided for failure to set the motion for hearing not later than 50 days after the service of notice of the entry of judgment. The obvious purpose of the rule is to have the motion for a new trial set down for hearing at a time sufficiently in advance of the expiration of the two-months period prescribed by section 660 of the Code of Civil Procedure to enable the trial judge properly to consider and act upon the motion and avoid a denial thereof by operation of law. The penalty plainly implied by the rule is that, if the motion be not set down for hearing within the provided time, the noncompliance with the rule would operate as a good and sufficient reason or justification for the trial court to permit the motion to be denied by operation of law. In any event the failure to comply with the rule would not divest the trial court of jurisdiction to pass upon the motion at any time within the full two-months period.

[3, 4] The final ground urged for a dismissal of the appeal presents a more difficult problem. The effect of informalities and defects in a notice of intention to move for a new trial has frequently been considered by our appellate tribunals. See Hoover v. Wolfe, 167 Cal. 337, 139 P. 794, and cases cited; Hughes v. Alsip, 112 Cal. 587, 590, 44 P. 1027; Truitner v. Knight, 78 Cal. App. 508, 248 P. 702; Cormond v. United Railroads, 41 Cal. App. 683, 183 P. 218; 20 Cal. Jur. p. 178. From an examination of the cases it will be seen that defects in the notice have often been held fatal on an appeal involving the ruling on the motion. Yet, so far as we have been able to ascertain, it has never been held that a defective or informal notice has had the effect of depriving the party intending, as here, in good faith to move for a new trial, of the right to delay the filing of his notice of appeal until after the termination of the new trial proceedings. We are aware that in the case of O'Connell v. Main & Tenth St. Hotel Co., 90 Cal. 515, at page 518, 27 P. 373, the court declared itself in agreement with the contention of the respondent that the trial court had no jurisdiction to entertain the motion for a new trial unless the notice of intention was given substantially as prescribed by the Code. However, the notice of intention involved in that case was found to be sufficient. The declaration of the court on the question of jurisdiction was therefore not necessary to the decision. We incline to the view, and therefore hold, that if the notice of intention to move for a new trial be not substantially as prescribed by the statute, the proper course to be pursued is for the trial court either to deny the motion or to dismiss the proceedings. Such denial or dismissal would constitute a "termination in the trial court of the proceedings upon such motion" as contemplated by section 939 of the Code of Civil Procedure, and the time for filing notice of appeal would run from such denial or dismissal.

The motion is denied.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.

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207 Cal. 36

CAPPELLINO et al. v. MOORE et al.
(L. A. 8976.)

Supreme Court of California. April 9, 1929.

Appeal and error 🔑781(6)—Appeal will be dismissed as moot where appellant had filed formal waiver of further right to prosecute it.

Appeal in suit to cancel land contract will be dismissed as having become moot, where appellant deposited quitclaim deed to respondents together with formal receipt and satisfaction of all claims which appellant might have against respondents and formal waiver of any further right to prosecute appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Suit by Joe Cappellino and another against L. M. Moore and others to cancel a contract for the sale and purchase of real property. Judgment for plaintiffs, and named defendant appeals. Appeal dismissed.

L. M. Moore and I. Henry Harris, of Los Angeles, for appellant.

Andreani & Haines and Dana R. Weller, all of Los Angeles, for respondents.

RICHARDS, J. This appeal is from a judgment of the superior court in and for the county of Los Angeles, made and entered in the plaintiffs' favor, canceling a certain contract which had been entered into between the parties to this action for the sale and purchase of a certain tract of land, by the terms of which the defendant and appellant Moore had agreed to purchase and to make certain installment payments upon the purchase price of said land. Having failed to make payment of certain of these installments plaintiffs elected to declare a forfeiture of the contract and to procure a cancellation thereof by means of this action. Upon the trial of the cause upon the issues framed by the pleadings the trial court made its findings in favor of the plaintiffs and thereupon entered the judgment, from which this appeal was taken. The date of the entry of the judgment was July 11, 1925, and the date of the defendant's appeal therefrom to this court was August 7, 1925. The opening brief of the appellant was filed on January 4, 1926. No respondents' brief having been filed, this court on November 2, 1928, issued and caused to be served upon counsel for the parties to this appeal an order to show cause why the respondents' brief had not been filed and why this court should not make such order as should be meet in the premises.

In response to this order counsel for the respondents presented an affidavit, which set forth in substance that on or about April 26, 1926, they had entered into a contract with one Hersie Mau for a sale of a portion of the property involved in this action, and as part of the consideration of such sale the respondents had agreed with said Hersie Mau to credit on account of the purchase price certain moneys which had theretofore been paid to and accepted by the appellant L. M. Moore; that said L. M. Moore and one P. M. Reidy had participated in the execution of the contract above referred to; and that as a condition to the execution of said contract the respondents herein had demanded that Hersie Mau and his associates procure a quitclaim deed to all the property involved in this action from said L. M. Moore and a release of any and every claim which said L. M. Moore might make against the respondents, and also a dismissal of this appeal; that the papers containing the foregoing stipulation were deposited in escrow on said date with the Merchants' National Trust & Savings Bank of Los Angeles for the purpose of delivery upon the completion of the escrow through the deposit of said quitclaim deed and release and of a formal dismissal of this action; that on or about the 2d day of July a quitclaim deed from said L. M. Moore to the respondents was so deposited, together with a formal receipt and satisfaction of any and all claims and demands which said L. M. Moore might have or make against the respondents, and also a formal waiver of any further right to prosecute this appeal. Thereupon the escrow was closed, and counsel for the respondents supposed that this appeal had been dismissed, and for that reason presented no respondents' brief therein. In response to this affidavit the appellant caused to be filed an affidavit wherein the facts of the creation of said escrow and of the making and execution by appellant of said quitclaim deed and acquittance and waiver of this appeal were admitted, but affiant deposed that he had never received the benefits to which he would have been entitled under said escrow and that the same had never been closed in such manner as to entitle him to receive such benefits, and hence that his quitclaim deed and acquittance were ineffectual, and that this appeal should not be dismissed. Upon the submission of said order to show cause certain other affidavits were presented by the respective parties, bearing upon the question as to whether or not the said escrow had been closed in accordance with the spirit and intent of those who were parties thereto, and whether as the result thereof said deed, acquittance, and waiver of this appeal had been duly delivered to the respondents herein. Without reciting the content of these affidavits in detail we are satisfied that they sufficiently show that said escrow and the transaction to which it related were duly completed during the month of July, 1926, and that thereupon the respondents became entitled to and actually received the delivery of the appellant's quitclaim deed, acquittance, and waiver of this appeal. Whether or not the appellant received all or any of the anticipated benefits arising from the execution and delivery of said documents are or may be matters of controversy between himself and those certain parties who were interested with him in said transaction, but are of no concern to the respondents herein as to whom the appellant by virtue of the execution and delivery in due course of said documents fully waived all of his claims and demands against the respondents as set forth in his pleadings and proofs in this action, and also fully waived and abandoned his rights under this appeal.

This being so, it appears that by virtue thereof this appeal has become moot, and upon the hearing to show cause issued by this court herein and the showing made thereon, it is hereby ordered that this appeal be and the same is hereby dismissed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

207 Cal. 44

KUHLKEN et al. v. MANGINI et al.
(S. F. 12767.)

Supreme Court of California. April 9, 1929.

New trial ⚷159—Judge sitting in place of judge hearing case properly declined to rule on motion for new trial, evidence not being written up.

Judge sitting in place of judge hearing case properly declined to make order on motion for new trial, and ordered motion dropped, where testimony taken upon trial of action had not been written up by reporter, and no request had been made that it should be written up, and the two months' period provided for in Code Civ. Proc. § 660 limiting court's power to pass on motions for new trial expired three days later.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey and Edward W. Engs, Judges.

Action by Anna Mary Ernest Kuhlken and others against Maria Mangini, individually and as administratrix of the estate of Luigi Mangini, deceased. From a judgment for defendants, plaintiffs appeal. Affirmed.

R. M. F. Soto, of San Francisco, for appellants.

Jas. T. O'Keefe, of Redwood City, and J. A. Kennedy and Raymond Salisbury, both of Oakland, for respondents.

RICHARDS, J. The plaintiffs have appealed from a judgment in favor of the defendants in an action to quiet title to certain real property described in the complaint, in which action a cross-complaint was filed by the defendant Maria Mangini in her individual capacity and as administratrix of the estate of Luigi Mangini, deceased. Upon the trial of the cause judgment was rendered and entered denying the plaintiffs the relief sought, and adjudging that the title to the property be quieted in favor of the defendants upon their cross-complaint. Thereafter the plaintiffs gave notice of intention to move for a new trial upon three grounds, namely: (1) Insufficiency of the evidence to justify the decision; (2) that the decision is against law; and (3) errors of law occurring at the trial and excepted to by the plaintiffs. The notice of intention stated that the motion for new trial would be made upon the minutes of the court, and that the motion would be called for hearing on May 20, 1927. The cause had been tried and the judgment therein rendered by Hon. J. D. Murphey, judge of the superior court of Alameda county. Thereafter Judge Murphey was assigned to sit for a season in the District Court of Appeal in and for the Second Appellate District, sitting in the county of Los Angeles, and, when the plaintiffs' motion for a new trial came on for hearing on May 20, 1927, Hon. J. J. Trabucco was sitting in the place and stead of Judge Murphey in the superior court of the county of Alameda. The motion was continued on the calendar from May 20 to June 3, 1927, on which date Hon. Edward W. Engs, judge of the superior court of the county of Sierra, was sitting in the place and stead of Judge Murphey, and said motion coming on for hearing before him was again continued to June 10, and upon that date was again continued until June 24. Counsel for plaintiffs and defendants were present in court upon each occasion when these several continuances were had, and upon each occasion it was manifest that the motion was in no condition to be heard upon its merits, for the reason that the testimony taken upon the trial of the action had not been written up by the reporter, and that no request had been made by the plaintiffs that it should be so written up or presented to the judge presiding in said court upon each occasion when the motion came on to be heard. Upon several of these occasions the respondents offered in open court to stipulate for the submission of the motion upon briefs to be filed and for the transmission of such briefs to Judge Murphey, in order that he might act upon said motion. Counsel for the appellants, however, refused to enter into such stipulation, and the matter stood in the foregoing condition when the motion finally came on for hearing on June 24, 1927, when counsel for the respective parties were present and offered to submit the motion without argument to Judge Engs, who was then presiding in said court. In the absence of such argument and of the evidence taken at the trial, it is obvious that Judge Engs, who had not presided at the trial, and who was wholly unfamiliar with the evidence taken therein and with the rulings of the trial judge thereon, was utterly unable to act intelligently upon said motion. He therefore made the following order: "Counsel for plaintiffs present said motion and after statement of respective counsel and in the absence of J. D. Murphey, judge who presided at the trial of said action, and owing to the short time left to consider the said motion, the court not being fully advised in the law and premises declines to make a ruling and said motion is ordered dropped." The foregoing was the only order or ruling made upon the motion for a new trial or in any manner disposing of said motion. Three days later, however, the two months' period provided for in section 660 of the Code of Civil Procedure, limiting the power of the court to pass upon motions for new trial, expired, and, such motion not having been otherwise determined within said time, the effect thereof under said section amounted to a denial of the motion. After the expiration of said period, and within the time provided by law, the plaintiffs gave notice of appeal from said judgment and

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

also gave notice of an appeal from the order made and entered on June 24, 1927, the substance of which is above set forth. Upon said appeals the plaintiffs caused to be prepared and filed a bill of exceptions, which relates wholly to their motion for a new trial and to the order made and entered therein from which the latter appeal was attempted to be taken, and in which bill of exceptions the facts above stated are substantially set forth.

The brief upon these appeals presented on behalf of the appellants contains no word of attack or criticism upon the integrity of said judgment, but is wholly devoted to the appellants' contention that they have suffered substantial injury through the order of Judge Engs, declining to take cognizance of the appellants' motion for a new trial for the reasons which are above set forth. There is no merit in the appellants' contention in the foregoing regard. By their own action or nonaction Judge Engs had been rendered unable at the time the said motion came finally before him for hearing to make any intelligent order in the premises, and he therefore properly declined to make said order. The effect of his declination in that regard was simply to leave the matter in a condition wherein section 660 of the Code of Civil Procedure would inevitably become effective in woking a denial of the plaintiffs' motion for a new trial in the absence of any further effort on the part of the plaintiffs to prosecute said motion or to provide for its submission upon the merits. They therefore suffered no further or other injury from the making and entry of said order than that which inevitably befell them when, by reason of their own passivity, the two months' period provided in section 660 of the Code of Civil Procedure was permitted to pass without the determination of the motion upon the merits.

The appellants having, upon their appeal from the judgment, presented no reason why the judgment should be reversed or why their motion for a new trial was not properly disposed of on the merits, the judgment and order herein are, and each of them is, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.

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98 Cal. App. 206

PEOPLE v. KUDER et al. (Cr. 1757.)

District Court of Appeal, Second District, Division 2, California. April 10, 1929.

1. Licenses 🔑42(4)—Evidence as to sale of stock to incorporators who paid therefor with checks of corporation, leaving no bank balance in corporation's favor, held to show violation of Corporate Securities Act (St. 1917, p. 673).

In prosecution for violating the Corporate Securities Act (St. 1917, p. 673), evidence that articles of incorporation and application for permit to sell stock stated that proceeds of sale of stock for full cash value would be devoted to purposes specified in articles of incorporation and permit was issued in conformity therewith, and evidence that incorporators issued stock to themselves and paid for same by checks of corporation in same amounts as stock, so that corporation had no bank balance at any time, showed violation of Securities Act and fraud on public.

2. Licenses 🔑42(4)—Attorney for corporation held shown to have participated in offense of issuing stock to himself and others without consideration (Corporate Securities Act).

In prosecution against incorporators for violation of Corporate Securities Act (St. 1917, p. 673) by issuing stock of corporation to themselves without paying cash therefor to corporation, as required by application for permit to sell stock, evidence that defendant was attorney for corporation, organizing and signing articles of incorporation, reciting that he subscribed $100 and was stockholder to extent of one share, and evidence that defendant as secretary of corporation, had possession of records, was not entirely circumstantial, but was sufficient to show that defendant had knowledge of unlawful scheme and participated in offense.

3. Licenses 🔑42(4)—Application and permit to sell capital stock constituting original files offered by corporation commissioner through assistant held properly admitted in prosecution for violation of Corporate Securities Act (St. 1917, p. 673; Code Civ. Proc. § 1918, subd. 6).

In prosecution against incorporators for violation of Corporate Securities Act (St. 1917, p. 673) by issuing stock of corporation to themselves without paying cash therefor to corporation as required by application for permit to sell stock, application for permit and permit to sell stock were properly admitted in evidence, where auditor testified that he prepared records of corporation from official archives thereof and application and permit were stamped "Received State Corporation Department" and records were original files offered by corporation commissioner through one of his assistants and not required to be identified, under Code Civ. Proc. § 1918, subd. 6.

4. Licenses 🔑42(4)—Evidence that defendant, prosecuted for violating Corporate Securities Act, signed minutes of meetings and other documents, held sufficient to show he was secretary of corporation (Corporate Securities Act).

In prosecution against incorporators for violation of Corporate Securities Act (St. 1917, p. 673) by issuing stock of corporation to themselves without paying cash therefor to corporation, as required by application for permit to sell stock, evidence that defendant signed minutes of meetings of board of directors as secretary and other documents and evidence identifying signatures as defendant's was sufficient to show that defendant was secretary of corporation.

5. Criminal law ⚷444—Corporate books and records of corporation signed by secretary held properly admitted in prosecution for violation of Corporate Securities Act (St. 1917, p. 673).

In prosecution against incorporators for violation of Corporate Securities Act (St. 1917, p. 673) by issuing stock of corporation to themselves without paying cash therefor to corporation, as required by application for permit to sell stock, books, and records, *held* properly received in evidence as official recitals of corporate acts and defendant's participation therein, where auditor testified that he examined books received from defendant, showing that records were signed by defendant as secretary and were in harmony with operations of corporation.

6. Criminal law ⚷444—Records of bank made in regular course of business and testified to by witness who was cashier when records were made held properly admitted in evidence (Corporate Securities Act).

In prosecution against incorporators for violation of Corporate Securities Act (St. 1917, p. 673) by issuing stock of corporation to themselves without paying cash therefor to corporation as required by application for permit to sell stock, records of bank with which corporation did business *held* properly received in evidence, where bank cashier swore records were part of corporation's account, though he was not cashier at time records were compiled, but further testimony showed that records were made in regular course of business, and witness who was cashier when records were compiled testified to records.

7. Criminal law ⚷1144(13)—Records of bank made in regular course of business will be presumed correct (Corporate Securities Act).

In prosecution against incorporators for violation of Corporate Securities Act (St. 1917, p. 673) by issuing stock of corporation to themselves without paying cash therefor to corporation as required by application for permit to sell stock, records of bank shown by evidence to have been made in regular course of bank's business, though not showing connection with bank on their face, but explained and read into record, will be presumed to have been correct and evidence taken as true.

8. Licenses ⚷18½—Corporate Securities Act is intended to protect stockholders and merchants dealing with corporation from loss (Corporate Securities Act).

Purpose of Corporate Securities Act (St. 1917, p. 673) is to shield purchasing stockholders from fraud and to protect merchants and tradesmen who may deal with corporation from loss through extended credit.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

J. M. Kuder and others were convicted of violating the Corporate Securities Act, and defendant Stephen Bedford appeals. Affirmed.

Raymond E. Hodge and William Guthrie, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

CRAIG, J. This case was before us on motion to dismiss an appeal by the People (People v. Kuder et al. [Cal. App.] 266 P. 337), and upon the merits of that appeal; the same being from an order granting a motion in arrest of judgment (People v. Kuder et al. [Cal. App.] 269 P. 198; Id. [Cal. Sup.] 269 P. 630).

It appears that during the month of July, 1925, a corporation named Fishelton Farms, Inc., was incorporated under the laws of this state by J. M. Kuder, Edward B. Fishel, U. R. Fishel, C. G. Luke, and Stephen Bedford, appellant herein. In August of the same year, by a petition verified by J. M. Kuder, filed with the commissioner of corporations, it was recited, among other things, that the corporation was organized with a capital stock of $25,000, divided into 250 shares of the par value of $100 each, which the incorporators agreed to subscribe and pay for in cash, and prayed leave to issue and sell the whole thereof to said incorporators at par, without payment of brokerage. A permit was thereafter issued, authorizing Fishelton Farms, Inc., a California corporation, to sell and issue to its five incorporators an aggregate of 250 shares of its capital stock at par, for cash, so as to net the applicant the full amount of the selling price thereof.

The appellant and his coincorporators were subsequently indicted by the grand jury of San Bernardino county, and charged with having violated the Corporate Securities Act, a felony. Specifically, they were alleged to have willfully, unlawfully, knowingly, fraudulently, and feloniously authorized and directed and aided in the issue and sale of, and caused and assisted in causing to be issued, executed, and sold, 246 shares of the capital stock of said corporation, without paying, remitting or delivering to the corporation, or demanding, obtaining, or receiving for and on its behalf, or paying, remitting, or delivering thereto, cash, so as to net it the full amount of the selling price of said shares as provided by the terms of the permit, with intent to avoid and violate the terms thereof, contrary to the uses and purposes to which the petition of the applicant had represented to the commissioner of corporations that the proceeds of sale should be applied. Briefly stated, the grand jury charged the defendants with having issued to themselves $24,600 worth of corporate stock without paying anything therefor, but for which they agreed, as a basis for obtaining a permit, and were accordingly directed to pay to the corporation full cash value at par. Pursuant to a trial upon the foregoing charges, a verdict was returned reciting that "the jury in the above entitled action, find the defendant guilty as charged in the indictment." The trial court, following the proceedings therein and in the appellate tribunals, as above recited, ruled that: "This is not a felony. They are guilty of a misdemeanor. They are not guilty of a felony. * * * I think the law is clear enough that the penalty determines the degree of the crime"—and assessed a fine of $500 in each instance, with the alternative of being imprisoned in the county jail one day for each $2 thereof. The defendant Stephen Bedford appealed "from the order * * * denying his motion for a new trial, and from the judgment rendered in this cause."

The appellant's argument is premised by quoting the indictment as a "statement of the offense," and a presentation of certain exhibits introduced upon the trial which it is asserted constitute all of the evidence against him. The exhibits in their numerical order, as introduced by the people, consist of the following: (1) A book entry showing assets in the nature of a poultry business in Indiana inventoried at $34,990, and one in California inventoried at $33,319.64; liabilities, $23,869.46; surplus, $44,440.18; and reciting that the poultry business was purchased from J. M. Kuder for $25,000 by Fishelton Farms, Inc., whose entire authorized capital stock of $25,000 was sold to the five incorporators for cash, with the agreement that the corporation should pay the liabilities above mentioned, all "as set forth in the following balance sheet," which latter does not exist. (2) Certain book entries showing credits to the corporation by issuance of stock, $24,600 to Kuder, and $100 to each of the other incorporators, with corresponding debits of like amounts appearing as cash in bank received from the same persons on the same date; also entries, "Purchase price $24,600," "Stephen Bedford, legal services, $100," and $100 to each of the other incorporators for services rendered. (3) Stock journal showing stock certificates issued, of which appellant received one share. (4) Minutes of directors' meeting, authorizing purchase of certain real and personal property from Kuder at $24,600 cash and promissory note of $12,000, and payments for services above noted. (5) Stock certificate book showing issuance of said shares. (6) Articles of incorporation. (7) Application of the corporation for permit; and (8) the permit to issue stock. (11) Five bank checks in favor of Kuder in the sum of $24,600, and $100 each to the other incorporators. (12) Ledger sheet, bearing entries to account of the corporation of a deposit of $25,000 on September 30, 1925, and issuance on the same date of the checks last mentioned, leaving "Balance .00," and deposit to the company's credit on October 2, 1925, of $6.10. (13) Loose-leaf ledger sheet account of Stephen Bedford, consisting of a deposit September 30, 1925, of $100 and corresponding withdrawal of the same amount by check on the same date, leaving "Balance, .00" (14, 15, 16). Like accounts of others of the incorporators, including J. M. Kuder, "deposit $24,600, checks $24,600, balance .00," on September 30, 1925. (17) "San Bernardino Valley Bank, Deposit of Fishelton Farms, Inc.," deposit slip of the same date last mentioned, of checks received from the incorporators, four of $100 each, and one of $24,600. (18, 19, 20, 21, 22) Five individual deposit slips, showing deposits in the same bank on the same date to their respective private accounts of similar amounts, including "Stephen Bedford 9—30—25 Check $100.00."

The case was prosecuted upon the theory that, as to appellant herein, a certificate for one share of stock for which he was required by the permit to pay cash was issued to him; that he deposited in an account wherein he had no funds, a check of the corporation for $100 which his coincorporators issued against its account which had no funds, and that appellant in turn gave to the corporation as an ostensible payment for his share of stock a personal check for $100, which merely offset the worthless check of the corporation. In short, it was contended by the People, and the evidence strongly tends to show without contradiction, that the whole purpose of the incorporators was to mulct the corporation of the entire issue of $25,000 in capital stock without payment of one dollar of cash or credit. The purported entries tend to indicate that appellant received $100 by check for legal services in incorporating the Fishelton Farms, Inc., which he deposited in its bank, and immediately checked out in its favor for his one share of capital stock. All of the respective accounts consist of contemporaneous credits and debits, in spite of which there were no funds ever in the possession of the bank, and it requires no degree of expert bookkeeping to reveal the fact that it received nothing and disbursed nothing through the checking system of the depositors, and the corporation received nothing for the certificate of stock issued to appellant.

No evidence was offered by the defendant Bedford, except through witnesses who testified to his previous good character, and through the briefs there is no attempted denial of the facts as herein recited.

[1] It is first contended that the Corporate Securities Act (St. 1917, p. 673) does not make it unlawful to pay to the corporation cash for its capital stock, or to use cash obtained from the sale thereof for purposes other or contrary to those recited in the application, or to issue or sell shares of stock without demanding or receiving cash for capital stock; that it does provide that it is a crime to violate any provision of a permit; but that the permit here involved does not require that persons receiving its stock shall pay cash therefor to the corporation, or that

the corporation shall use the cash so obtained for the uses and purposes recited in the application. It is sufficient answer to this argument, however, that the articles of incorporation specified the purposes of the corporation, its application for permit stated under oath that the proceeds of sales of stock for full cash value, at par, would be devoted to those purposes, and the permit itself was issued in pursuance and conformity with these and other documentary evidences of responsibility and good standing of the incorporators and of their fictitious creation, requiring that each share of stock should be issued and sold to the incorporators for the sum of $100, in cash, "so as to net the applicant the full amount of the selling price thereof." Since the corporation had no balance in the bank at its inception, and none after the stock was issued and disposed of, it results that the permit was flagrantly ignored and violated in its most essential requirement, and that the public, in dealing with a concern ostensibly having a cash capitalization of $25,000 on hand, would be compelled to resort for satisfaction of corporate obligations to the unexplained ultimate balance of $6.10, which was deposited after the evident "wash" had been consummated.

[2] It is argued, however, that appellant was not alleged to have been an officer or employee of the corporation, or to have been charged with the duty of participating in the issuance or sale of stock; that, although there was evidence that he was a director, and treasurer, and that he participated in meetings of directors which resolved that the stock should be sold for cash, this all tended to show compliance by him with the requirements of the permit, and that he cannot be held chargeable with knowledge of the contents of the accounts. The effect of this argument is that there is no evidence that appellant received the share of stock issued in his name, or that he took any part in the alleged violation of the terms of the permit. In this he attempts to rely upon People v. Blackman, 127 Cal. 248, 59 P. 573, which merely holds that books and records kept by a deceased accountant, over which it did not appear that the defendant had supervision or control, were not sufficient evidence of embezzlement of funds therein appearing to have been illegally converted. The record before us discloses that appellant was attorney for the Fishelton Farms, Inc., that he organized it, signed and acknowledged its articles of incorporation, stating that he subscribed $100, and that he was a stockholder to the extent of one share; that he prepared the application for permit to issue and sell the stock for net cash, stating therein that he was treasurer and a director, and making the articles of incorporation a part thereof. The by-laws of the corporation, which bear the legal form and phraseology creditable to an experienced lawyer, recite for the information of the corporation commissioner, "The treasurer shall receive and keep all the funds of the corporation and pay them out only on the check or warrant of the president countersigned by the secretary"; and are also made a part of the application. As secretary of the corporation, appellant had possession of its books and records, and delivered them to an auditor who examined them, and from whose testimony as a witness in the case the financial manipulations of the incorporators are detailed herein. We think the evidence from which the jury may have concluded that appellant participated in the offense, by aiding in the issuance of stock to himself as well as to others, without consideration and in violation of the permit, was ample. It was by no means wholly circumstantial, and in its entirety it cannot be said as a matter of law insufficient to convince an unbiased mind beyond a reasonable doubt that appellant as attorney for the others was cognizant of, and directed, the machinations of their unlawful scheme, and that he received stock of the corporation without paying for it.

[3] It is insisted that the application for permit and the permit to issue and sell the capital stock in question were improperly admitted in evidence over objections that they were incompetent, irrelevant, and immaterial, and that no foundation for their introduction had been laid. The auditor of the corporation commission testified that he had been such for two and a half years, that he made an examination and investigation of the books and records of the corporation in controversy, and that he had with him and was then and there producing the files of the Fishelton Farms, Inc., from the official archives of the Corporation Commission. The application and permit were stamped, respectively, "Received State Corp. Dept.," August 13, 1924, and September 5, 1925. Appellant contends that there is no provision in the statute authorizing the employment of an auditor by the commission, and that these documents were therefore not offered "by the original, or by a copy, certified by the legal keeper thereof," as provided by subdivision 6 of section 1918 of the Code of Civil Procedure, nor brought into court by a legal officer of that department. The witness swore, however, that they were the files of both the Sacramento and Los Angeles divisions of the department; that he knew one of them to be the application filed by Fishelton Farms, Inc., with the Corporation Commission, and that he knew the other to be the permit issued by that commission to said corporation. Section 16 of the statute authorizes the commissioner to employ such clerks and deputies as may be necessary to discharge the duties of his office, and, since the witness was admittedly employed as a bookkeeper or accountant, we are unable to perceive any ground for disqualifying him because he may have been an expert, or for doubting his knowledge of the

genuineness of the records of his superior. Under the existing circumstances, the documents in controversy did not require certification by their legal keeper, since they were the original files, in the hands of a member of the department, regardless of the name by which such a clerk or deputy might be designated by the commissioner. There is no merit in this contention.

[4, 5] Appellant next contends that there is no legal evidence of the fact that he was secretary of the corporation, or that any of the corporate records comprising exhibits heretofore mentioned were its property, or were under his control, or were true and correct, and that they should not have been admitted over objections interposed upon the foregoing grounds. A witness, J. K. Culton, testified that, as an auditor employed by the corporation to examine its books, he received them from appellant, who then indicated that he had been secretary by stating that he had theretofore resigned from that office. The minute book bore appellant's name as such secretary, repeatedly signed to minutes of directors' meetings, and the journal and ledger contained entries of items recited earlier in this opinion which but for the absence of an actual money consideration exactly comport with the numbers of shares of stock and amounts of money set forth in the application for permit, a part of which are the articles of incorporation under oath of the incorporators, including Bedford. Whether or not appellant made the entries therein, or caused them to be made, that he was secretary, cannot under all of the evidence be seriously questioned, and that he was treasurer is borne out by the records of which he at times had custody and control. Hence he was at least responsible for their accuracy, and for the funds of the corporation as prescribed by the by-laws. Appellant's signature was identified upon certain exhibits by an expert, and as we have observed, all of their dates and other entries correspond without an exception with the objects, purposes, methods and interests outlined by the articles of incorporation signed by appellant, and which he concedes were properly received in evidence. That the records of the corporation were correct in every respect need not, and in many instances cannot, be established. Patrick v. Tetzlaff, 46 Cal. App. 243, 189 P. 115. However, appellant does not attempt to advance the theory that any of them were false, and, in view of many unavoidable facts and circumstances, we think they were properly received in evidence as official and genuine recitals of the corporate acts and of appellant's participation therein. It is asserted by appellant in his briefs that Culton's testimony was stricken out, but reference to the ruling discloses that only "the testimony of Mr. Culton as to Mr. Luke's signature," as secretary, to the minutes of a special meeting of September 30, 1925, was stricken from the record.

It is also advanced as a ground for reversal that the prosecution should first have shown as a foundation for the reception of such testimony and documentary evidence, that they were kept in the regular course of business, by persons having personal knowledge of the transactions, or by those who obtained such knowledge from memoranda regularly made by persons authorized and invested with the power and duty to furnish the latter.

As to the records of Fishelton Farms, Inc., it appears that the minutes of the corporate proceedings and entries of moneys claimed to have been received and expended, were obtained from the original incorporators who at convenient and appropriate intervals were officers in charge, custody, and control of them. That appellant organized the corporation is undisputed, and his name appears as the attorney who filed the application for permit. The application contained, as exhibits, a copy of the articles and by-laws. He delivered to an auditor, when asked for the records of Fishelton Farms, Inc., the books from which were taken the entries of items constituting the evidence before us, at that time admitting that he had been secretary, and no question appears to have arisen as to the authenticity of such entries. They reflect a complete consummation of the issuance and sale of the exact number of shares, and amounts of proceeds therefrom, outlined by the application to the corporation department. All of the exhibits bear the name of appellant as incorporator, director, secretary, and treasurer, and his only complaint is that the book entries were not admitted to have been made by him or under his direction. We think, however, that their former custody, and their perfect harmony, cause all of the exhibits to so completely dovetail that the disputed ones are, as evidence of corporate operations, inseparable from those which cannot be denied, and that they were clearly admissible.

[6, 7] The bank records also were properly received in evidence. The foundation was laid by two witnesses. The witness Thompson testified that he was cashier of the San Bernardino Valley Bank at the time of the trial, and produced a number of documents, later admitted in evidence and marked "12 to 22," inclusive, which he swore were parts of the corporation account with his institution. This witness, not having been cashier or otherwise having had supervision of the bank records at the time they were compiled, could do no more than state that they were such. However, it appears from the testimony of the witness Haubert that they were made in the regular course of business, by clerks and tellers who had been instructed as to the custom and methods of the bank when they were employed. He was placed upon the

stand and completed the laying of the foundation by testifying that he was cashier and was in charge and control of the records during the period when they were made up. He had had charge and general supervision of the bank's working forces and accounts. Many of these exhibits indicate on their face their connection with the bank. Exhibits 12 and 13 do not so show, but the foundation for their introduction was laid as above indicated, and each was explained and read into the record. Under such circumstances they will be presumed to have been correct, and the evidence will be taken as true. People v. Woollacott, 80 Cal. App. 275, 251 P. 826.

[8] Both classes of exhibits might properly have been deemed by the trial court competent as parts of the res gestæ. They represented, as contended by appellant, honest transactions; but their fallacy lay in the fact that none of the moneys which they so represented had any existence. The purpose of the Corporate Securities Act is to shield the purchasing stockholder from fraud, and to protect merchants and tradesmen who may deal with the corporation from loss through extended credit. All of the statements, representations, book entries, and stock holdings, from the initial step in organizing the corporation to the time of auditing its accounts, tallied and harmonized, and were apparently regular. But the entries, sham and meaningless, were created by reciprocating deposits and withdrawals at the bank, without the use of funds, which perpetrated a fraud upon the public and upon the corporation department, and thus constituted a violation of the statute, since there was not the slightest prospect of financial security or return to the corporation or to its prospective constituents or creditors. The exhibits were therefore instruments by means of which the defendants accomplished the fraud at which the Corporate Securities Act is directed, and all of the evidence consisted of circumstances, facts, and declarations growing out of the main fact, contemporaneous with it, and serving to illustrate its character. Each case turns upon its own circumstances, and, while the evidence in the instant case was by no means entirely circumstantial, the fact of incorporation followed by uninterrupted insolvency, accomplished by interlacing credits and debits which were the cause, and a part of, the fraud, and were things done during the progress and accomplishment of the offense. Walker v. State, 137 Ga. 398, 73 S. E. 368; Illinois Cent. R. Co. v. Houchins, 125 Ky. 483, 101 S. W. 924; Hermes v. C. & N. W. Ry. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69; Coffin v. Bradbury, 3 Idaho (Hasb.) 770, 35 P. 715, 95 Am. St. Rep. 37.

The jury and the trial judge had before them all of the facts and circumstances, observed the witnesses on the stand, and took the case as a whole. Under an instruction that neither of the defendants could be convicted upon circumstantial evidence alone, unless all of the circumstances concurred to show that the crime charged had been committed by him, excluding to a moral certainty and beyond a reasonable doubt every other conclusion than that of guilt, appellant was convicted. As heretofore stated, the evidence was not wholly circumstantial, and, upon the record before us we are satisfied that there was no prejudicial error or miscarriage of justice.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

LOBB v. BROWN et al. (Civ. 6562.)★

District Court of Appeal, First District, Division 2, California. April 1, 1929.

Rehearing Denied April 30, 1929. Hearing Granted by Supreme Court May 29, 1929.

1. Parties ⚷76(5)—Want of capacity to sue is deemed waived, unless objection thereto is taken by demurrer (Code Civ. Proc. §§ 430, 434).

Under Code Civ. Proc. § 434, objection to want of capacity to sue, apparent on face of complaint, is deemed waived, unless taken by demurrer in accordance with provisions of section 430.

2. Wills ⚷667—Legatee had legal capacity to bring action to enforce forfeiture against other legatees under provision of will forbidding contest (Civ. Code, § 2224).

Legatee had legal capacity to bring action against other legatees for purpose of having it declared that defendants held property received under decrees of partial distribution in trust for him, on ground that they had contested will in violation of provisions thereof, since, being the only party in interest in having forfeiture declared, he was in the same position as that of an heir suing distributee under will to impress constructive trust on property which legatee has received under conditions making him an involuntary trustee within Civ. Code, § 2224.

3. Pleading ⚷406(8)—Misjoinder of causes of action is deemed waived when not raised by either demurrer or answer (Code Civ. Proc. §§ 427, 430, 434).

Under Code Civ. Proc. § 434, objection that there was a misjoinder of causes of action under sections 427 and 430 must be deemed to have been waived when such objection was not raised by either demurrer or answer.

4. Appeal and error ⚷193(2)—Defendant waiving objection to misjoinder of causes of action, by failing to raise objection by demurrer or answer, could not raise point on appeal (Code Civ. Proc. § 434).

Defendant having waived objections that there was misjoinder of causes of action in ac-

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★Rehearing denied. 277 P. 371.

cordance with Code Civ. Proc. § 434, by failing to raise objection either by demurrer or answer, was in no position to raise such point on appeal.

5. Action 🔑50(1)—Joining legatees as defendants in action by other legatee to enforce forfeiture under will was not misjoinder of causes of action (Code Civ. Proc. § 379).

Under Code Civ. Proc. § 379, to effect that any person claiming adverse interest in controversy may be made a party defendant, the joining of two legatees, in action by the other legatee to enforce forfeiture under provision of will forbidding contest, did not constitute a misjoinder of causes of action, in that all legatees were proper parties either as plaintiff or defendant.

6. Wills 🔑651—Clause providing for forfeiture in event of contest is valid.

Clause of will providing for forfeiture in the event of a contest of will by legatee is valid as within public policy.

7. Wills 🔑665—Payment of expenses and fees in contest of will was contest thereof within provision for forfeiture of legacy of those contesting will.

Legatee's payment of court expenses incurred in contest of will and payment of fees of contestant's counsel was a contest within provision of will providing for forfeiture of the legacy of those contesting will, though legatee did not appear as party of record to contest.

8. Trial 🔑396(7)—Finding contrary to admission of answer and to evidence must be disregarded.

Finding contrary to admission in answer to direct allegation of fact in complaint, and directly contrary to evidence, must be disregarded.

9. Wills 🔑667—Decrees of partial distribution did not prevent legatee from impressing trust on property obtained by other legatees pursuant to forfeiture provision.

Decrees of partial distribution of estate did not prevent legatee from impressing trust on property obtained by other legatees under decrees of distribution in accordance with provisions of will providing for forfeiture of interest of legatee contesting will.

10. Wills 🔑717—Legatees filing petitions for partial distribution agreed to abide by will and forfeit legacies in case of contest as provided therein.

Legatees filing petitions for partial distribution of property of estate must be deemed to have elected to stand by terms of will, and could not thereafter openly contest will without first restoring to estate property which they had procured under it, and must be deemed to have contracted to abide by terms of will and agreed that in case of contest they would forfeit their legacies in accordance with provision to that effect.

11. Appeal and error 🔑1178(6)—Evidence as to whether legatee contested will within forfeiture provision thereof required that cause be remanded for additional evidence.

Evidence as to whether legatee had contested will, within meaning of clause providing for forfeiture of legatee's interest in case of contest, *held* such as to require that the cause be remanded for purpose of taking additional evidence on the issue.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Harry W. Lobb against Frank Arthur Brown and another. From a judgment for defendants, and denial of a motion for order to set aside and vacate the judgment, and for entry of judgment in favor of plaintiff on the findings, plaintiff appeals. Reversed and remanded on appeal from the judgment, and appeal otherwise dismissed.

Hadsell, Sweet & Ingalls, of San Francisco, and Earl Warren and Ralph E. Hoyt, both of Oakland, for appellant.

Byrne & Lamson and Knight, Boland & Christin, all of San Francisco, for respondents.

NOURSE, J. The plaintiff sued in equity to have it declared that the defendants held in trust for him properties which they had received under decrees of partial distribution under the estate of Mary Ellen Moore, deceased. The defendants had judgment, and the plaintiff has appealed upon typewritten transcripts.

Mary Ellen Moore died testate on August 14, 1920, in the county of Alameda. In her will she made a number of special bequests in which she bequeathed to the defendants both real and personal property. The seventeenth paragraph of her will devised all the residue to the two defendants and to this plaintiff, share and share alike. The eighteenth paragraph of the will reads as follows: "If any person named herein, or unnamed herein, shall institute proceedings in anywise contesting this my last will and testament, then I give, devise and bequeath to such person or persons the sum of one dollar ($1.00), and no more. In the event of any person named herein contesting this will, then the share of said person mentioned in this will shall go to the residuary legatees or legatee not contesting." Previous to making said will, and on the 4th day of April, 1910, Mary Ellen Moore had made another will wherein she bequeathed to these defendants certain specific legacies and left to them all the residue of her estate. On January 7, 1921, the two defendants received under a decree of partial distribution property valued at $103,926, and on July 20, 1921, they received under another decree of partial distribution additional property valued at $14,564.

Between the dates of these two decrees of partial distribution and on June 9, 1921, George J. Moore and certain named stepchildren of the decedent, Mary Ellen Moore, filed a contest directed solely to that portion of the 17th clause of the last will of Mary Ellen

Moore which bequeathed one-third of the residue of the estate to the plaintiff herein. Thereafter, and in August, 1922, this contest of the will came to trial, and the defendant herein, Frank Brown, secretly supplied witnesses, documentary evidence, and advice to the contestants and to their counsel, and the defendant Herbert Brown paid all the costs and expenses of the litigation for the contestants, including their attorney's fees.

On September 2, 1920, the will of Mary Ellen Moore was duly admitted to probate upon the petition of the plaintiff herein, who was named in said will as executor. Immediately thereafter, and on September 8, 1920, one of the law firms representing the defendants herein (but not the same attorneys who represent Herbert Brown on this appeal) filed in the offices of the county clerk of Alameda county their notice of appearance and demand for notices as such attorneys. This firm continued to act as the attorneys for these defendants throughout the proceedings of probate of said estate, applied for and conducted the proceedings leading up to the two decrees of distribution, and appeared for them openly and at the time of the trial in all the matters relating to the contest of the will on the part of George Moore and others heretofore mentioned. (The trial court found that this firm of attorneys was not authorized to appear *at the trial of* said contest on behalf of defendant Herbert Brown, and that said defendant had no knowledge that any member of said firm did appear at said trial, but the record evidence is all contrary to the finding, and the finding is directly contrary to the express admissions in Herbert's answer.) In this contest R. L. McWilliams appeared as attorney for the contestants. His entire fee for these services and all the costs of the contest were paid to him by a member of said firm of attorneys with moneys secured by him from Herbert Brown, one of the defendants herein. Following the trial of that contest and the judgment adverse to the contestants therein, and at the special urgence of this attorney, McWilliams took an appeal from said judgment, which was wholly financed through moneys paid to him by said attorney and obtained from Herbert Brown for that purpose. The activities of the defendant Frank Brown consisted mainly in supplying witnesses and documentary evidence to Mr. McWilliams during the course of the contest and in his attendance at the time of the trial, but manifestly the most substantial aid given to the contestants, other than supplying the funds, was that given by their counsel in filing their joint answer in which they failed to deny the allegations of the petition charging Lobb with undue influence in procuring the residuary bequest from Mrs. Moore, in his attendance at the counsel table during the course of the trial, in his encouragement and co-operation with Mr. McWilliams, and in his open declaration in court that, though appearing for the two contestees, "I have no hesitancy in saying that we would like to see the contestants succeed in this case," and that his clients had a financial interest in it if the contestants did succeed. The "financial interest" of the defendants in the contest of the will was this: Under a previous will executed by Mrs. Moore these two defendants were named as the only residuary legatees; if, therefore, the contestants were successful in defeating the portion of the will probated, it was agreed between them that they would offer the prior will for probate and thus secure for themselves the entire residue of the estate, except that, as Herbert Moore testified, the "understanding was that in case they (contestants) were successful in the contest they (contestants) were to receive $15-000."

With the exceptions noted and those hereinafter referred to, the trial court found all the foregoing facts to be true. Upon these findings the trial court drew the conclusions of law that the plaintiff had no legal capacity to sue; that there was a misjoinder of causes of action and a misjoinder of defendants; that the defendant Frank A. Brown did not institute proceedings or contest the will or any portion thereof; and that the plaintiff was not entitled to any judgment against either defendant. Following the entry of the judgment the plaintiff moved the trial court, in accordance with sections 663 and 664, Code of Civil Procedure, for an order setting aside and vacating the judgment, and for the entry of a judgment in favor of plaintiff upon the findings. This motion was denied, and an appeal was taken. This appeal is presented upon the same transcript with the appeal from the judgment.

[1, 2] At the outset the appellant attacks the conclusions of law touching the matter of procedure. He insists that the trial court was in error in concluding that he had no legal capacity to sue. We agree with his contention in this respect. Want of legal capacity to sue is a ground for special demurrer within the provisions of section 430, Code of Civil Procedure. When the want of capacity is apparent from the face of the complaint, and objection thereto is not taken by demurrer, it is deemed waived. Section 434, Code Civ. Proc.; Agricultural Extension Club v. Hirsch & Son, 39 Cal. App. 433, 435, 179 P. 430; Crittenden v. Superior Court, 166 Cal. 340, 345, 136 P. 287. The ground upon which the respondents seek to sustain this conclusion of law is that, because the appellant was the executor of the estate and the property in suit was estate property, he should have sued as an executor, and that he could not sue as an individual. Though the theory is wholly untenable, all the facts covering the relation of the appellant in his character as an execu-

tor, his interest as a residuary legatee, the proceedings in the estate by which partial distribution was made, and the manner in which the respondents secured possession of the property in suit appeared on the face of the complaint. If these facts would render the appellant incapable of suing in his individual capacity, that plea should have been made by special demurrer, and this was not done. But the appellant did have legal capacity to sue. The property had been in the possession of the executor and had gone out of the estate by means of decrees of distribution, which had become final. Neither the executor nor the probate court had any jurisdiction over the property thereafter. Estate of Baird, 181 Cal. 742, 744, 186 P. 351. By the terms of the will a contest on the part of the respondents herein forfeited their legacies to the appellant. The appellant was, therefore, the only party in interest in having such forfeiture declared. He is, therefore, in the same position as that of an heir who sues the distributee under the will to impress a constructive trust upon property which the distributee has received under such conditions as would make the distributee an involuntary trustee within the terms of section 2224, Civil Code. Such cases are numerous. Brazil v. Silva, 181 Cal. 490, 185 P. 174; Morgan v. Asher, 49 Cal. App. 172, 193 P. 288; Thompson v. Thompson (Cal. App.) 267 P. 375; McCabe v. Healy, 138 Cal. 81, 70 P. 1008. In support of their position respondents cite Holland v. McCarthy, 177 Cal. 507, 171 P. 421. The case is not in point. There the plaintiff sought to recover property alleged to have belonged to the decedent during her lifetime. The plaintiff, though an heir to the estate, was not the executor, and the court merely held that it was the executor's function to sue for this purpose. But it will be noted that the property had never gone through administration, as is the case here. The real ground upon which the decision rested was that a judgment in such a case in favor of an heir would be no plea in bar in an action against the same defendant for the same property brought by the executor of the estate. Estate of Clark, 190 Cal. 354, 212 P. 622, cited by respondents, merely holds that a judgment in an action between the administrator and another involving title to property claimed by the estate is binding upon an heir under the well-accepted rule that the administrator is the representative of the heirs in all such proceedings.

[3] The appellant complains of the findings that there was a misjoinder of causes of action, and that there was a misjoinder of parties defendant. In the discussions in the brief counsel have argued these two findings as though they presented but one issue. But they are separate issues and should be separately treated. The question of a misjoinder of causes of action takes us to section 427, Code of Civil Procedure, which provides what character of causes of action may be united in the same complaint, but section 430, Code of Civil Procedure, specifies the improper union of several causes of action as a ground for demurrer to the complaint, and section 434, Code of Civil Procedure, provides that, if no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same; the objection by answer being permitted only when the matters enumerated in section 430 do not appear upon the face of the complaint. Here the objection on the ground that there was a misjoinder of causes of action was not raised by either demurrer or answer, and it must, therefore, be deemed waived. This has been the rule since Macondray v. Simmons, 1 Cal. 393, and further discussion of the point is unnecessary.

The objection on the ground that there was a misjoinder of parties defendant was not raised by demurrer by either party, and was not raised by answer or other plea on behalf of the respondent Frank Brown. Under the rule just cited this respondent must, therefore, be deemed to have waived the objection.

[4] As to the respondent Herbert Brown, he did make the objection in his answer that he was improperly joined with his co-respondent. Manifestly, if the misjoinder is apparent on the face of the complaint, objections should have been made by demurrer (section 433, Code Civ. Proc.), and, not having been so made, it could not have been raised in the answer. As far as we are able to understand the argument of counsel for Herbert Brown, it seems to be that he was prejudiced by the joinder of Frank as a party defendant, because the appellant was thereby enabled to bring before the court the activities of Frank which were alleged to have been made in behalf of the contestants of the will. This may have emphasized the evil committed by Herbert, but the cause of action framed by the complaint was that Herbert and Frank, admittedly represented in the contest by the same attorney, were working in concert for the purpose of defeating the will, one furnishing the money to enable their adversaries in the trial to prosecute the contest, the other furnishing evidence and information to their adversaries' counsel for the same purpose. That the appellant was unable to prove all these allegations does not support a finding that the respondents were improperly joined in that cause of action. But, aside from this, the complaint stated a good cause of action against Herbert Brown, and the evidence required a finding and judgment against him as we will hereafter point out. This being so, he cannot object that another has been joined with him against whom a cause of action may not have been proved. Frank Brown having waived the objection and thus

consented to the joinder of Herbert is in no position to raise the point on this appeal, and, if it be Herbert's position at this time that his case should have been separated from Frank's because of his residence in another county, then he too has overlooked his legal rights during the course of the proceedings in the trial court. Gardner v. Samuels, 116 Cal. 84, 89, 47 P. 935, 58 Am. St. Rep. 135.

[5] Aside from the question of procedure in raising the objections, there is no merit in the point. The three parties were all beneficiaries under the same clause of the will which provided that, in the event that one or more should contest the will, his interest should go to the one or to those who did not contest. Thus, if appellant was right in his claim that both Frank and Herbert Brown contested the will, he would be the sole beneficiary under that clause and would be the sole party plaintiff in an action to have a trust declared with himself as the beneficiary. On the other hand, if one of the Browns contested and the other did not, then the one contesting would alone forfeit his interest in the estate, and in that event the appellant herein and the noncontesting Brown would be the beneficiaries under the will and under the trust which was sought to be established. They then would be the proper parties plaintiff, but, if one should fail to join as a party plaintiff, he would be both a proper and a necessary party defendant. This is so because of the rule that in an action to declare a trust in relation to particular property all those who are entitled to or claim to be entitled to any portion of the trust estate are proper parties defendant. Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134, O'Connor v. Irvine, 74 Cal. 435, 443, 16 P. 236.

Aside from the rule of these decisions, the right of the appellant to join both respondents as parties defendant is statutory. Section 379, Code of Civil Procedure, provides that, when any person claims an interest in a controversy adverse to the plaintiff or "who is a necessary party to a complete determination or settlement of the question," he may be made a party defendant. This, of course, is particularly applicable to all actions in equity such as we have here, because of the principle of public policy enforced in courts of equity "that a decree should finally and completely determine the rights which all persons have in the subject matter decided, so that the parties may safely obey and act upon the decree, and a multiplicity of suits or a circuity of proceedings may be avoided." 21 C. J. 258.

For the foregoing reasons we conclude that the trial court was in error in finding that the appellant here did not have capacity to sue, that there was a misjoinder of causes of action, and that there was a misjoinder of parties defendant. The finding that the attorneys appearing were not authorized to appear at the trial on behalf of the defendant Herbert Brown, and that said Herbert Brown had no knowledge that they did appear at said trial, is wholly unsupported by any evidence of any character, and is without force, because it was admitted in the answer of this defendant. The finding that the said Herbert Brown paid to the attorney for the contestants costs and attorney's fees expended in that contest, as well as the expenses of prosecuting an appeal therein, and that, when he did so, "he knew that said money was to be so used and thereafter he knew that the same was so used," was sufficient to support a judgment against said respondent Herbert Brown. The matter to be determined as to his interest is whether his codefendant, because of nonparticipation in the contest, should be held a joint beneficiary with the appellant in the share forfeited by Herbert. The finding or conclusion that Frank Brown did not contest the will is a mixed finding of fact and law, and, as we have reached the conclusion that the appellant is entitled to a new trial as to that issue, it will be necessary to relate the evidence covering his activities in the contest more at length.

On the merits of the controversy two questions present themselves for consideration: First, whether the acts of respondents or of either of them were sufficient to constitute a contest within the terms of the will, and second, whether, if this be so, the appellant should be permitted to follow the properties received by the respondents under the decrees of partial distribution and to hold the respondents or either of them as trustees of such property for his benefit.

[6] Clauses of this character, providing for a forfeiture in the event of a contest of a will, have long been approved by the courts of this state as within public policy. The reason for the rule is found in Estate of Hite, 155 Cal. 436, 441, 101 P. 443, 445 (21 L. R. A. [N. S.] 953, 17 Ann. Cas. 993), where the court said: "Experience has shown that even after the death of a testator, unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced, wherein, not infrequently, are brought to light, matters of private life that ought not be made public, and in respect to which the voice of the testator cannot be heard, either in explanation or denial, and as a result the manifest purpose of the testator is thwarted." In re Kitchen, 192 Cal. 384, 388, 220 P. 301, 302 (30 A. L. R. 1008), the Supreme Court in approving a similar clause in a will said: "The testatrix could give or refrain from giving; and could attach to her gift any lawful condition which her reason or caprice might dictate. She was but dealing with her own property and the beneficiary claiming thereunder must take the gift, if at all, upon the terms offered." In Donegan v. Wade, 70 Ala. 505, it was held that one David

Wade, Jr., was subject to the forfeiture under a similar clause of a will because he aided and abetted his sister in a contest of the will "that he was even bearing the expenses of the litigation, and advising in its management." In that case it was argued that Wade had not participated in the contest because he never appeared upon the records of the court as a contestant. But the court held that the steps taken by his sister constituted opposition to the unlitigated probate of the will "and the participation of David Wade, Jr., in such contest, was of the same character, however deficient in the candor of open resistance." The court further said in this opinion that to relieve him under these circumstances, and to visit the penalty of forfeiture upon his sister, would permit the law to place a premium upon artifice, and to suffer the just reproach of seeking after the shadow instead of the substance. It was said by the court to be a case for the application "of the principle, 'qui facit per alium, facit per se.'" In Re Stewart's Will (Sur.) 5 N. Y. S. 32, 35, one Mrs. Wetherell was a legatee under a will containing such a forfeiture clause. A contest was filed by others, and Mrs. Wetherell entered into an agreement with them providing that she was to receive her legacy without regard to the outcome of the contest. The court held that by this agreement she elected to disregard the terms of the will and to cast her lot with the contestants. In Kayhart v. Whitehead, 77 N. J. Eq. 12, 76 A. 241, the court enforced the forfeiture clause upon the ground that, while Mrs. Whitehead was in attendance of the case in open court, counsel stated to the court that he appeared to argue on her behalf against the admission of the will to probate. Moran v. Moran, 144 Iowa, 451, 123 N. W. 202, 30 L. R. A. (N. S.) 898, 903, is authority to the point that an attack upon a single clause of the will is a "contest" within the terms of the will providing for forfeiture in the event of a contest of the will.

[7] Respondents argue that the eighteenth paragraph of the will is aimed to penalize those who "institute proceedings" contesting the will, and that the facts here disclose that the contest was instituted without their knowledge. However, the same clause provides, "in the event of any person named herein contesting this will," then his share shall go to those not contesting. Manifestly, the payment of the court expenses incurred in the contest of a will and the payment of the fees of contestants' counsel, though the legatee does not appear a party of record to the contest, are acts contemplated by the testator in providing for a forfeiture of the legacy of those who contest the will. As was said in Estate of Hite, 155 Cal. 436, 443, 101 P. 443, 445 (21 L. R. A. [N. S.] 953, 17 Ann. Cas. 993), after referring to Smithsonian Institution v. Meech, 169 U. S. 398, 18 S. Ct. 396, 42 L. Ed. 793, the purpose of these clauses is "to prevent the implication of any of the technical rules of law to be employed to thwart his expressed wishes; it was to prevent all attacks upon his character, reputation, or sanity by dragging into publicity his private life, and it was equally to secure to the beneficiaries whom he named, the fruits of his bounty. When it appears that the effect of the legal action which a contestant has taken has been to thwart the testator in any of these most obvious purposes, can the party, who has deliberately and designedly taken such action, be heard to say that he has not contested? We think not."

[8] Here the trial court found that Herbert Brown paid through his attorney to McWilliams, the attorney for the contestants, the sum of $706.40, while the contest was in progress before the probate court for the payment of the expenses of the contest and of the contestants' counsel fees therein; that after the decision of the probate court adverse to the contestants he paid in the same manner to McWilliams the sum of $100 for the prosecution of an appeal therein; and that at the time he paid these moneys he knew that they were to be used and were used for those purposes. It is true, as pointed out by this respondent, that the court found that Herbert Brown *stated to his counsel* that these advances were made as loans to the contestants. There is no competent evidence to support this finding, but it is immaterial any way as these *loans* were made, as stated by Herbert Brown, without any arrangement or communication with the contestants, without any evidence of indebtedness, and without any promise or terms of repayment. They were just as efficient an aid to the contestants whether they be called "payments" or "loans." But the advancement of the necessary funds to finance the contest was not the only act on the part of this respondent. His attorney appeared in open court with the attorney for the contestants, aided him in procuring witnesses in support of the contest, stated in open court on behalf of both respondents that they desired the contestants to succeed, and that they had a financial interest in the matter if the contestants were successful, and thereafter urged the attorney for contestants to take an appeal from the judgment. It is true that the trial court found that no member of this firm was authorized to appear at the trial of the contest on behalf of Herbert Brown, and that Herbert Brown had no knowledge that any such attorney did appear at said trial, but this finding must be disregarded because the allegation of that fact in the complaint was admitted in Herbert Brown's answer, and furthermore, the finding is directly contrary to the evidence. The interest of this respondent is disclosed by his own testimony, which is that he had discussed with his attorney the probability of the contestants' success in voiding the portion of the will attacked, and that it had been agreed in that event that his attorney would

on behalf of himself and Frank Brown offer an earlier will of Mary Ellen Moore for probate under the terms of which this respondent and Frank Brown would receive the entire residue of the estate. Also that it was *understood* that if the contestants were successful that the contestants would receive the sum of $15,000.

The activities of the respondent Frank Brown are of a somewhat different character. He admitted in his answer that the defendants (himself and Herbert Brown) paid all the costs and attorneys' fees of the contestants in the contest. He attended, with one exception, every session of the court during the trial of the contest, which lasted nine days; he knew that his attorney was sitting at the counsel table with Mr. McWilliams, attorney for the contestants, was suggesting questions to him, and otherwise aiding him in the contest; he took books, papers, and documents from the former home of the deceased and delivered them to the attorney for the contestants to aid him in the prosecution of the contest; he frequently met the attorney for the contestants prior to and during the trial, discussed the testimony which he could give at the trial, and brought other witnesses to the attorney for the contestants to aid in the contest. In consideration for this aid to them, the contestants, through their counsel, agreed that they would not oppose the probate of the former will of Mrs. Moore. The foregoing activities, which were established by competent evidence, would have supported a finding and conclusion by the trial court that Frank Brown had aided the contestants in their assault upon the will. In some respects, which are not necessary to detail here, the trial court found contrary to this evidence and drew the conclusion that Frank Brown did not contest the will, and for this reason a new trial will be necessary to determine that issue.

[9] It is argued on behalf of both respondents that, notwithstanding their asserted activities in support of the contest, the appellant cannot recover in this action, because the decrees of partial distribution have become final and are conclusive upon any attack of this nature. They cite numerous authorities to the effect that a decree of distribution in a probate matter is a conclusive determination of the meaning and effect of the will, and that it is not subject to collateral attack nor to be impeached by resort to the terms of the will. All these authorities are beside the mark. The appellant herein sues to impress a trust upon the property obtained under the decrees of distribution, and does not attack the decrees themselves. The rule is well stated in Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 658, 221 P. 368, 370, where the court said: "The sanctity and immunity of a decree of distribution which has become final attaches to the decree itself and not to those who under it may have derived an unconscionable advantage through fraud, accident or mistake." The cited case quotes with approval from Silva v. Santos, 138 Cal. 536, 541, 71 P. 703, where the authorities are gathered and the rule followed that equity has jurisdiction to do justice to the injured and to follow the property obtained under a decree of distribution to the extent that the one wrongfully holding the property may be declared a trustee for the one rightfully entitled thereto. In other words, actions of this character are actions in rem to have it declared that one who has wrongfully procured property under color of a decree or judgment becomes a trustee for those to whom it rightfully belongs. The case is on a line with Brazil v. Silva, 181 Cal. 490, 185 P. 174; Estate of Walker, 160 Cal. 547, 549, 117 P. 510, 36 L. R. A. (N. S.) 89; 25 Cal. Jur. 150.

Though many of the cases just cited stress the point that the property was gained by "fraud, accident or mistake" so as to bring them expressly within the terms of section 2224, Civil Code, the power of a court of equity is not confined to a case of that character. The broader view is expressed in 1 Pomeroy's Equity Jurisprudence, § 155: "Constructive trusts are raised by equity for the purpose of working out right and justice. * * * If one party obtains the legal title to property, not only by fraud or by violation of confidence or of a fiduciary relation, *but in any other unconscientious manner*, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity the beneficial owner." This rule was approved in Teich v. San Jose, etc., Bank of Savings, 8 Cal. App. 397, 402, 97 P. 167. It has been followed generally by the authorities. The appellant applies the rule to the case before us, through the argument that the noncontest clause of the will was in effect a stipulation or contract on the part of the testatrix under which the legacies were made, and that when the legatees took the property under the decrees of distribution they consented to all the terms of the will, including this clause. That is to say, that they thereby contracted with the testatrix and the beneficiaries under the will that, in the event they should contest the will, they would forfeit their legacies in accordance with the terms of the will. From this it is argued that, having agreed to the terms of the will, they are in equity bound to relinquish the property which they procured under it, and that, having refused to do so, equity should declare that they hold the property as involuntary trustees for those who in equity are entitled to it. The argument is supported by many authorities holding that one who accepts a legacy which is given under conditions mentioned in the will thereby ratifies and accepts the conditions and is bound to give effect to all its provisions and to perform the burdens attached to its benefit. Moore v. Baker, 4 Ind. App. 115, 30 N. E. 629, 51 Am. St. Rep. 203; Shaver's Adm. v. Ewald's Exr., 143 Ky. 160, 136 S. W. 130; Van Schaack v. Leonard, 164 Ill. 602, 45 N. E. 982; Tripp v Nobles, 136 N. C. 99, 48 S. E. 675, 67 L. R. A. 449. The same principle is followed in Re Morrison, 29 Cal. 346, where it was said that he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conform to all its provisions, and renounce every right inconsistent with it. The principle underlying the rule of these authorities is stated in Holliday v. Perry, 38 Ind. App. 588, 597, 78 N. E. 877, 880, as follows: "The fact that the transaction was without fraud in its inception did not prevent its becoming fraudulent upon the subsequent refusal of appellee to perform his part of the agreement." The Indiana court in the same case stated the principle somewhat differently in its quotation from Story's Equity Jurisprudence: "Fraud, indeed in the sense of equity, includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another."

[10] Respondents first filed their petition for partial distribution for portions of the property bequeathed them under the terms of the will. After having obtained this property the contest of the will was filed. Thereafter, the respondents filed another petition for further partial distribution, and obtained additional property through a decree which recited that this property was a "portion of the property to which the said petitioners are entitled under the will." The contest was then heard and determined, and thereafter the respondents filed their petition for a final distribution of the property claimed by them under the will. Under these circumstances the respondents must be deemed to have elected to stand by the terms of the will. They could not, therefore, openly contest the will without first having restored to the estate the property which they procured under it. Holt v. Rice, 54 N. H. 398, 20 Am. Rep. 138. They must, therefore, be held to have contracted to abide by the terms of the will and to have agreed that, if they did contest it, they would forfeit their legacies under it. If, therefore, the acts here proved constituted a contest of the will on their part, they are now holding property which in equity and good conscience they are not entitled to, and their acts are a fraud upon the testatrix and upon the beneficiaries under the will. The case is on a line with those authorities which hold that, where one has made an oral promise with a decedent to make a special use of a devise to him and thereby obtain the legal title to the property, equity will hold that he is an involuntary trustee for the beneficiary, even though the oral promise is within the statute of frauds. As said in Re O'Hara, 95 N. Y. 403, 47 Am. Rep. 53, cited with approval in Brazil v. Silva, 181 Cal. 490, 497, 185 P. 174, 177: "Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest, is to perpetrate a fraud upon the devisor which equity will not endure."

From the foregoing we conclude that the acts of the respondent Herbert Brown recited herein, and found to be true by the trial court, constituted a contest of the will on his part, and entitled appellant to judgment against him. The cause as to this respondent must, therefore, be reversed, with directions to the trial court to enter judgment against him as prayed for in the complaint, subject, however, to the further finding of the participation of his co-respondent in such contest. That is to say, that if on a retrial of this issue, it be found that the respondent Frank Brown did participate in said contest, then separate judgments should be entered against each respondent, decreeing that each is holding the properties procured by him under these decrees of distribution in trust for the use and benefit of the appellant herein. If, on the other hand, it be found on a retrial of that issue that the respondent Frank Brown did not participate in said contest, then the judgment should run against Herbert Brown, decreeing that he holds the property obtained by him under these decrees of distribution in trust for the use and benefit of the appellant herein and of the respondent Frank Brown, share and share alike.

[11] This brings us to a consideration of the case relating to the respondent Frank Brown, as distinguished from the case made against his co-respondent. The trial court drew its conclusion of law from the facts found that this respondent did not institute proceedings in anywise contesting the will, and did not contest the will. We are satisfied from our review of the record that the findings of fact are all too favorable to this respondent. The evidence is that this respondent attended the sessions of the trial of the contest on all but one day thereof, and was mainly active in furnishing the contestants' counsel with evidence to support their attack upon the will. In addition to this, it is conceded that his counsel appeared at the same trial and consulted with the contestants' counsel during the course of the trial. As has heretofore been pointed out, these attorneys were the attorneys for both Herbert Brown and Frank Brown in the trial of that contest. These parties appeared jointly as defendants in the contest, and filed a joint answer through these attorneys. The interest of Herbert Brown in financing this contest through his attorney has already been detailed, but the trial court found that the respondent Frank Brown had no knowledge of

this fact. Appellant insists that such knowledge must be presumed under the well-known rule that knowledge of the attorney is knowledge of the client. 6 Cor. Jur. 638; Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172; Bogart v. Geo. K. Porter Co., 193 Cal. 197, 210, 223 P. 959, 31 A. L. R. 1045. Respondents argue that the rule should not be applied here, because the interests of the two respondents were adverse, that is to say, that if Frank Brown through their common attorney was able to have Herbert Brown successfully contest the will without his being involved therein, he would succeed to a portion of the legacy forfeited by Herbert Brown and that, if Herbert was able in the same way to have Frank carry on the contest, Herbert would succeed to a portion of Frank's forfeited legacy. There is nothing, however, in the record to support this dual relation. As we have said, both parties appeared by the same attorney, and both had an equal interest in the success of the contest to the portion of the will covering the legacy to this appellant.

It is inconceivable that this respondent did not have actual knowledge of the activities of his co-respondent in financing the contest or of the agreement made by his counsel with Mr. McWilliams to compensate the contestants in the event of a favorable judgment. But, if he did not have actual knowledge of these facts, this would seem to be a proper case for the application of the presumption of knowledge of the client because of the actual knowledge of the attorney. However, the trial court found in favor of this respondent in both instances, and we do not feel that the undisputed evidence, however persuasive it may be, is sufficient to support a contrary finding by this court. We are asked to take additional evidence under section 956a, Code of Civil Procedure, as added by St. 1927, p. 583, for this purpose, but we are satisfied that the convenience of the witnesses, and of the parties as well, would best be served by having this done in the trial court, and the cause will be remanded for that purpose. In remanding the cause it is with the direction that the trial court take evidence on this issue alone, that is to say, the acts and conduct of the respondent Frank Brown in relation to the contest of the will and his participation therein, either individually or through his attorney and associate, Herbert Brown, and his knowledge of the acts and conduct of his associate, Herbert Brown, in aid of said contest. Upon the conclusion of said trial, judgment should be entered against the respondent Herbert Brown as heretofore directed and in favor of the appellant for the whole or for the half of Herbert Brown's interest as the case may be, and judgment should be entered either in favor of or against the respondent Frank Brown as the court shall determine the issue of his participation in said contest.

The appeal from the order denying appellant's motion to enter a different judgment on the findings requires but a word. Obviously, upon the record as it stood at the time, this motion should have been granted in part. The finding of participation by Herbert Brown and of nonparticipation by Frank Brown demanded a judgment in favor of appellant for one-half of Herbert Brown's forfeited share of the estate. But, as we have shown that the finding and judgment favorable to Frank Brown must be reversed, it is apparent that this motion should not be granted at this time. The appeal from this order is, therefore, dismissed.

The judgment is reversed, and the cause is remanded for the purposes heretofore indicated.

We concur: KOFORD, P. J.; STURTEVANT, J.

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98 Cal. App. 189

MICHAEL v. KEY SYSTEM TRANSIT CO.
(Civ. 6753.)

District Court of Appeal, First District, Division 1. California. April 9, 1929.

1. Appeal and error 🔑1057(1)—Exclusion of testimony as to habit of storing street cars on street held not prejudicial error, in view of uncontradicted testimony and statement in appellant's brief.

In action for injury to one riding in automobile, which collided with standing street car, exclusion of testimony that defendant habitually stored cars on street approximately in position of that involved for several hours, *held* not prejudicial error, in view of uncontradicted testimony as to defendant's practice in moving its cars back and forth between barn and street, and statement in plaintiff's brief that her cause of action for negligence in such respect was entirely sustained by evidence.

2. Negligence 🔑56(2, 3)—Negligence must be proximate cause of injury to warrant recovery, though arising from violation of law or ordinance, or maintenance of nuisance.

To recover for negligence of another, such negligence must have been proximate cause of or proximately contributed to injury, even though it arises because of violation of law or ordinance, or results from maintenance of nuisance.

3. Street railroads 🔑102(1)—Whether street railway company habitually stored cars on street held immaterial in action for injury in automobile collision with standing car.

Whether defendant street railway company on previous occasions or habitually stored its cars on street *held* immaterial in action for injury to one riding in automobile which collided with standing car; such habit having no causal connection with injuries sustained.

4. Trial 🔑260(8)—Refusal of instructions that permitting street cars to stand on street constituted nuisance and negligence held not error, in view of instruction given.

Refusal of instructions that permitting street cars to stand or be stored on street constituted a nuisance, and negligence as matter of law, *held* not error, in view of instruction to find for plaintiff, in action for injuries in collision between automobile and standing car, if defendant negligently permitted car to stand on street insufficiently or improperly lighted or guarded.

5. Street railroads 🔑90(1)—Leaving street car standing on tracks for reasonable time, properly lighted or guarded, is not negligence per se.

Leaving a street car standing on tracks for a reasonable time, properly lighted or guarded, does not constitute negligence per se.

6. Street railroads 🔑90(1)—Street car, left standing in street for few minutes about 1:30 a. m., held not unlawful obstruction or nuisance as matter of law.

Street car left on tracks in street near car barn for a few minutes about 1:30 a. m., with street clear for vehicular traffic on both sides, as authorized by franchise, *held* not unlawful obstruction of street, nor nuisance as matter of law; whether street car company should be permitted to leave cars standing in street when not in use being for municipal authorities to determine.

Appeal from Superior Court, Alameda County; L. D. Jennings, Judge.

Action by Jeane Michael against the Key System Transit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Vincent W. Hallinan and Charles R. Boden, both of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco (Frank S. Richards, of Oakland, of counsel), for respondent.

CAMPBELL, Justice pro tem. Appellant sustained certain personal injuries while riding in an automobile driven by one Harold Wagner on July 31, 1926, when the automobile collided with a street car owned and operated by respondent. The collision occurred about 1:30 o'clock in the morning on East Fourteenth street, near Ninety-Sixth avenue, in the city of Oakland. The street car involved in the collision was at the time of the accident standing on the south track of respondent's car line in the vicinity of one of its barns. It had been moved out of the car barn and onto the street approximately 45 minutes prior to the accident, but had been at the place where the accident occurred only about 15 minutes. The street car had been moved out so that respondent could properly handle and repair cars at the barn. It was necessary to run cars back and forth between the track on East Fourteenth street and the car barn. This was done late at night or early in the morning when the traffic on the street was light.

At the time of the accident Harold Wagner was operating the automobile in question along East Fourteenth street in the direction of San Leandro at about 24 or 25 miles an hour and for some distance had been straddling the south street car track. The street on both sides of the car tracks was clear and unobstructed, and, if the automobile had been driven on that part of the street customarily used for vehicular traffic, the collision would not have occurred. The street car was standing parallel with the sidewalk and in the same position occupied by it when operating along East Fourteenth street in the direction of San Leandro. Wagner testified that his headlights were adjusted so that he was unable to see clearly any object more than 10 or 12 or 10 or 15 feet ahead of him; that when he first saw the street car it was 10 or 12 feet away; that he attempted to turn out, but collided with it. There is a conflict of testimony as to whether or not the street car was lighted at the time of the accident, several witnesses testifying that it was. Appellant testified that she was dozing in the automobile and did not see the street car until she was about 4 feet from it. The case was tried before the court and jury, and resulted in a verdict for the defendant, and from the judgment entered upon such verdict plaintiff has appealed.

The complaint sets out three separate causes of action charging negligence. The first cause of action alleges that the street car at the time of the collision was unlighted and unguarded, and by reason of the failure of defendant corporation to properly light or otherwise guard the street car it was not discernible to persons driving vehicles, and that by reason of its indiscernibility the automobile was caused to collide with it. The second cause of action charges negligence, specifying that negligence to be that defendant had been accustomed to lease unused cars owned and operated by it standing on the tracks on East Fourteenth street for several hours each night and particularly on the night that the accident took place, and that the street car with which the automobile collided had been standing upon the street in accordance with such custom for a number of hours, and that it was thereby an obstruction and an impediment to traffic, and constituted a menace to the safety of persons operating automobiles on East Fourteenth street, and was a nuisance. The third cause of action charges negligence, in that the street car was permitted to stand on the street for an unreasonable length of time, and was not properly lighted or guarded, and that this was a proximate cause of the collision. The jury was fully and correctly charged with respect to the first and third causes of action and no contention is made by appellant that the evidence is insufficient to support the verdict in favor of defendant. It is merely with respect to the second cause of action that complaint is made and with which we are concerned.

[1] In support of her second cause of action appellant offered to prove certain facts to which objection was sustained and which ruling is assigned as error. The offer is as follows: "We offer at this time, if the court please, to show by this witness (Futardo) that the defendant, Key System Transit Company, for the last three or four years habitually stored their cars on the street for two or three hours, by leaving two, three or four cars standing on the street approximately in that position, and that this car was one of the cars left standing on the street as part of that procedure." An examination of the testimony of the witness Futardo, an employee of Key System Transit Company, which is uncontradicted, discloses that the witness described in detail the practice of the company in moving its cars back and forth between the car barn and East Fourteenth street, and therefore the record contains practically all of the testimony appellant proposed to offer. In fact, appellant states in her brief that her second cause of action is entirely sustained by the evidence. This being true, appellant was not prejudiced by the court sustaining the objection to her proof of the facts stated in her offer, if such facts were material.

[2, 3] We think it immaterial under the facts disclosed whether respondent on previous occasions, or habitually, stored its cars on the street, for, to entitle one to recover for the negligence of another, that negligence must have been the proximate cause of, or must have proximately contributed to, the injury. This is so, even though negligence arises because of the violation of a law or an ordinance. Arrelano v. Jorgensen, 52 Cal. App. 622, 199 P. 855; Berges v. Guthrie, 51 Cal. App. 547, 197 P. 356; Williams v. Southern Pacific Co., 173 Cal. 525, 160 P. 660. So, also, where the negligence results from maintaining a nuisance, the nuisance must contribute to the injury. It cannot be said that the mere fact—if it be a fact—that respondent permitted its cars to remain at approximately the same position of the car in question at the time of the accident on other occasions had any connection whatever with the injury suffered by appellant. Appellant sustained her injuries by being driven into a particular standing car on the morning of July 31, 1926. There could be no causal connection between that injury by striking that car at that particular time and the maintenance of other cars at approximately the same place on other nights prior to the accident. While it is well settled that the violation of an ordinance is conclusive evidence of negligence in this state (Scragg v. Sallee, 24 Cal. App. 144, 140 P. 706), and that a person who wrongfully places an obstruction in the public highway must be held responsible for such accidents as occur by reason of its presence (Cohen v. Mayor, etc., of New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506), the violation of an ordinance or maintenance of an obstruction must have contributed directly to the injury, for, however improper or illegal such violation or maintenance may be in the abstract, unless such contribute directly to the injury no action for damages can be founded upon them (Berges v. Guthrie, supra). Although the violation of a penal statute constitutes negligence per se, to make such negligence actionable it must be a proximate cause of the injury for which the action is brought. Williams v. Southern Pacific Co., supra.

[4] Appellant urges that the court erred in refusing certain instructions to the jury proposed by her on the theory embraced in her second cause of action, which is stated in her brief to be in short this: "That by keeping the street car in the position which it occupied the defendants were maintaining a public nuisance, that such maintenance of a public nuisance constituted negligence per se, and that if this maintenance of a nuisance were established, and the plaintiff was free from contributory negligence, she was entitled to a verdict as a matter of law." Appellant contends that instructions proposed covering this theory were refused, and that no instructions were given involving the element of nuisance. It is true the court did refuse several instructions requested by appellant on this question, appellant's particular objection being that the court refused to instruct that permitting cars to stand or be stored on the street constituted a nuisance and was negligence as a matter of law, and no further proof on plaintiff's part was required. The court, however, gave the following instructions, which correctly state the law applicable to the facts, and which sufficiently enlightened the jury on the question of nuisance as here involved:

"I further instruct you that anything which unlawfully obstructs the free passage or use in the customary manner of any street or highway is a public nuisance. If you believe from the evidence that the defendant, Key System Transit Company, unlawfully obstructed the public highway by permitting its street cars to remain upon the same for an unreasonable length of time, then I instruct you that it is no excuse or defense to them that they were permitted to do so by the municipal authorities, or that no objection was made to such practice by the police or other municipal authorities, as such authorities have no right to license or permit the maintenance of a nuisance. If you believe from the evidence that the defendant, Key

System Transit Company, permitted the street car involved in this action to stand upon the street, and that the said street car was insufficiently or improperly guarded or lighted, or that it was not sufficiently lighted, so as to render the same clearly discernible to persons operating automobiles along that street, and if you believe from the evidence that it was negligence for them to permit or cause the said street car to so remain on the street, or that it was negligent for them to fail to properly or sufficiently light or guard the said street car, and that, by reason of such negligence, plaintiff sustained injury and was herself free from contributory negligence, then your verdict should be in favor of the plaintiff and against the defendant, Key System Transit Company."

[5, 6] We are not in accord with appellant's contention that a street car standing on its tracks, if so left for not an unreasonable time and being properly lighted or guarded, constitutes negligence per se; nor that the street car in question, which was left standing on the tracks where the accident occurred for but a few minutes and the street on both sides of the car tracks used for vehicular traffic being clear, constitutes an obstruction or renders the street dangerous and unfit for use by the traveling public. At the time of the accident and for a long time prior thereto the respondent company maintained its tracks and equipment and operated its cars on East Fourteenth street by authority of franchises from the county of Alameda and the city of Oakland. It was not only expressly authorized to use the streets, but was required to do so under its franchises. These facts place respondent in a different position from a private individual using the streets. Whether respondent should have been permitted to leave its cars standing on its tracks in the street when not in use was a matter for determination by the authorities.

As was said in George v. Los Angeles Railway Co., 126 Cal. 362, 58 P. 821, 46 L. R. A. 829, 77 Am. St. Rep. 184: "Instruction 10 was as follows: 'Whether the defendant's trailer cars should have been permitted to stand on the track in the street during the hours of the day when they were not needed for carrying passengers, was a question to be determined by the city authorities, and is a wholly irrelevant and immaterial question in this case.' It is objected that this instruction was confusing and misleading to the jury, because they had been previously told that the questions of the manner of leaving the cars, the place where they were left, et cetera, were to be considered by them in determining whether defendant was negligent or not. It seems to us that this particular instruction was intended to show simply that the city authorities alone could determine whether the cars should be permitted to be left on the street for the convenience of defendant. It is true that the right to so use the street must come from the city, and in so saying to the jury the court did not weaken the force of the other instructions as to the care defendant should exercise in so occupying the street."

In Poland v. United Traction Co., 107 App. Div. 561, 95 N. Y. S. 498, the court says: "A street railway company has the right, without being charged with a breach of duty or an unlawful obstruction of the highway, to allow its cars to stand upon its tracks for a reasonable length of time. Adams v. Metropolitan Street Railway Co., 82 App. Div. 354, 81 N. Y. Supp. 553. In the case cited, the fender was down and the car was unlighted and unattended, which presented a stronger state of facts than those of the case at bar, and yet the defendant was held blameless because the car had not remained in such condition for an unreasonable length of time."

Section 3479 of the Civil Code provides: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or *unlawfully* obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." It follows, therefore, that leaving the car in question on the company's tracks on East Fourteenth street for the few minutes it was left on the morning of the accident did not constitute it an *unlawful* obstruction, nor a nuisance as a matter of law. On the contrary, the street car not having been left standing on the street, as found by the jury, for an unreasonable time, respondent was *lawfully* using the car tracks at the time of the accident as authorized by its franchise from the city of Oakland, and the street on both sides of the tracks used for vehicular traffic being clear, no obstruction in fact existed.

Appellant has cited a number of cases where the acts of individuals have been held to constitute nuisances per se, but in these cases the obstructions were unlawful—the California cases cited being Colgrove v. Smith, 102 Cal. 220, 36 P. 411, 27 L. R. A. 590, where a contractor unlawfully dug trenches without authority from the city; McKune v. Santa Clara V. M. & L. Co., 110 Cal. 480, 42 P. 980, where a mill operator maintained an unauthorized obstruction on the highway; Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 P. 881, where an unlawful obstruction to the free use of the highway was erected, and Monsch v. Pellissier, 187 Cal. 790, 204 P. 224, wherein it is said that gratings which were apparently in a condition which might render them in their character "of the nature of a nuisance," the defendant who had or was charged with knowledge of their condition cannot escape liability upon the ground that she had not received statutory notice of such nuisance.

We fail to see the applicability of these authorities, as the facts are not analogous to those in the present case. In Chicago Northwestern Railroad Co. v. Prescott (C. C. A.) 59 F. 237, 23 L. R. A. 654, cited by appellant, in which case a railroad train obstructed a cross street and injury resulted to a person endeavoring to pass, the court uses this language: "And according to well-established rules, the issue as to whether a street was rightfully obstructed, should be submitted to the jury, if the circumstances attending the blockade are such that reasonable persons might entertain different views as to whether the action of the company was justifiable."

So in the present case the court properly submitted this question to the jury, and as the evidence is sufficient to support the verdict in favor of defendant, the judgment should be and it is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 1

PEOPLE v. AYMAR et al. (Civ. 6142.) ★

District Court of Appeal, Second District, Division 2, California. March 27, 1929.

Rehearing Denied April 25, 1929. Hearing Denied by Supreme Court May 23, 1929.

1. Criminal law ⟹636(1)—Defendant charged with misdemeanor must be present in person at trial in municipal court (Pen. Code, §§ 977, 1043, 1148, 1193, 1305, 1306, 1434, 1438, 1451, 1461a; Wright Act).

One charged with violating Wright Act (St. 1921, p. 79), a misdemeanor, is required to be present at trial in municipal court under Pen. Code, §§ 1434, 1438, 1451, since sections 977, 1043, 1148, and 1193, relate to superior courts only, under section 1461a, and forfeiture of bail bond under sections 1305 and 1306 was therefore proper when defendant failed to appear.

2. Appeal and error ⟹125—Summary judgment forfeiting bail bond when one accused of misdemeanor failed to appear in municipal court held not appealable, in view of surety's consent (Pen. Code, §§ 1305, 1306; Wright Act).

Summary judgment forfeiting bail bond entered under Pen. Code, §§ 1305, 1306, when defendant accused of violating Wright Act (St. 1921, p. 79), a misdemeanor, failed to appear for trial in municipal court, *held* entered in accordance with consent of surety and therefore not appealable, in view of language of bond.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

James Aymar was charged with violating the Wright Act, and from a judgment against the Seaboard Surety Corporation of America forfeiting bail bond, it appeals. Appeal dismissed.

Arthur T. Stollmack, of Los Angeles, for appellant.

Lloyd S. Nix, City Prosecutor, and Joe W. Matherly, Deputy City Prosecutor, both of Los Angeles, for the People.

IRA F. THOMPSON, J. [1] The defendant was charged with a violation of the Wright Act (St. 1921, p. 79), a misdemeanor, and the appellant Seaboard Surety Corporation of America executed a bail bond for him, which bond reads in part as follows: "Now, we, the Seaboard Surety Corporation of America, hereby undertake that the above defendant, James Aymar, will appear and answer the charge above mentioned in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and, if convicted, will appear for judgment and render himself in execution thereof, or if the said defendant fails to perform either of these conditions, that he will pay to the people of the state of California the sum of seventeen hundred dollars, lawful money of the United States. If the forfeiture of this bond be ordered by the court, judgment may be summarily made and entered against said Seaboard Surety Corporation of America and the said defendant, if he be a party to the bond, for the amount of their respective undertakings herein, as provided by sections 1305 and 1306 of the Penal Code." On January 4, 1928, the defendant was arraigned in the municipal court of Los Angeles, and his trial set, before a jury, for February 1, 1928. On the latter date, the defendant failed to appear for trial, and his bail was declared forfeited. Thereafter judgment was entered in the superior court against the surety for the amount of the bond in accordance with sections 1305 and 1306 of the Penal Code, and it is from this judgment that the surety appeals. The respondent has made a motion to dismiss on the ground that the judgment is not appealable. Inasmuch as the motion and the merits involve identically the same questions of law, the cause has been submitted as to both.

It is asserted by appellant that the presence of a defendant at the trial upon a misdemeanor charge is not necessary unless an order has previously been made requiring him to be present for the purposes of identification, and it points to sections 977, 1043, 1148, and 1193 of the Penal Code for confirmation of its contention. Section 1043 reads: "If the prosecution be for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant: if, however, his presence is necessary for the purpose of identification, the court may, upon application of the district attorney, by

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★Rehearing denied. Hearing denied by Supreme Court.

an order or warrant, require the personal attendance of the defendant at the trial." Section 977 provides that in misdemeanor cases the defendant "may appear upon the arraignment by counsel." Section 1148 says that verdicts in misdemeanor cases may be received in the defendant's absence, and section 1193, that judgment may be pronounced in his absence. It is to be noted, at this juncture, that none of the sections to which we have referred are to be found in part II, title 11 of the Penal Code, which outlines the proceedings in justice and police courts and is made applicable by section 1461a thereof to proceedings in the municipal courts. They therefore relate to the superior courts only. While the reason for requiring the presence of a defendant in the inferior courts named and not in the superior court may appear difficult of comprehension, nevertheless we find that the Legislature has declared a different policy with respect to the trial of misdemeanor cases before the former tribunals from that which applies to the superior court.

Section 1434 of the Penal Code, which is found in the title above mentioned, reads: "The defendant must be personally present before the trial can proceed." Section 1438 of the same Code provides that the proofs and allegations shall be delivered in the presence of the defendant, and section 1451 says that a new trial shall be granted "when the trial has been had in the absence of the defendant, unless he voluntarily absent himself, with full knowledge that a trial is being had." Both of these appear in the same title. It would be difficult to find language less free from uncertainty than the wording of section 1434, and if the authorities were equally as free from doubt we would have no difficulty in saying that the presence of the defendant is required in the municipal court. However, appellant also relies upon the cases of Carroll v. Police Court, 66 Cal. App. 66, 225 P. 35; People v. Ebner, 23 Cal. 158, and People v. Budd, 57 Cal. 349. Carrol v. Police Court, supra, cannot be considered, for the reason that there the police judge made an order requiring the defendant to appear at the time of trial for the purpose of identification, thus removing all doubt concerning the question. It is also apparent that the case of People v. Budd is not controlling here, for the reason that the defendant was there indicted; that he was admitted to bail by a judge of the Fifth judicial district, and called for trial in the county court of Stanislaus county. This court was comparable to our superior court (Stats. 1863, p. 337), and governed in its procedure by law similar to those statutes now pertaining to trials in the superior court. The case of People v. Ebner was tried in the court of sessions, a court created by the Constitution of 1849, with the proviso that the Legislature should prescribe its criminal jurisdiction. Article 6, § 8, Constitution 1849. In 1850 the Legislature, it is true, fixed the jurisdiction of this court as follows: "The court of sessions shall have jurisdiction throughout the county over all cases of assault, assault and battery, breach of the peace, riot, affray, and petit larceny, and over all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or both such fine and imprisonment." Stats. 1849–50, p. 210. At the second session of the Legislature, however, this jurisdiction was materially increased and altered by the following provision: "The court of sessions shall have jurisdiction: First, to inquire, by the intervention of a grand jury, of all public offenses committed or triable in its county; second, to try and determine indictments found therein, for all public offenses, except murder, manslaughter, and arson; and to try and determine indictments in these excepted cases against a person holding the office of a district judge; third, to hear and determine appeals from the justice and recorders' courts, in cases of a criminal nature." Stats. 1851, p. 19. Thus was the jurisdiction of the court defined at the time the Ebner Case was tried, except that there was probably included in the excepted criminal cases "fighting a duel, and killing or wounding any person therein," added in 1860 (see Stats. 1860, p. 31), shortly after the decision in People ex rel. Terry v. Bartlett, 14 Cal. 652, which case grew out of the Broderick-Terry duel, and wherein it was decided that the court of sessions had jurisdiction of an indictment charging Terry with "the fighting of a duel by agreement with David C. Broderick, and the death of Broderick as the result of the meeting." It is obvious from what we have said that neither the case of People v. Ebner, supra, nor People v. Budd, can be considered either as controlling the situation or helpful as precedents in solving the problem. We conclude that section 1434 of the Penal Code is determinative, and that the presence of the defendant was required.

[2] It thus becomes apparent that the summary judgment was entered in accordance with the consent of the appellant and is not appealable. Duerr v. Sloan, 50 Cal. App. 512, 195 P. 475; Roberts v. Fitzgerald (Cal. App.) 271 P. 1110. We are fully aware of the fact that the sureties on an undertaking executed in accordance with section 942 of the Code of Civil Procedure secured a reversal in the case of Hawley v. Gray Bros. Artificial Stone Paving Co., 127 Cal. 560, 60 P. 437, because the summary judgment was prematurely entered, and that a reversal was ordered in Reay v. Butler, 118 Cal. 113, 50 P. 375, because the bond given was ineffectual as a stay, and therefore the consent was likewise ineffectual to authorize a summary judgment. We see no inconsistency, however, in saying that a consent judgment is not appealable, but where the judgment is not entered in accordance with the consent it is

appealable, because in the latter case a consent judgment is not involved. The view thus expressed is a sufficient reason for saying that the appeal should be dismissed rather than declaring that the judgment should be affirmed.

Appeal dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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98 Cal. App. 65

PUREXO PRODUCTS CO. v. YAMATE.
(Civ. 6601.)

District Court of Appeal, First District, Division 2, California. April 1, 1929.

1. Intoxicating liquors 🔑329(2)—Buyer defending action for goods sold and delivered had burden on issue whether contract was illegal, as for alcohol.

In action for goods sold and delivered, burden of proof was on defendant on issue presented by him as to whether contract was illegal; subject-matter of sale consisting of wine tonic containing alcohol.

2. Appeal and error 🔑930(4)—In support of judgment for plaintiff, reviewing court assumes jury found against defendant on issue of illegality of contract.

In support of judgment for plaintiff in action for goods sold and delivered, reviewing court must assume that jury found against defendant on issue of illegality of contract.

3. Sales 🔑218½, 340—Facts held to show that title passed to buyer, authorizing seller to sue for balance of contract price rather than for damages.

In action for goods sold and delivered, facts *held* to warrant jury in inferring that title to goods passed from seller to buyer, so that seller was not required to sue for damages, but could bring action for balance of contract price.

4. Appeal and error 🔑174—Plaintiff's failure to prove corporate capacity cannot be complained of for first time on appeal.

It is too late on appeal to claim for first time, that plaintiff failed to introduce proof of corporate capacity, where point was not called to trial court's attention and was not included in motion for nonsuit nor in instructions.

5. Pleading 🔑121(4)—Denial based on want of information or belief of plaintiff's incorporation and compliance with local state laws held insufficient as to matters of record in office of secretary of state.

Defendant's denial by allegations based on want of information or belief of plaintiff's allegations that it was incorporated under Nevada laws and had complied with California laws *held* insufficient at least as to matters of record in office of secretary of state at Sacramento.

6. Corporations 🔑29(2)—Showing that plaintiff, a foreign corporation, had filed copy of articles of incorporation with secretary of state was sufficient on collateral attack (Civ. Code, §§ 358, 405).

Showing that plaintiff, a foreign corporation, had filed certified copy of purported articles of incorporation with secretary of state, was showing that it was corporation de facto under Civ. Code, § 405, and this was sufficient on collateral attack under section 358.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for goods sold and delivered, brought by the Purexo Products Company against Sasto Yamate, doing business under the firm name and style of Yamate Bros. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph J. McShane, Anthony S. Devoto, and Devoto & Richardson, all of San Francisco, for appellant.

Harold L. Levin, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff sued the defendant to recover a balance due for goods sold and delivered. The defendant appeared and answered, and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff. From a judgment entered on the verdict, the defendant has appealed.

[1, 2] Before proceeding further, it will clarify the situation to state that the subject-matter of the alleged sale consisted of a number of cases of wine tonic containing alcohol. Both in the trial court and in this court something has been said regarding the contract being illegal. That issue was presented by the defendant. On him rested the burden of proof. On the subject of legality or illegality, the evidence was distinctly conflicting. In support of the judgment, we must assume that the jury found against the defendant on that issue.

[3] The defendant contends that his motion for a nonsuit should have been granted, that the trial court erred in giving to the plaintiff as damages the contract price, and that there is no evidence as to the amount of the damage suffered by the plaintiff. These three contentions the defendant presents as one point, the contention that the plaintiff should have sued for damages instead of for the balance of the contract price. In making this point, the defendant is relying principally upon the rule as stated in Gopcevic v. California Packing Corp., 64 Cal. App. 132, 220 P. 1078. He concedes that, as stated in the case cited, "If tender is made by the vendor with intent to pass title in the goods to the vendee, title is thereby deemed to have passed, and the vendor may sue for the con-

tract price." Civ. Code, § 1141. In Turner, Kuhn & Fraser, Inc., v. Jones, 61 Cal. App. 732, at page 734, 215 P. 1033, 1034, the court said: "Under a contract of sale the parties may agree when title shall pass. If they expressly do so, their contract controls, even though the subject matter has only a potential existence. If they do not so previously agree and a dispute arises as to the true character of the agreement, the question is one rather of fact than of law." We do not understand the defendant to question the rule as so stated, but we do understand him to contend that, under the facts in the instant case, the title did not pass. Whether it did or not can be determined only from a number of circumstances which were introduced in evidence. The purchaser maintains an office where he transacts business, but there are not at that office storerooms for the purpose of holding his merchandise. The written order out of which this litigation arose contained the language: "This confirms my order for 200 cases of Vin Zymo Tonic at $5 per case. Same to be delivered on or before January 10, 1927. *The order is not subject to cancellation.*" The last sentence was written into the contract by the seller. In the trial court and in this court it contends that the sentence was meant to indicate that it was passing to the purchaser the title to the tonic at the time the order was accepted. On the trial of the case, the plaintiff's manager testified that he asked the purchaser to give the seller shipping directions, but the purchaser refused to do so. He also testified that on many occasions he offered to make delivery, and the purchaser refused to accept delivery. Furthermore, it is a conceded fact that the bottles were to be labeled by the seller with the purchaser's labels. These facts and other facts we think warranted the jury in inferring that the title to the goods passed from the seller to the purchaser. That being so, the first three contentions made by the defendant are not supported.

The defendant makes the point that two of the court's instructions erroneously stated the law regarding illegal contracts. But we think his authorities do not sustain his contention. If at one instant a sale is illegal for want of a permit, non constat, the same act, at a later date, after a permit has been obtained, is entirely legal. That was the substance of the instructions.

[4-6] In its complaint, the plaintiff alleged that it was a corporation organized under the laws of the state of Nevada and doing business in California. In his answer, the defendant pleaded: "Denies any knowledge or information sufficient to form a belief whether, * * * etc." No proof was introduced at the trial. At this time the defendant claims that the plaintiff failed to prove his allegation. To that claim there are two answers. Assuming that the plaintiff did not introduce sufficient proof of corporate capacity, the record shows that the point was not called to the attention of the trial court and that the court made no ruling thereon. At the end of the plaintiff's case the defendant made a motion for a nonsuit. The grounds of the motion appear in the reporter's transcript. Nothing was said on the point. The instructions requested by the defendant and refused by the trial court are set forth, but no instruction was requested on the subject of failure to introduce proof of plaintiff's corporate capacity. It is now too late to make the claim for the first time. 2 Cal. Jur. 248. The other answer is this: The plaintiff alleged (1) that it was incorporated under the laws of Nevada, and (2) that it had complied with all the laws in relation to doing business in California. Both allegations the defendant attempted to deny by allegations based on want of information or belief. At least as to matters of record in the office of the secretary of state at Sacramento, the denial was insufficient. The answer admitted, therefore, that the plaintiff had filed a certified copy of purported articles of incorporation with the secretary of state—in other words, that it was a corporation de facto. Civ. Code, § 405. This showing was sufficient on a collateral attack. Civ. Code, § 358.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

98 Cal. App. 185

McWILLIAMS et al. v. HUDSON et al.★
(Civ. 3717.)

District Court of Appeal, Third District, California. April 9, 1929.

Rehearing Denied May 9, 1929. Hearing Denied by Supreme Court June 5, 1929.

Appeal and error ⟹82(1) — Order relieving party from failure to timely file bill of exceptions held not appealable as "special order made after final judgment" (Code Civ. Proc. § 963, subd. 2).

An order granting ex parte application to relieve party from failure to file bill of exceptions within 10 days after notice of entry of order denying motion for new trial is not special order made after final judgment, within Code Civ. Proc. § 963, subd. 2, and not a final determination of matter affecting appellant, and is therefore not appealable.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Special Order.]

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by C. H. McWilliams and others against C. A. Hudson and another. From an order relieving plaintiffs from their failure

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★For opinion on rehearing, see 277 P. 529. Hearing denied by Supreme Court.

to file a bill of exceptions within 10 days after notice of entry of order denying new trial, defendants appeal. Appeal dismissed.

Woodruff, Musick, Pinney & Hartke, of Los Angeles, and Ticknor, Carter & Webster, of Pasadena, for appellants.

James Farraher and Ewell D. Moore, both of Los Angeles, for respondents.

MONCUR, Justice pro tem. This is an appeal from an order of the trial court relieving respondents from their failure to file a bill of exceptions within 10 days after notice of entry of an order denying a motion for a new trial.

In an action commenced by respondents herein, plaintiffs below, against appellants, judgment went for the appellants. Plaintiffs, within the time allowed by law, moved for a new trial, and the motion was denied on September 8, 1925, and notice of decision was served on respondents' counsel on September 17, 1925. No order or stipulation extending time within which to file a bill of exceptions was made. On October 31, 1925, plaintiffs, without notice to the defendants, or their counsel, made an ex parte application to the court for relief from their failure to file a proposed bill of exceptions within the period provided by law, and asked for leave of court to serve and file their proposed bill of exceptions to be used on appeal from the judgment rendered in the action, by November 6, 1925. The application was made upon the affidavit of one of counsel for plaintiffs, and on October 31, 1925, the trial judge made and entered an order relieving plaintiffs from their said failure to so file their bill of exceptions, and permitted them to serve and file the same on or before November 15, 1925.

It is the contention of appellants that the trial court was without authority to relieve the respondents from such failure to so file their bill of exceptions, for the reason that the time limit embraced in section 650 of the Code of Civil Procedure, within which the draft of a proposed bill of exceptions may be served upon the adverse party, is mandatory. This contention, however, cannot be sustained. See Banta v. Siller, 121 Cal. 414, 53 P. 935, and cases therein cited. The relief granted, of course, is based upon section 473 of the Code of Civil Procedure, and it is contended by appellants that the requirements of said section, particularly in respect to notice to counsel on the other side and an affidavit of merits, have not been complied with. However, in the view we take of the appeal, it is not necessary to decide this matter. It is the contention of respondents that the order appealed from is not an appealable order, and we are satisfied that this contention must be sustained. The case of Kaltschmidt v. Weber, 136 Cal. 675, 69 P. 497, seems to be squarely in point, and at page 676 (69 P. 497) of said decision it is said: "After a judgment of nonsuit had been entered in the above-entitled action, the plaintiff served upon the defendant a proposed bill of exceptions to be used upon his motion for a new trial, to which the defendant served his proposed amendments. The plaintiff gave notice to the defendant that he did not accept the amendments, and that on a day designated he would present the same for settlement to the judge who had tried the cause. On that day the defendant objected to the settlement of the bill upon the ground that the same was not presented within the time allowed by law, presenting an affidavit in support of his objection. The judge continued the hearing until a subsequent day, at which time the plaintiff applied to be relieved from his neglect to present the bill for settlement, upon the ground that such neglect was excusable and owing to inadvertence, and presented certain affidavits in support of his motion. Affidavits in opposition thereto were also presented on the part of the defendant, and upon hearing the same the court granted the plaintiff's motion for relief. From this order the present appeal has been taken. The respondent now moves to dismiss the appeal upon the ground that the order is not appealable. The order appealed from is not 'a special order made after final judgment,' within the meaning of subdivision 2 of section 963 of the Code of Civil Procedure although it was made subsequent to the entry of judgment. 'It in no manner affected the judgment, or bore any relation to it, either by way of enforcing it or staying its operation.' [Griess v. State Investment, etc., Co., 93 Cal. 411, 28 P. 1041.] Neither is it a final determination of any matter affecting the appellant in the proceeding before the court in which it was made."

Also, the case of Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 136 P. 523, seems to be conclusive upon the right of appeal involved herein. At page 741 (136 P. 526) of said last-named decision it is said: "A preliminary objection is urged by the plaintiff against a consideration of the bill of exceptions and the affidavits used by the defendant on its motion for a new trial, on the ground that the same were not prepared and served within the time prescribed by law. The same point is made the subject of a distinct appeal in Kramm v. Stockton Elec. R. R. Co. (Civil No. 1126) [22 Cal. App. 761], 136 P. 534, but the order relieving the defendant from its alleged default is not one from which an appeal is authorized (Kaltschmidt v. Weber, 136 Cal. 675, 69 P. 497); hence said appeal has this day been dismissed." See, also, to the same effect, Lake v. Harris, 198 Cal. 85, 89, 243 P. 417.

The order appealed from herein not being an appealable order, it is ordered that the said appeal be, and the same is hereby, dismissed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

97 Cal. App. 769

PALOS VERDES LIBRARY DIST. OF LOS ANGELES COUNTY v. McCLELLAN.

(Civ. 6360.)

District Court of Appeal, Second District, Division 2, California. March 26, 1929.

1. Constitutional law 🔑290(3)—Municipal corporations 🔑4—Statute authorizing organization of library districts does not deny due process because not providing opportunity for objection to inclusion in district (Const. art. 9, § 1; St. 1909, p. 815, §§ 1, 15).

As, in view of Const. art. 9, § 1, and St. 1909, p. 815, §§ 1, 15, relative to establishment of libraries, library district organized under such act is an educational district, statute does not deprive taxpayers of property without due process of law because providing for including their property without notice and opportunity to object to its inclusion.

2. Municipal corporations 🔑12(8)—Notice of library district election need not be published in newspaper when none is published within district (St. 1909, p. 815, § 3).

Under St. 1909, p. 815, § 3, requiring election on question of organizing library district to be posted and published in "daily or weekly paper therein, if there be one," where no paper is printed or published within the district, notice need not be published in newspaper printed outside the district and circulated within the district.

3. Municipal corporations 🔑12(8)—General statute as to publication of notices is inapplicable to library district election (Pol. Code, §§ 4458–4466; St. 1909, p. 815, § 3).

Pol. Code, §§ 4458–4466, respecting publication of legal notices, is inapplicable to notice of election on question of organizing library district, in view of special provision in St. 1909, p. 815, § 3.

4. Municipal corporations 🔑918(4)—Library district bond election was not invalid because statutory hours were not observed, when votes cast within statutory hours were largely in favor of bonds (St. 1909, p. 815, § 22).

Though, at election in library district on question of issuing bonds, polls were opened before 1 p. m. contrary to St. 1909, p. 815, § 22, election was not invalid, where 68 votes were cast for the bonds and seven against, and at least 35 of the votes were cast after 1 p. m.

Original application by the Palos Verdes Library District of Los Angeles County for a writ of mandate, directed to R. F. McClellan, as Chairman of the Board of Supervisors of the County of Los Angeles. Writ granted.

Everett W. Mattoon, County Counsel, and J. H. O'Connor, Assistant County Counsel, both of Los Angeles, for petitioner.

O'Melveny, Tuller & Myers, and Paul E. Schwab, all of Los Angeles, for respondent.

CRAIG, J. Pursuant to a petition therefor, signed by more than 50 taxpayers and residents of the unincorporated village or town of Palos Verdes Estates, in Los Angeles county, the board of supervisors by resolution enacted that on January 31, 1928, between the hours of 1 p. m. and 7 p. m., an election be held to determine whether or not a library district should be formed in accordance with the provisions of the act of April 12, 1909 (page 815). In said petition and resolution it was recited that the territory to be included in such district is entirely located within the county of Los Angeles, and the same was described by metes and bounds. A notice of election was accordingly given by posting in three of the most public places in said district, but, there being no newspaper published within the boundaries thereof, "no publication of said notice in any newspaper was given or made." It is alleged that on the date mentioned an election was held between the hours of 1 p. m. and 7 p. m., at which election the question was submitted by ballots to the qualified electors, and that of 238 qualified electors 45 voted, 44 of whom cast their votes in favor of the proposition and but one opposed it. Thereafter, at a regular meeting of the supervisors the returns of said election were canvassed, and by resolution reciting the antecedent proceedings, it was enacted that "a public library district to be known and designated as Palos Verdes library district be and the same is hereby ordered formed." It is alleged by both parties to this proceeding that no hearing was had before the board of supervisors as to the extent of the boundaries of the proposed district or upon the question as to whether or not the lands within its limits would be benefited by being included therein; that no taxpayer had an opportunity to be heard as to the extent of the tax to be imposed upon him or as to whether or not his land should be included in such proposed district. By a subsequent resolution the supervisors directed that an election be held on June 28, 1928, between the hours of 8 o'clock a. m. and 7 o'clock p. m. of said day, for the voting of bonds in the amount of $90,000, and authorizing their sale, for the purpose of establishing and equipping a library. On the date last mentioned 75 votes were cast, 68 of which were in favor of the bond issue, and 7 were opposed thereto. It is alleged by the petitioner that at least 35 of such ballots were cast between the hours of 1 o'clock p. m. and 7 o'clock p. m. Following a canvass of the election the board of supervisors ordered and directed that the chairman of said board and the county auditor sign each bond, and that they be issued and sold. Bids having been submitted to the trustees and accepted, the bonds were issued and presented to the chairman of the board of supervisors for his signature. Respondent refused to sign them, contending, as he here insists, that: (1) The statute under which the library district was formed is unconstitutional and void, in that it fails to provide for a hearing upon the extent of the boundaries of a proposed district or upon the amount of benefits to property included therein; (2) that the district was not legally organized, for the reason that notice of the election with respect to organization was not published in any newspaper; and (3) that the proceedings authorizing the issuance of the bonds were void by reason of the fact that the polls were open from 8 o'clock a. m. until 7 o'clock p. m., whereas the lawful period of time for holding such an election is from 1 o'clock until 7 o'clock p. m. Petitioner herein prays that respondent be required by writ of mandate from this court to affix his signature to each of said bonds, and insists that the statute is constitutional, that publication of said notice was not required, and that, a sufficient number of ballots having been cast within the legal limitation of time, the fact that the polls were actually open and other votes were received before 1 o'clock p. m. did not invalidate the proceedings.

[1] In support of the respondent's refusal to execute the bonds in question, the act under which the petitioning district was created is attempted to be placed in the same category with the legislation authorizing the creation, conduct, and maintenance of highway lighting districts, which latter enactment was held unconstitutional upon the grounds above mentioned.

It was provided by section 2 of the Lighting District Act (Stats. 1909, p. 551) that: "Any unincorporated town or village of this state may establish a highway lighting district for the purpose of installing and maintaining a system of street lights on public highways, for the better protection of its residents, in accordance with the provisions of this act."

Other sections thereof recite that the county supervisors shall ex officio constitute the supervisors of the district; that they shall invite bids and accept only those offering gas or other lighting commodity at rates not exceeding the rates paid by the county for highway lighting in other portions of the county; that the lighting is "for the better protection of its residents." The supervisors of the county have power to make rules, regulations, and laws for the administration, operation, and maintenance of the district; to estimate the cost thereof for each ensuing year, which, added to the rate paid to the contracting distributors, is taxable to the property within the lighting district at the equalized value thereof.

In People v. Van Nuys Lighting District, 173 Cal. 792, 162 P. 97, Ann. Cas. 1918D, 255, quoting, in part, from Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369, it was said: "In all substantial particulars regarding this question the act was similar to the lighting district act here involved. The court recognized the fact that the formation of such districts involved two distinct features, one of which was the creation of a public corporation and the other the levying of an assessment or special tax upon property benefited by the proposed improvement. With respect to the creation of the corporation the court said: 'There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which requires notice to or hearing of the parties included therein before it can be formed. It is created for a public purpose, and it rests in the discretion of the legislature when to create it and with what powers to endow it.' See, also, People v. California Fish Co., 166 Cal. 576, 606, 610, 138 P. 79. With respect to the other consequences the court said: 'In the act under consideration, however, the establishment of its boundaries and the purposes for which the district is created, if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in an assessment upon all the lands included within the boundaries of the district. The legislature thus in substance provides for the creation not alone of a public corporation but of a taxing district whose boundaries are fixed, not by the legislature, but, after a hearing, by the board of supervisors.' The court then proceeds to declare that when the power to form such district is delegated to a local board or tribunal, it acts judicially in fixing the boundaries, and the parties whose lands are proposed to be included are entitled to a hearing upon the question of benefits, before the formation of the district, and to have their lands excluded if it appears that they are not benefited."

The petitioner likens library districts to school districts in this respect, and maintains that no *lands* are benefited or affected by the library service, that the creation of such districts does not result in an assessment, or permit of the exclusion of the property of any inhabitant thereof, and that neither notice nor hearing upon these questions is required.

Section 1, article 9 of the Constitution of California, which article relates to education, provides: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."

Sections 1 and 15, respectively, of the Library District Act (St. 1909, p. 815), read as follows:

"Any unincorporated town or village of this state may establish, equip and maintain a public library for the dissemination of a knowledge of the arts, sciences and general literature, in accordance with the provisions of this act."

"Every [public] library established under the provisions of this act shall be forever free to the inhabitants and non-resident taxpayers of the library district, subject always to such rules, regulations, and by-laws as may be made by the board of library trustees. * * * "

It is therein further provided that the board of supervisors of the county where the district is situated shall appoint three trustees, who shall be vested with power to make and enforce all rules, regulations, and by-laws necessary for the administration, government, and protection of libraries and library property; that they shall estimate the cost thereof for each ensuing year, and report the same to the supervisors of their county; that they may borrow from and loan to libraries books, periodicals, magazines, etc.; they must be "open for the use of the public during every day in the year," alike to residents, to nonresident taxpayers, and to nonresidents who pay no taxes, under such conditions as the trustees may impose.

It will thus be seen that, subject to the appointment of trustees by the county supervisors, and reporting to the latter of each annual estimate of the cost of maintenance, a library district, as distinguished from a highway lighting district, is wholly local in management and control, and is independent of the county government. That a public library is educational in character has repeatedly been held when its liability to taxation has been questioned. In Webster City v. Wright County, 144 Iowa, 502, 123 N. W. 193, 24 L. R. A. (N. S.) 1205, the Supreme Court of Iowa, in construing the statutes of that state, exhaustively reviewed the authorities of various states, and concluded:

"Indeed, it would seem that little doubt should be entertained regarding the educational character of such institutions. On no other theory can a tax levy in their support be sustained. The national bureau of education at Washington has always taken the position that public libraries are institutions of learning. In interpreting the will of John Crerar, the founder of the great public library in Chicago, Judge Tuley, at circuit, said in an opinion, adopted by the appellate court as its own: 'Such a library, beyond dispute, is a great public blessing to all within its range, rich and poor alike. It will make all of them wiser and better and more useful and powerful for good in all the relations of life. It is preeminently an educational institution, because its benefits will extend to a larger body of people than can be reached by any college or other school of learning.' Crerar v. Williams, 44 Ill. App. 497, s. c. 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454. In this state a library is considered to be within the proper range of school apparatus, for the statute expressly authorizes the acquirement and use of books by a school township and rural independent districts, and the establishment of small libraries to aid in the dissemination of knowledge. See Acts 28th Gen. Assem. c. 110, p. 83. Indeed, it is quite generally conceded that Carlisle was right when he said that the true university of today is a collection of books."

We are satisfied that the distinction, both in legislative intent and in fact, between lighting districts and their kin, and library districts, is patent. The former are maintained for the supplying to the public of a *utility*, which may be furnished by private capital or by a municipality. Rawle's 3d Rev. Bouv. Law Dict. vol. 3, p. 2766; Dillon on Mun. Corp. (5th Ed.) vol. 3, p. 2089, § 1290. The latter are conducted for the general diffusion of knowledge and intelligence, and are educational, as well as quasi municipal. In re Orosi Public Utility District, 196 Cal. 43, 235 P. 1004. In the case last cited educational districts are declared to be quasi municipal in character, and our Supreme Court said that there is an obvious distinction between acts providing for their formation and acts under which are created public utility corporations or assessment districts which practically authorize property owners to place burdens upon the property of others, without notice, for the sole purpose of improving their own property. It was further said that the Constitution does not attempt to limit the power of the Legislature in providing for the determination of the question as to what shall constitute municipal territory. The decision quotes with approval from Cook v. Port of Portland, 20 Or. 580, 27 P. 263, 13 L. R. A. 533, that:

"'A city or purely municipal corporation is perhaps the highest type of corporation created for municipal purposes, because it is a miniature government, having legislative, executive and judicial powers, but there is another class of corporation, such as counties, school districts, road districts, etc., which, though varying in application and peculiar features, are but so many agencies or instrumentalities of the state to promote the convenience of the public at large, and are, in the broadest use of the term, for municipal purposes.'"

It is there plainly pointed out that, in discerning the distinction for the purpose of determining the applicability of the "due process" rule, the problem lies in deciding whether or not the act under which the district was created provides for the organization of a district which is in its nature a public corporation, the inhabitants and property owners of which are subject to taxation for municipal purposes without any hearing as to the benefits to be derived from the creation and conduct of the corporation, or is an assessment district created for the primary purpose of assessing upon private lands the benefits to be derived thereby from the public improvements for which purpose the district was formed; that the exactions which public utility corporations may enforce "are in the nature of assessments or taxes for local benefits, to be spread on the property in the districts in proportion to the peculiar advantage accruing to each parcel from the improvement. * * * Districts of the nature just discussed are not municipal corporations in the contemplation of the constitution." And, in denouncing the rule as to the other class of districts, it is said: "We have been cited to no authorities which hold that the requirement as to due process of law gives a property owner an absolute right to notice and hearing before his property may be included within the limits of a municipality or a quasi municipal corporation, by reason of the creation of which his property will be subjected only to the burden of a general tax for the purposes for which the district was formed, in contradistinction to a tax or assessment for some local benefit."

We conclude that the statute is not unconstitutional as depriving taxpayers within a proposed library district of property without due process of law, by including their property therein without notice and without opportunity to object to the intended boundaries. In respondent's briefs it is not seriously urged that the omission of a provision requiring such notice from acts authorizing the creation of educational districts would nullify them. It is, however, insisted upon cited authority that there is in this respect a distinction between school districts and park districts, since the latter, like public streets, confer special benefits upon neighboring property. From what has already been observed we do not deem it necessary to further discuss this phase of the question, as it does not tend to alter the conclusion heretofore reached.

[2, 3] It is next asserted that, assuming the statute to be constitutional, the proceedings were illegal because the notice of election was given only by posting, and was not published in a newspaper. The Library Act provides that upon filing with the board of supervisors of a petition by 50 or more taxpayers and residents of a town or village, the board must order an election to be held in the proposed district, and shall appoint three qualified electors *thereof* to conduct the same. And section 3 of that act requires that: "Said election shall be called by posting notice thereof in three of the most public places in said proposed library district and by publication in a daily or weekly paper *therein*, if there be one, at least once a week for not less than fifteen days." St. 1909, p. 815.

Respondent strenuously insists that, while no newspaper was actually printed within the prescribed boundaries of the proposed district, a daily or weekly paper was published in the city of Redondo, which was the nearest point thereto, and that publication should have been made therein. Although certain Code sections are discussed in the briefs, both sides state that they do not apply in this proceeding. The sections referred to are 4458 to 4466, inclusive, of the Political Code. We agree with counsel that these provisions are general and do not control where, as, in this instance, a special provision has been enacted for the particular proceeding. County Sanitation Dist. v. Payne, 197 Cal. 448, 241 P. 264. We are not here concerned with a statute where such terms as "newspaper of general circulation," "published," or "established, printed and published" are employed. Cases cited in which it has been held that where such terms are used the paper may be maintained and issued at a point outside of the district do not aid us. The plain wording of this act requires that the newspaper be within the district. There is no mention of the publication being within its boundaries. The requirement is that if there be a daily or weekly paper in the proposed library district notice shall be published in it. No other interpretation can, we think, reasonably be given to the language of section 3 of the act.

We think that had the Legislature intended the publication of notice in a newspaper published and printed outside of the proposed district, but at the nearest point thereto and circulated in the district, it doubtless would have so specified, or have omitted the four qualifying words, "if there be one." In other instances the intention of the Legislature is expressly indicated by various sections of the Civil Code and Code of Civil Procedure.

A summons in proceedings to quiet title must be published "in some newspaper of general circulation * * * and published in the county where the property is situated, and *if there be no such paper* in such county, then in some adjoining county, to be designated by the court or judge thereof." Code Civ. Proc. § 750.

Notice of assessment of corporate stock must be given by publication in "some newspaper of general circulation, * * * published at the * * * principal place of business * * * of the corporation," and, "if there be no newspaper published at the place designated as the principal place of business of the corporation, then the publication must be made in some other newspaper of the county, *if there be one*, and if there be none, then in a newspaper published in an adjoining county." Civ. Code, § 336.

Certificates relating to partnerships must be published "in a newspaper published in the county, *if there be one*, and if there be none in such county, then in a newspaper in an adjoining county," or, "in the nearest county thereto." Civ. Code, §§ 2466, 2483.

Since no daily or weekly newspaper was printed or published within the limits of Palos Verdes library district, notice of the election for its incorporation could not be so published therein, and we conclude that the law does not require it to be published in a newspaper printed and published in an adjoining municipality.

[4] Finally, respondent contends that the proceedings were irregular because the polls were opened at 8 o'clock a. m., whereas section 22 of the Library Act provides that in such districts they "must not be opened before one o'clock p. m., and must be kept open not less than six hours." Petitioner contends that had the seven opposing votes heretofore mentioned been cast between 1 o'clock and 7 o'clock p. m., more than two-thirds of the qualified electors voting expressed their assent to the bond issue, and that the result was not affected by this deviation from the statute. Respondent insists that 40, or more than one-half of the ballots, having been cast before the statutory hour for opening the polls, less than two-thirds of the qualified electors who voted cast legal ballots.

In Kenworthy v. Mast, 141 Cal. 268, 74 P. 841, wherein it appears that the polls in two precincts did not open until 7:45 and 8:10 o'clock a. m., respectively, under a statute requiring the commencement of balloting at 6 o'clock a. m. it was held that the votes of qualified electors in those precincts should not be rejected. The rule of this state is there stated in the following language:

"It is said that the provisions as to time and place of holding an election are mandatory, and that the departure from those requirements was in this case so substantial as to forbid any inquiry as to whether or not any injury resulted. That a literal compliance with the provisions of the law as to the hour of opening the polls is absolutely essential to the validity of the vote of a precinct has never been held in this state, and no good reason can be conceived for so holding. Learned counsel for respondent admit that even the disobedience of a mandatory statute must be liberally construed, and that, if the departure therefrom is slight, and it can easily be determined that no injury resulted therefrom, the vote will not be rejected. It was said by this court in Atkinson v. Lorbeer, 111 Cal. 419, 421 [44 P. 162]: 'Of course, neither the voters nor those voted for have any control over election officers, and to set aside the vote of a precinct, when there was clearly no fraud or any mistake affecting the result, for mere irregularities occasioned by the ignorance or carelessness of election boards would, in many cases, be a patent injustice. Moreover, a construction requiring an exceedingly strict compliance with all statutory provisions might tempt to irregularities contrived for the very purpose of vitiating the vote at a certain polling-place, and as was said in Whipley v. McKune, 12 Cal. 361, "might lead to more fraud than it would prevent."'

"On the other hand the election laws should not be so construed as to open the door to future frauds which it is the purpose of those laws to prevent. It is practically impossible to lay down any general rule covering all cases, but we think the true test to be applied to departures from the requirements of the laws relating to the conducting of elections on the proper day and at the proper place, be those requirements called mandatory or directory, is as to whether or not the particular departure is of such a nature as to make it impossible or extremely difficult to determine, under the circumstances of the case, whether fraud had been committed or anything done which would affect the result. If, as was said in Atkinson v. Lorbeer, 111 Cal. 419 [44 P. 162], speaking of a departure from a so-called 'directory' provision, it may be easily shown that the departure was not accompanied with fraud or any act affecting the result, and such showing is made, the vote will not be rejected. If, on the other hand, the departure from the law is so gross as to give rise to a suspicion of fraud or unfairness, and the circumstances are such that in the nature of things no evidence as to the effect thereof could be satisfactory, a court will not enter upon the task of inquiry."

Again, in People ex rel. Escalle v. Town of Larkspur, 16 Cal. App. 169, 116 P. 702, it appeared that the polls were not opened until 2½ hours later, and were closed one hour earlier, than the time fixed by the statute. It was contended that between 6 o'clock a. m. and the opening of the polls a number of qualified electors appeared and were turned away because the official ballots had not arrived, and that 12 electors cast ballots which they wrote out in full upon blank paper; that "all of said electors worked outside the territory hereinabove set forth and some of them would have voted against incorporation." In affirming a decree declaring the election valid, it was said:

"So that, in any view of the facts the expression at the polls showed that a majority of all the electors who were entitled to vote was in favor of incorporation. We are next to inquire whether, in such a case, the will of the majority is to be set aside on the ground now urged. We think the principles enunciated in the well-considered case of Kenworthy v. Mast, 141 Cal. 268, 74 P. 841, are decisive of the question. The general rule laid down in McCrary on Elections, section 165, is quoted approvingly, namely, that where there is no statutory provision expressly declaring that a failure, in the respect now being considered, shall render the election void, it will be regarded as directory only, and that, unless the deviation from the legal hours has affected the result, it will be disregarded, but that if such deviation is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it has not. That burden was successfully borne in the present case."

So, in the instant case, to deduct the 7 negative votes from the 75 cast during the whole day, or from the 35 cast within legal hours, would leave more than two-thirds in favor of the bond issue, and in either event the expression of the required number of qualified taxpayers and residents of the library district readily appears.

The following authorities cited by respondent state the same rule as that enunciated in those from which we have quoted, and for the same reasons hold the elections involved to have been invalid. Directors of Fallbrook Irrigation Dist. v. Abila, 106 Cal. 365, 39 P. 793, failed to present a sufficient showing of the number of ballots cast during the time when the polls should have been closed, and hence it did not appear that the violation of the statute was harmless. Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 183 P. 809, was an appeal from a judgment of dismissal after sustaining a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The Supreme Court reversed the judgment, holding that the rule enunciated in Kenworthy v. Mast, supra, and People ex rel. Escalle v. Town of Larkspur, supra, had properly been invoked, and that the complaint was not demurrable upon the ground alleged by the defendant, since it presented facts which, if proved, would invalidate the election.

We think that the writ of mandamus should issue directing the chairman of the board of supervisors of Los Angeles county to sign the bonds here in question, as prayed, and it is so ordered.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice, pro tem.

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98 Cal. App. 201

LAUGHLIN et al. v. HOUGHTON et al. (Civ. 6745.)

District Court of Appeal, First District, Division 1, California. April 10, 1929.

Automobiles 🔑169—Leaving truck with rear extending onto pavement where there was no crossing warranted recovery for death from collision of car with truck.

The act of the driver of a truck in leaving the rear thereof extending over the paved part of the highway at night, after making a left turn crossing to turn around at a point in a busy thoroughfare where there was no crossing or intersection, and at a time when many cars were passing in both directions, *held* to constitute such negligence as to warrant recovery for death of person caused by collision with the truck of the car in which she was riding.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Everett Laughlin and another against G. E. Houghton and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Donahue, Hynes & Hamlin, of Oakland, for appellants.

Otto G. Kuklinski, of San Francisco, for respondents.

TYLER, P. J. Action for damages brought by the heirs at law of Flora Mabel Laughlin, deceased, claiming that decedent met her death in an automobile accident by reason of the negligence of the defendants. The accident occurred about 9 o'clock in the evening of May 16, 1927, on the main highway running between the towns of Tracy and Livermore. Decedent was riding in a Ford touring car, accompanied by a relative, Mr. William Laughlin. The car was being driven by one Stewart Armstrong. The party had taken the husband of the deceased to his work and was returning to the Laughlin home. Deceased was seated in the tonneau with her two minor children, the elder being three years old and the younger some thirteen months, and the car was proceeding along the highway in a westerly direction. The accident occurred at Altamount, opposite to the Summit Garage. At this place the paved portion of the highway is 20 feet in width, with a gravel road on either side. Defendant G. E. Houghton had driven a Mack truck, the body of which was some 18 feet in length, in front of the garage, facing in an easterly direction toward Tracy, and he desired to turn the truck around for the purpose of proceeding in the opposite direction. He made a left-hand turn and pulled his truck across the highway, the rear end of the truck projecting diagonally back toward the paved portion thereof. While in this position the automobile in which deceased was riding struck the rear end of the truck, seriously injuring William Laughlin and killing the mother and her youngest child. The case was tried before a jury, which resulted in a verdict in favor of the plaintiffs in the sum of $15,000. A motion for a new trial was made and denied. This is an appeal from the judgment. The sole point relied upon by defendants for a reversal is that there is no substantial evidence in the record to support the verdict. There is no merit in this claim. At the time of the accident there was a heavy traffic upon the highway, as many machines were being driven in both directions. At the point where defendant made his turn from the south to the north side of the highway, there was no crossing or intersection. The automobile occupied by deceased was being driven at a rate of speed variously estimated at from 20 to 25 miles an hour at the time of the impact with defendants' truck. There is evidence to show that at this time the truck extended over the paved portion of the highway. While there is a conflict in the testimony upon this subject, it is a matter with which we are not here concerned. In addition to the testimony, the surrounding circumstances indicate that the end of the truck projected over and across the highway proper, as broken glass and the body of the child were found exactly in the middle thereof. The act of the driver of the truck in backing the same over a busy thoroughfare where there was no crossing or intersection, and at a time when many cars were passing in both directions constituted such negligence on his part as warranted the jury in rendering a verdict for the plaintiffs.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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98 Cal. App. 155

KOPKE v. CARLSON et al. (Civ. 6742.)

District Court of Appeal, First District, Division 1, California. April 6, 1929.

1. Venue 🔑5(3)—Action for specific performance of contract for sale of land is triable in county where land is situated (Code Civ. Proc. § 392, subd. 1).

Action for specific performance of contract for sale of land, without more, is local action, which cannot be removed to place of defendant's residence, under Code Civ. Proc. § 392, subd. 1, providing that actions for recovery of real property or interest therein, or for injuries to the same, must be tried in county where land is situated.

2. Pleading 🔑49—Nature of action is determinable from character of complaint and of default judgment which might be rendered thereon.

Nature of action is to be determined from the character of the complaint and from the judgment which might be rendered on default thereon.

3. Venue 🔑5(3)—Suit by purchaser for ascertainment of amount due on contract and for vendors' execution of deed on payment thereof held suit for specific performance, triable where land was situated (Code Civ. Proc. § 392, subd. 1).

Complaint, alleging that plaintiff and defendants entered into installment contract for sale and purchase of real property, and that plaintiff performed all obligations on his part, but defendants refused to give deed except on payment of certain taxes and street assessments, with prayer that amount due defendants be ascertained, and that defendants be directed to execute deed on payment of such amount, *held* action for specific performance triable in county where land was situated, under Code Civ. Proc. § 392, subd. 1, irrespective of residence of defendants, since prayer for determination of amount due was merely incidental.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action by August Kopke against Mary Carlson and another. From an order granting defendants' motion for change of place of trial, plaintiff appeals. Reversed.

John Thompson, of Monterey, for appellant.

E. Fitzgerald, of Placerville, for respondents.

TYLER, P. J. [1] Venue of action. Appeal by plaintiff from an order granting defendants' motion for the change of place of trial. The action was brought by plaintiff as vendee against defendants as vendors for the specific performance of a contract for the purchase and sale of real property situate in Monterey county. Defendants are residents of El Dorado county. The motion was granted upon the theory that defendants were entitled to have the action tried in the county of their residence. The sole question here presented is whether the action is local or transitory. If local, the place of defendants' residence is immaterial. Section 392, subd. 1, of the Code of Civil Procedure, provides, in substance, that actions for the recovery of real property, or interest therein or for the determination in any form of such right or interest or for injuries to the same, must be tried in the county in which the subject of the action, or some part thereof, is situated. An action for the specific performance of a contract for the sale of land, without more, is manifestly one coming within the provisions of this section. Grocers' Fruit Growing Union v. Kern County Land Co., 150 Cal. 466, 89 P. 120; Tutt v. Davis, 13 Cal. App. 715, 110 P. 690; 25 Cal. Jur. p. 862. Counsel for respondents, in support of the order, seek to avoid the effect of this principle by claiming that, where real and personal actions are joined in the same complaint, a defendant is entitled to have the action tried in the county of his residence, and we are cited to the case of Smith v. Smith, 88 Cal. 572, 26 P. 356, and other cases of similar import, as upholding this doctrine. It undoubtedly is the rule that, where the main object of a suit is to recover a money judgment, as where a vendor seeks to recover the purchase price of land, that a defendant is entitled to have the action tried in the county of his residence, notwithstanding that the subject-matter of the action is land. But the instant case presents no such situation.

[2, 3] The nature of an action is to be determined from the character of the complaint and from the judgment which might be rendered upon a default thereon. McFarland v. Martin, 144 Cal. 771, 78 P. 239. Here the complaint alleges that plaintiff and defendants entered into an installment contract for the sale and purchase of certain real property. Further allegations show that plaintiff has complied with all the conditions and obligations in the contract to be by him performed, and has tendered the balance due on the purchase price, and demanded a deed free and clear of all incumbrances, but defendants refused to comply with his demand, except upon the payment of certain taxes and street assessments. The prayer of the complaint is that the amount due from plaintiff to defendants be ascertained, less the amount of taxes, incumbrances, and assessments, and that defendants be directed to execute a deed to plaintiff upon payment by him of the amount found to be due. It thus appears that the suit is one solely for the specific performance of the contract and nothing more. The mere fact that it is prayed that the proper amount due defendants be ascertained does not in any manner make the action twofold, or unite a real or local, and a personal or transitory, action. Robinson v. Williams, 12 Cal. App. 515, 107 P. 705. The action stripped to its essentials is one for the specific performance of a contract for the sale of land, and that portion of the prayer asking that the amount due be determined is a mere incident to the main relief sought, and does not change the nature of the action. Dial v. Homestead Land Co., 39 Cal. App. 479, 179 P. 444; Grocers' Fruit Growing Union v. Kern County Land Co., 150 Cal. 466, 89 P. 120.

The order is reversed.

We concur: KNIGHT, J.; CASHIN, J.

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98 Cal. App. 53

GLAZER v. HANSON et ux.

CONSIDINE v. SAME.

(Civ. 3707.)

District Court of Appeal, Third District, California. April 1, 1929.

1. Brokers 🔑10—Offer of exchange of property embodied in agreement employing broker held not irrevocable.

Agreement authorizing broker to effect exchange of property on terms set forth in offer embodied in agreement *held* not irrevocable, but subject to revocation at any time before acceptance by person to whom offer was made, notwithstanding writing purported to show agreement was coupled with interest, since agent's interest was in commissions only, and not in estate.

2. Principal and agent 🔑34—Power is coupled with interest, where grantee has interest in estate as well as in exercise of power.

Where the grantee has an interest in the estate, as well as in the exercise of the power, such power is coupled with an interest, and the agreement becomes irrevocable.

3. Brokers 🔑43(3)—Husband's oral authorization of wife's signature for him of brokerage contract held ineffective (Civ. Code, § 1624, subd. 6; § 2309).

Agreement employing broker to effect exchange of properties, signed only by wife, who also wrote husband's name at foot of agreement, was not binding on husband, irrespective of whether he orally expressed satisfaction with agreement; Civ. Code, § 1624, subd. 6, and section 2309, making said oral authorization ineffective.

4. Damages 🔑79(1)—Broker cannot recover liquidated damages for breach of contract of employment to effect exchange of properties, in absence of showing that it would be impracticable or extremely difficult to ascertain actual damage (Civ. Code, §§ 1670, 1671).

Broker cannot recover liquidated damages specified in agreement employing him to effect exchange of properties, in view of Civ. Code, §§ 1670, 1671, in the absence of any pleading or showing that it would be impracticable or extremely difficult to fix actual damage or agreed compensation.

5. Brokers 🔑11—Loss of commissions is measure of broker's damage for breach of agreement employing him to exchange properties.

The measure of damages for breach of an agreement employing broker to effect exchange of property is his loss of commissions.

6. Brokers 🔑43(3)—Contract employing broker to sell real estate on commission must contain description of land sufficient to identify same without aid of parol evidence (Civ. Code, § 1624, subd. 6; § 2309).

Under Civ. Code, § 1624, subd. 6, and section 2309, contract authorizing or employing agent or broker to sell real estate for commission, must contain description of land sufficient in itself or by reference to identify the same, without the aid of parol evidence.

7. Brokers 🔑43(3)—Contract employing broker to exchange ranch property for urban realty held unenforceable for indefiniteness of description.

Agreement employing broker to effect exchange of ranch property for property in city of Oakland, located at southeast corner of Sixteenth street and Eighth avenue, *held* unenforceable for indefiniteness of description of property involved.

Appeals from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Separate actions by David Glazer and by J. F. Considine against Per Hanson and wife.

Judgments for defendants, and plaintiffs appeal, the cases being consolidated for purposes of appeal. Judgments affirmed.

W. T. Belieu, of Willows, for appellants.

R. M. Rankin and H. W. McGowan, both of Willows, for respondents.

PLUMMER, J. The above-named actions, though based partly upon different contracts, begun separately, and asking for judgments in different sums, were consolidated for the purposes of this appeal, and have been presented upon one transcript and argued in one set of briefs. For convenience we will consider first the questions presented in the Glazer case, which to some extent will answer the questions presented in the appeal by Considine, and we will then consider the questions which are peculiar to the Considine appeal. Both cases were prosecuted to recover commissions relating to the exchange of real property, and nonsuits were granted in both cases. The appeals are from the judgments granting nonsuits.

The record discloses that Per Hanson and Susan Hanson, his wife, were the owners of certain real property situate in the county of Glenn, and that on or about the 1st day of October, 1926, at Oakland, in the office of the plaintiff Glazer, the defendant Susan Hanson signed a writing for exchange of properties. The writing, which we will call an agreement, was never signed by her husband, Per Hanson. The name "Per Hanson" was attached to the writing by Susan Hanson. Susan Hanson, however, was never authorized in writing to affix the name of her husband. The defendant Per Hanson was not present at the time his wife affixed his name to the agreement. The instrument to which we have referred is in the words and figures following:

"This agreement witnesseth: That the undersigned Per Hanson and Susan Hanson (wife) owner of the firstly hereinafter described property, in consideration of services to be rendered by David Glazer, hereinafter designated as agent, and for other valuable considerations, hereby agrees with the owner of the secondly hereinafter described property, to exchange said firstly described property for said secondly described property upon the terms and conditions hereinafter set forth.

"Said firstly described property owned by the undersigned, located in the county of Glenn, state of California, is the following: [Here follows description of real properties.]

"Terms: First property, 47 acres, more or less, subject to Federal Farm Loan of $6,400, at 5½ interest.

"Also

"First property, 40 acres more or less, to be free and clear.

"Second property, subject to $40,000.00 first loan, flat until February, 1927, then payable at $465 per month including interest for four years.

"The undersigned hereby authorize said agent to act as agent for them and said agent may also receive a commission from the owners of the hereinbefore secondly described property and the undersigned agrees to pay to said agent at their office, for services rendered $——— within ten days from the date when said agent secures from the owners of the secondly hereinbefore described property, a written agreement which completes or accepts this offer to exchange. If the undersigned refuses to complete this exchange after said acceptance is secured said undersigned then agrees to pay said agent within 15 days from date hereof as liquidated damages to be added to said commission the amount specified to be paid to said agent by the owner of the secondly hereinbefore described property, and a reasonable counsel fee if action is brought for the collection of said commission. Said agent may receive as additional compensation for their services to be added to the commission hereinabove specified, to be paid them by the undersigned any other or further profit obtained by them in said exchange; it being agreed and understood that the full consideration passing to the undersigned for this exchange is that the title to said second piece of property to be delivered to the undersigned subject only to the incumbrances herein stated.

* * * * * *

"The undersigned hereby agrees to furnish, within fifteen days after notification by said agent that this agreement has been accepted, a title insurance policy, and a deed conveying title to the property first above described, subject only to the incumbrances above named, and will allow fifteen days for the owner of said second piece of property to furnish a title insurance policy, and a deed to the property secondly above described.

"Time is of the essence of this agreement. Said agent is given until October 11, 1926, to secure said acceptance from the owners of said secondly described property and this agreement is irrevocable before that date.

"Dated at Oakland, California, this 1st day of October, 1926.

"[Seal] Per Hanson, S. H.
"[Seal] Susan Hanson."

This agreement was signed in duplicate by Susan Hanson. On the back of one of the copies of the agreement appears the following:

"I hereby accept this exchange with the proviso that there will be secured for me an additional loan of $8,600.00 on the first herein mentioned properties. Loans to be flat and for a period not less than 2 years, interest not to exceed 8 per cent per annum. This agreement is void after October 11, 1926. V. D. Accepted 10—5, 1926. V. A. Dunn. Evelyn Dunn."

It will be observed that while the agreement which we have set forth fails to specify the amount of commissions to be paid to the plaintiff, it does provide for the payment of liquidated damages in such sum as the owners of the secondly described property may agree to pay the plaintiff as commissions, and also reasonable counsel fees in the event the parties signing the agreement fail to complete the exchange. The record shows only the conditional acceptance to the agreement which we have herein set forth. On or about the 3d day of October, 1926, it appears that V. A. Dunn and Ray R. Stevenson, who appears in the case as a real estate agent or broker acting for and with the plaintiff David Glazer, visited the defendants at their home place near Orland in Glenn county. During this visit Mr. Stevenson endeavored to have the defendant Per Hanson sign the agreement to which his wife had affixed his name. The defendant refused, however, to do so, or to have anything to do with the agreement. After this visit, and on or about the 7th day of October, 1926, it appears that after some conversation between the plaintiff and V. A. Dunn, one of the signers to the conditional acceptance of the agreement of exchange which we have mentioned wrote to the plaintiff the following letter:

"Victor A. Dunn, Attorney at Law,
"Central Bank Bldg., Oakland, California.
"October 7, 1926.
"Mr. David Glazer, 1460 Webster St., Oakland, Calif.

"Dear Sir: Pursuant to our telephonic conversation of to-day beg to state that you can notify Mrs. Susan Hanson and her husband that I have accepted their offer of exchange as specified in exchange agreement dated October 1, 1926, without any qualification or change and that I am ready and able to make said exchange. The data on the back of the said exchange of course does not enter into the exchange, you having personally agreed to make the loans mentioned herein.

"Your commission is to be $3,000.00 and no more as per our understanding.

"VAD/A [Signed] V. A. Dunn."

It does not appear that the defendants were made aware of the contents of this letter, although it does appear that either the plaintiff or Mr. Stevenson notified the defendants orally that V. A. Dunn had accepted the agreement of exchange. This action is for the collection of the $3,000 mentioned in this letter addressed to the plaintiff by V. A. Dunn. On the 6th day of October, 1926, and prior to the writing of the foregoing letter to Glazer by Dunn, H. W. McGowan, an attorney at law acting as the attorney for both the Hansons, wrote a letter to the plaintiff David Glazer, notifying him that the Hansons refused, and would refuse, to have anything further to do with the exchange of the properties referred to in the agreement. The testimony of the plaintiff in relation to the letter promising him $3,000 for services by Dunn is well illustrated by the following excerpt: "So upon completing the conversation over the telephone I went over to his office and we sat into the matter for sometime and I satisfied him I could secure the money for him, and in view of that he wrote me that letter which we presented here as evidence, that he would pay that commission, and in that letter it states that if I secured the money for him he would give me $3,000.00 for my services and no more."

The record shows no unconditional acceptance of the agreement for exchange of property by V. A. Dunn and Evelyn Dunn. While it is argued that the letter written by Dunn to Glazer is such an acceptance, it is evident from an inspection of what we have herein set forth that no action for specific performance would lie against V. A. Dunn and Evelyn Dunn. It is also evident that there is nothing in the record and nothing in the agreement signed by Susan Hanson, and to which she affixed the name of her husband Per Hanson, furnishing a consideration for charging defendants with whatever sum might be named as the commissions that the owner of the secondly described property might at some future time agree to pay the plaintiff. The record shows that the plaintiff, on the 7th day of October, 1926, received the letter written by the attorney of the Hansons, notifying him of their withdrawal from the offer of exchange.

[1, 2] It is argued that the instrument called an agreement of exchange was irrevocable on the part of the Hansons. This, of course, is not the law. If the agreement were otherwise valid as an offer of exchange, it was subject to revocation at any time before acceptance by the person to whom the offer was made. If the plaintiff, as agent, suffered damages by reason of such withdrawal or revocation of offer, it might present a question which is not pertinent here. The writing which we have set forth also purports to show that it is coupled with an interest. The language in the contract, however, to that effect, does not make it so. This is shown by a reference to 4 California Jurisprudence, 562: "There is an exception to the rule that a contract of employment can be revoked at will where no time is specified for its continuance, which exists where the agency is coupled with an interest. In such a case the principal may not revoke the agreement without incurring liability to the broker therefor. A power coupled with an interest is where the grantee has an interest in the estate as well as in the exercise of the power." Here the agent has no interest in the estate. His interest is only in the commissions he might earn by effecting an exchange.

[3] There is another objection to the validity of the agreement so far as it affects the defendant Per Hanson, which precludes the

possibility of any recovery against him by the plaintiff in this action. In this case of Myres v. Surryhne, 67 Cal. 657, 8 P. 523, the rule is laid down that subdivision 6 of section 1624 of the Civil Code is applicable to the employment of agents for the exchange of real property. It is there said (quoting from the syllabus): "An agent employed to exchange real estate cannot recover any compensation or commission for his services in that behalf unless the services were performed under a contract in writing subscribed by the principal." Section 2309 of the Civil Code reads: "An oral authorization is sufficient for any purpose, except that an offer to enter into a contract required by law to be in writing can only be given by an instrument in writing." One of the witnesses for the plaintiff did testify that the defendant Per Hanson said that whatever his wife did was satisfactory to him. This does not constitute an authorization required by statute. The testimony of the witness referred to is denied by the defendant Per Hanson, but whether the defendant Per Hanson did or did not make such statement is wholly immaterial, as the statute requires the authorization to be in writing. Just as stated in McRae v. Ross, 170 Cal. 74, 148 P. 215: "An authorization to an agent empowering him to make a contract on behalf of the principal to sell real estate," etc., "must be in writing." Plaintiff in that case attempted to show that the different defendants had referred the transaction to a brother, who apparently was conducting the negotiations, but the court held that section 2309 of the Civil Code is applicable, and the attempt to show oral authorization, insufficient.

[4, 5] There is another reason why the plaintiff cannot recover in this action against either of the defendants. It purports to be an action founded upon an agreement to pay liquidated damages, and, if it be assumed that the writings to which we have referred constitute an agreement to pay liquidated damages, the plaintiff's action, nevertheless, must fail, and the nonsuit was properly granted. Section 1670 of the Civil Code reads: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." The next section, 1671, reads: "The parties to a contract may agree upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

There is nothing in the complaint, and not one word in the testimony to the effect that it would be impracticable or difficult to ascertain and fix the plaintiff's damage in this case. Broker's commissions are usually based and figured at a certain percentage of the valuation of the property involved. That is the extent of the damage, and there is no showing that such damages are not easily ascertained and fixed, if any such there be, However, by reason of the fact that the pleadings are silent, and the testimony is silent, the judgment of nonsuit followed a motion therefor as a matter of course. We need only to refer to one case, to wit, Sun-Maid Raisin Growers of California v. Paul A. Mosesian & Son, 265 P. 828, where this court had occasion to examine, and also to refer to a large number of cases relating to actions wherein it was sought to recover liquidated damages. This court there said: "The law is well settled in this state that the allowance of liquidated damages, or the enforcement of a clause in a contract providing for liquidated damages, is a matter of pleading and proof. There must be proof of the surrounding and attendant circumstances connected with the execution of the contract, from which the court may make its findings of the impracticability of fixing damages otherwise." That case and the authorities there cited are conclusive as against the plaintiff's right to recover in this action. This case was affirmed in the case of Sun-Maid Raisin Growers of California v. Arakelian (Cal. App.) 265 P. 832. In both cases a hearing was denied in the Supreme Court. This disposes of the case of the appellant Glazer.

In the case of the appellant Considine, the complaint, so far as material here, alleges as follows: "That heretofore on October 1, 1926, defendant became indebted to this plaintiff in the sum of $2,000.00 for services which he had rendered to them in the exchange of their property at Orland, in Glenn county, California, for property in the city of Oakland, county of Alameda, state of California, which said sum of $2,000.00 was payable in the following manner, to wit: The sum of $500.00 cash, on or before October 11, 1926, and the balance amounting to $1,500.00, to be evidenced by a bankable note payable at the rate of $50.00 per month until paid." To this complaint the defendants interposed a demurrer, setting forth, among other things, that the complaint did not state a cause of action. The demurrer was overruled, and upon the trial the plaintiff introduced in support of his contention the following agreement:

"This agreement, entered into this 1st day of October, 1926, between Per Hanson and his wife, Susan Hanson, and J. F. Considine, agent:

"Per Hanson and Susan Hanson hereby agreed to pay J. F. Considine the sum of $2,000.00 for services rendered in the exchange of their ranch property for property in the City of Oakland, said property located at the S. E. corner of 16th Street and 8th Avenue.

"Said $2,000.00 to be paid as follows: $500 cash upon the acceptance of the agreement between the owner of the Oakland property, and the balance amounting to $1,500.00 in the form of a bankable note, payable $50.00 per month until paid.

"The option, however, is given to Per Hanson and wife to pay all cash on the completion of this transaction; and in that event J. F. Considine will accept the total sum of $1,500.00.

"Time is the essence of this agreement, and all parties hereto agree to execute said evidence of the fulfillment of this agreement immediately upon the completion of the exchange agreement, which this agreement is a part of, covering the property hereinbefore mentioned.
Per Hanson, S. H.
"Susan Hanson.
"J. F. Considine."

[6, 7] This agreement was signed by Susan Hanson only, who affixed the name of her husband, Per Hanson, without any authority, as we have shown in considering the case of the appellant Glazer. In addition to what has been said in the Glazer case, we need only to state the following: In a contract authorizing or employing an agent or broker to sell real estate for a commission, there must not only be an instrument in writing signed by the parties to be charged, but the instrument must contain a description of the land sufficient in itself, or by reference, to identify the same without the aid of parol evidence. Or, as said in one of the cases: "In short, a description of land sought to be sold under a broker's contract can be cured but not created by parol evidence." This statement of the law is supported, among others, by the following authorities: Proulx v. Sacramento Valley Land Co., 19 Cal. App. 529, 126 P. 509; Craig v. Zelian, 137 Cal. 105, 69 P. 853; Cowing v. Wofford, 68 Cal. App. 538, 229 P. 883; Dillingham v. Dahlgren, 52 Cal. App. 322, 198 P. 832. Other cases might be cited, but these are sufficient.

It necessarily follows from what has been said that the court erred in overruling the defendant's demurrer to the plaintiff's complaint, and that the plaintiff's complaint does not state facts sufficient to constitute a cause of action. The land in Glenn county is not referred to by any description, and there is nothing in the complaint showing what property the pleader had in view when mentioning the city of Oakland. Likewise, the court erred in overruling the defendant's objection to the introduction of the agreement. First, as to the defendant Per Hanson, there is no showing that he had authorized any one to sign his name, as required by the Codes; secondly, the agreement is invalid and ineffective as against either of the defendants for the reasons set forth in the cases to which we have referred. The first paragraph of the agreement of employment, as we have said, reads:

"Per Hanson and Susan Hanson hereby agreed to pay J. F. Considine the sum of $2,000.00 for services rendered in the exchange of their ranch property for property in the city of Oakland, said property located at the southeast corner of Sixteenth street and Eighth avenue."

We only need to ask, Where is the ranch property? What property is located at the southeast corner of Sixteenth street and Eighth avenue? As the appellant Considine, in addition to what we have said in the Glazer case, failed also, for the reasons which we have stated in considering his own case, to make out a cause of action, the judgment of nonsuit as to him was also properly granted.

The judgments in both cases must be affirmed; and it is so ordered.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

98 Cal. App. 175

NORTON v. MEYERS. (Civ. 6696.)

District Court of Appeal, First District, Division 1, California. April 8, 1929.

1. Contracts 🔑322(4)—Testimony as to cost of building changes held not uncontradicted, so as to preclude finding that lesser sum would be sufficient, in view of evidence of oral agreement to construct smaller room than one included in estimate.

In action on note given in part consideration of agreement to perform building contract, testimony that it would require approximately $2,000 to remedy defects and make necessary changes, including reconstruction of room of dimensions originally specified, *held* not uncontradicted, so as to preclude finding that $750 would be sufficient, in view of evidence of oral agreement to construct smaller room.

2. Appeal and error 🔑930(1)—Intendments and presumptions from stipulation for inspection of building by trial judge must be indulged in favor of judgment.

Whatever intendments and presumptions legally flow from stipulation that trial judge should visit and inspect building with contractor and builder of his own selection, and consider any information thus obtained as if introduced in evidence, must be indulged in favor of judgment for plaintiff, in action on note given as part of consideration for agreement to perform building contract.

3. Contracts 🔑295(1)—Building contractor, substantially performing contract in good faith, can recover price, less damages for minor deviations, from owner taking possession.

Where owner has taken possession of building, contractor has substantially performed contract, failure of full performance can be compensated in damages deducted from price or allowed as counterclaim, and omissions and deviations were not willful or fraudulent, and do not substantially affect usefulness of building for intended purposes, contractor may recover unpaid balance of price, less amount allowed as damages for failure in strict performance.

4. Contracts ⚷295(1)—Substantial performance of building contract usually depends on existing facts and circumstances.

The question of what constitutes substantial performance of a building contract is usually to be determined in each case with reference to the existing facts and circumstances.

5. Contracts ⚷295(1)—Trial court's enumeration of minor departures from building contract held not to establish lack of substantial performance.

Trial court's enumeration of eight conceded departures from building contract *held* not to establish lack of substantial compliance with contractor's obligations, where variance from specifications did not impair building as whole, it was actually used for intended purpose, and defects can be remedied without damage to other parts of structure for amount allowed.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by W. A. Norton against Laura M. Meyers, who filed a cross-complaint. From a judgment for plaintiff, defendant appeals. Affirmed.

J. E. Haley and Birger Tinglof, both of Los Angeles, for appellant.

Charles J. Kelly, of Los Angeles, for respondent.

LANDIS, Justice pro tem. This is an action on a promissory note in the sum of $2,185, given plaintiff as part of the consideration of his agreement to perform a building contract.

In her answer defendant alleges that, by reason of the failure of plaintiff to complete the work within the time and as provided by the agreement, the consideration for the note wholly failed, and in her cross-complaint asks damages against plaintiff in the sum of $2,925 for failure to perform the building contract, and by reason of defective construction and material furnished by plaintiff.

The trial court found that plaintiff had substantially performed the contract, and that changes necessary to make the work conform to the agreement could readily be made, and gave judgment against defendant for the amount of the note, less certain allowances for changes in the work performed by plaintiff, to make the same comply with the agreement, detriment caused by failure to perform, for which plaintiff was not at fault, and a sum certain for failure to complete the work within a reasonable time. The amount of allowances made by way of recoupment, aggregating the sum of $850, covered the following items: $100 for damages for failing to complete the contract within a reasonable time and $750 because of deficiencies in construction of the building.

Defendant appeals, and for a reversal of the judgment relies upon and urges the following two points, viz: First, insufficiency of the evidence to sustain the finding to the effect that, in certain enumerated respects, the work performed and materials furnished by the plaintiff to the defendant were not in accordance with the contract between them, as a result of which the defendant sustained a loss of $750, to be deducted from the amount sued upon; second, insufficiency of the evidence to sustain the finding to the effect that the building and work as finished by plaintiff was completed substantially in accordance with the agreement between the parties.

[1] In support of the first point urged, appellant contends that the testimony of the witnesses Howard, Brown and Johnson, to the effect that, in their opinion, it would require approximately $2,000 to remedy the defects and make the necessary changes in construction and materials in the building erected by respondent, is in no way contradicted; and that, as respondent did not introduce any testimony in contradiction of the testimony of these witnesses, there is no basis for the finding that $750 would in fact be sufficient to remedy the defects and compensate appellant; that it is not a case of conflict of evidence, but simply a case where there is no evidence in conflict with the defendant's testimony in this regard. With this contention we are unable to agree. Upon an examination of the entire record, it appears to us that this is a case where there is a substantial conflict in the evidence. For instance, and without reviewing the entire testimony, it quite clearly appears that the principal item complained of is that of a room the construction of which was smaller in size than the contract called for. While it is true that the three witnesses hereinbefore mentioned did give it as their opinion that, to replace everything in first-class workmanlike manner, including the making of that room 14 feet by 18 feet, as originally specified and agreed upon, it would cost approximately $2,000, there is evidence to the effect that the available space would not permit the construction of a room the size called for, and that, after this fact was discovered, an oral agreement was entered into by and between the parties under which the smaller size was adopted; and an examination of the entire testimony of these witnesses discloses that the estimates given were based upon the cost of a reconstruction of the room, that is, the cost of taking apart the constructed room and the rebuilding of another room of the size originally called for. In short, there is evidence that contradicts the testimony of the

three witnesses Howard, Brown, and Johnson which, if believed by the court, justifies and supports the court's conclusion.

[2] The record also discloses that on the last day of the trial a discussion between the court and the respective counsel took place and resulted in a stipulation between the parties to the effect that the trial judge should visit and inspect the building in question and should take with him a contractor and builder of his own selection; that such inspection should be made in the absence of the parties and the attorneys, and that any information the judge obtained from such inspection or from the contractor so accompanying him on such inspection should have the same effect, and should by the court be considered as if such testimony had been introduced in court at the trial. The record does not show whether the judge did or did not inspect the premises, and the contention of respondent is that for the reason that the record fails to disclose that the judge did not inspect the building, under the rule often laid down by this court, all presumptions not contradicted by or inconsistent with the record on appeal must be indulged in favor of the judgment (citing Throop v. Weaver, 180 Cal. 335, 181 P. 55; Woods v. Diepenbrock, 141 Cal. 55, 74 P. 546; Jackson School District v. Culbert, 134 Cal. 508, 66 P. 741; Brown v. Vidal, 1 Cal. Unrep. 15; Myers v. Canepa, 37 Cal. App. 556, 174 P. 903, 906; Kovacevich v. Fischer Motor Body Co. [Cal. App.] 271 P. 351), and that it must be presumed in support of the judgment that the court did in fact inspect the building and consider the results of its own observations, in support of the findings complained of. Disposing of this contention of respondent in view of our having, without the consideration of the presumption urged, reached the conclusion that there is a substantial conflict of evidence, suffice it to say that whatever intendments and presumptions legally flow therefrom must be indulged in favor of the judgment.

[3] With respect to the second point urged by appellant, to the effect that there has not been a substantial performance of the contract, the law in this state on this subject has been considered in several recent decisions, and is now comparatively well settled. The rule as stated in the case of Haverty Co. v. Jones, 185 Cal. 285, 289, 197 P. 105, 107, and supported by a long list of authorities therein enumerated, is as follows:

"In the case of building contracts where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not wilful or fraudulent and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price, less the amount allowed as damages for the failure in strict performance."

[4, 5] Appellant contends that the finding and enumeration by the trial court of eight conceded departures by respondent from the contract show and establish a lack of substantial compliance with his obligations under the contract. The findings of the trial court, after specifying the eight particulars in which the construction did not conform to the agreement, in part recites as follows:

"Such neglect and failure to complete the work and furnish the materials were in minor details only in connection with the whole of said agreement, and can, almost without exception, be readily supplied by said defendant, and that the said agreement was in all respects substantially performed."

The question what constitutes substantial performance is one of some difficulty, but is usually "to be determined in each case with reference to the existing facts and circumstances."

In this case it quite clearly appears that the variance from the specifications of the contract does not impair the building as a whole; that, after construction, the building was actually used for the intended purpose, and that the defects can be remedied without material or in fact any damage to the other parts of the structure, and, other than the item of the reconstruction of the room, which may be eliminated from consideration by reason of the subsequent oral agreement, can be remedied for the amount allowed by the trial court for that purpose.

Based upon the conclusions hereinbefore announced upon the principal issues of the case, we are constrained to hold that the judgment expresses a correct conclusion upon the facts found, and that the evidence is sufficient to justify the findings upon the material issues necessary to support the judgment.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

HILL v. KNIGHT et al. (Civ. 3690.)★

District Court of Appeal, Third District, California. April 3, 1929.

Rehearing Denied May 3, 1929. Hearing Granted by Supreme Court May 29, 1929.

1. Brokers 🔑88(3)—Motion for nonsuit in broker's action for commission should have been granted, under evidence showing broker was not procuring cause of sale.

In broker's action for commission where evidence showed that broker did not consummate sale of property, did not have exclusive agency, that he knew owners claimed right to sell property themselves, did not inform owners that he had endeavored to interest purchaser in property, and that owners sold property without knowledge that broker had called it to attention of purchaser, *held*, that defendants' motion for nonsuit should have been granted.

2. Brokers 🔑49(1)—Merely calling purchaser's attention to property and urging desirability of its purchase is not sufficient to support judgment awarding commissions.

Merely calling attention of a prospective purchaser to property and urging upon him desirability of its purchase is not sufficient basis to support judgment awarding any commissions.

Appeal from Superior Court, Yolo County; Peter J. Shields, Judge.

Action by W. L. Hill against Edna L. Knight and others. Judgment for plaintiff, and defendants appeal. Reversed.

R. M. Rankin, of Willows, for appellants.

J. L. Royle, of Berkeley, for respondent.

PLUMMER, J. This appeal is from a judgment in favor of the plaintiff after motion for new trial had been denied by the court. The action was for recovery of commissions alleged to be due the plaintiff on account of the sale of certain real estate, was tried before a jury, and resulted in a verdict in favor of the plaintiff.

The plaintiff was a real estate broker doing business in Sonoma county, and on or about the 19th day of November, 1923, the defendants executed and delivered to the plaintiff a writing authorizing the plaintiff, for a period of 30 days, to act as agent in making sale of certain real and personal property described and referred to in said instrument. Time was made the essence of the agreement or authorization, and under its terms it expired 30 days after date. On the 11th day of December, 1923, R. N. Rankin, an attorney for the defendants, acting under instructions from one of them, wrote the plaintiff a letter extending the authorization for 30 days from its expiration date, with the understanding that there was no change in price and that the contract or authorization did not confer any exclusive rights upon the plaintiff. The selling price of the property mentioned in the writing executed and delivered to the plaintiff fixed the real estate at $35,000, which price included all machinery, farm implements, horses, harness, and saddles then on the property. The writing also included an authorization to sell 250 head of cattle, more or less, at $30 per head. The plaintiff was to receive 5 per cent. commission on the selling price of the real estate, and $1 per head for the cattle sold. The terms of sale were also set forth in the authorization, and the real estate, consisting of 2,823.93 acres, sufficiently described by reference to deeds, etc. The record shows that no sale was effected under the authorization to which we have referred, nor during the period of time mentioned in Rankin's letter extending the operation of the agreement for 30 days on and after December 9, 1923. As we have said, time was made the essence of the original agreement. In the extension of the authorization for 30 days mentioned in the letter of Mr. Rankin to the plaintiff, it is specifically set forth that the heirs, which means the persons who executed the authorization, will, if they have the opportunity, sell the property, or that they desire to sell the property. This, of course, is only a statement of a right which the heirs possessed during the entire period of time heretofore mentioned, but constituted a further notice to the plaintiff. No sale of the ranch having been effected, it appears that on or about May 25, 1924, one of the defendants, Mrs. Edna L. Knight, wrote a letter to the plaintiff, which, among other things, contained the following: "In regard to the stock ranch, so far as I know it has never been listed with anyone but yourself and while the heirs would not renew the option, if you consummated a sale, you would be protected in your commission. I think the price would still hold good with the exception of the cattle which of course would be revalued. At present day prices I believe cattle will be worth more money in the near future and then of course we would not sell either ranch or cattle separately. One depends on the other. The only assurance I can give you is that if you sell the property you will be protected in your commission—the price the same as that given you with the exception of the stock as I stated above." In this letter, as shown by the excerpt, it was stated that the heirs would not renew the option; that is, the agreement to which we have referred as having been executed and delivered to the plaintiff on or about the 9th day of November, 1923, authorizing the plaintiff, as agent, to make sale of the property therein mentioned. The letter, however, did state that if the plaintiff consummated a sale, he would be protected in his commission. The information is also imparted in the letter that any sale

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★Hearing granted. 285 P. 691.

made by the plaintiff must be of both the ranch and the cattle; that they would not consider separate sales. The record shows that there was no further communication relative to the sale of the property mentioned in the authorization between the plaintiff and any of the defendants. However, on or about the 30th of July, 1924, a little over two months after receipt of the letter to which we have just referred, it appears that the plaintiff had an interview with Richard Deming, Jr., at plaintiff's office in Sonoma county, but did not succeed in effecting a sale. On the 4th day of August thereafter the record shows that Richard Deming, Jr., called on the defendants in relation to buying the real property heretofore referred to, and before any negotiations were had with him by the defendants, they inquired particularly if he had seen the plaintiff, Mr. W. L. Hill, and being informed that he had not, and had had no negotiations with him, the defendants entered into negotiations with Richard Deming, Jr., for the sale of the real estate heretofore referred to and succeeded in selling said property to him for the sum of $32,000. Thereafter, the plaintiff learning of the sale of the real property made demand for payment to him of commissions in the sum of $1,600, and payment being refused, the plaintiff instituted this action.

[1] Upon this appeal it is insisted: First, that the defendant's demurrer to the plaintiff's complaint should have been sustained; second, that the plaintiff had no written contract for the sale of the premises referred to; third, that the court erred in denying the defendants' motion for nonsuit; and, fourth, that the court erred in its instructions to the jury. For the reasons hereinafter mentioned we do not deem it necessary to consider the defendants' demurrer to the plaintiff's complaint, nor do we need to consider the terms and conditions of the alleged contract further than to state that the plaintiff was not authorized to make any separate offer of the property mentioned therein. The letter dated May 25, 1924, which must be the basis of this action if plaintiff had any rights whatever, specifically informed the plaintiff that the real estate and the cattle must be sold together, or to use the language of the letter, "one depends on the other." The letter also informed the plaintiff that the price of the stock included in the sale would be a matter of further consideration. In other words, the letter, if it amounted to an authorization at all, simply authorized the plaintiff to offer the property for sale, accept a bid, and refer the same to the defendants, as the selling price of the cattle was not fixed. None of the other defendants herein signed the letter to which we have referred, but it appears that their attorney, in open court, stated in effect that if the letter of May 25, 1924, bound the defendant Mrs. Edna L. Knight, it bound all of the defendants.

It will be noticed, further, that the only promise made to the plaintiff was in the use of these words in the letter referred to, to wit, "if you consummated a sale, you would be protected in your commission."

Did the plaintiff bring himself within the terms of this letter, or even within the terms of the original authorization, and did the court err in denying defendants' motion for a nonsuit? These questions can be answered more readily after setting forth the testimony of the plaintiff concerning all that he did in the matter. The plaintiff testified that he saw Mr. Deming on what is known as and called the Canfield ranch, near Geyserville; that Mr. Deming was contemplating buying that ranch; that thereafter he wrote a letter to Mr. Deming concerning the property belonging to the defendants, and asked Mr. Deming to come to his office. It appears that the ranch known as the Canfield ranch, and the real property known as the Caldwell property, belonging to the defendants, was some distance apart. That in response to the letter just referred to Deming appeared at the office of the plaintiff, and they talked over the ranch belonging to the defendants; that the plaintiff told him who owned it, and "went through the details regarding it." The plaintiff testified that he told Mr. Deming he could see the president of the Chamber of Commerce at Santa Rosa; also, a Mr. Doyle, president of the bank there; he had a mortgage on the place for $12,000. The witness then testified as follows: "And after Mr. Deming spent some two hours in the office he got up and said, 'Well, now I am not interested in the ranch,' he said, 'I don't care to figure on it, and,' he said, 'must find a cheaper ranch'; and I said, 'Well, now, you haven't seen it; I will take you up there and show it to you.' He says, 'No,' he said, 'I would be losing my time as well as yours.' So I disregarded all my data on it and threw it in the wastebasket, and disregarded him. A few days later I learned that Mr. Deming had bought the ranch, so I immediately wired the Purkitt heirs that my man had bought it and I expected to be protected on my commissions. Then I looked up the deeds. It was July 30th, the time that Deming came into my office, and the ranch deal was made on August 4th." While there is testimony in the record showing what Mr. Deming, and also a man by the name of Mr. Adams, who appears to have been interested with Mr. Deming, did after the interview with the plaintiff on July 30th, there is nothing in the record showing that the plaintiff took any further action in relation to the sale of the property mentioned in the original authorization, or in relation to the sale of the real property known as the Caldwell ranch belonging to the defendants. No effort was made by him to communicate with the defendants and inform them that either Richard Deming or Mr. Adams had been in plaintiff's office, or that he had given them any data or information in relation to the property. The plaintiff appears to have acted in accordance with his own statement, that he disregarded him (referring to Mr. Deming), and threw all his data in the wastebasket. As stated heretofore, the defendants made inquiry of Mr. Deming as to whether he had had any negotiations with the plaintiff Hill, or had seen the plaintiff Hill in relation to the property. We refer to this because it shows that the defendants acted in good faith, and brings them within the language of the Supreme Court of Massachusetts in the case of Smith v. Kimball, 193 Mass. 582, 79 N. E. 800: "The fact that the plaintiff had failed to persuade the purchaser to take the property at one price, is not of itself evidence which would justify a finding that his services were the operating and efficient cause of a subsequent sale at a somewhat lower price which yet was higher than the plaintiff had succeeded in obtaining. Nor is there any question possible as to the defendants' right to terminate the plaintiff's employment. They could have done this, acting in good faith, even if they had known who the plaintiff's customer was, and then had proceeded to deal with him themselves. (Cadigan v. Crabtree, 179 Mass. 474, 61 N. E. 37, 55 L. R. A. 77, 88 Am. St. Rep. 397.) * * * There is no ground on which it can be said that the defendants in throwing over the plaintiff and themselves dealing directly with A. V. Lincoln, acted in bad faith." (Citing a number of authorities.) "They could not have intended to deprive the plaintiff of his commission; for they did not know that Lincoln had been his customer." Disregarding that portion of the quotation relative to knowledge of the plaintiff's customer, the latter portion of the quotation is directly applicable here. The plaintiff took no means and made no effort to inform the defendants that he had a prospective customer or that he had even mentioned to Richard Deming that the ranch was for sale. The mere fact that the plaintiff called the attention of the property to Richard Deming is not sufficient to enable him to prevail in this action. As said in Naylor v. Ashton, 20 Cal. App. 544, 130 P. 181: "It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commissions, even though he made efforts to sell property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault or fraud of the owner"—citing Zeimer v. Antisell, 75 Cal. 509, 17 P. 642; Ayres v. Thomas, 116 Cal. 140, 47 P. 1013; Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354; Hicks v. Post, 154 Cal. 22, 96 P. 878; Brown v. Mason, 155 Cal. 155, 99 P. 867, 21 L. R. A. (N. S.) 328. To the same effect is the case of Cone v. Keil, 18 Cal. App. 675, 124 P. 548, where it is said: "Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for, and even though a broker opens negotiations for the sale of the property, he will not be entitled to a commission if he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual at the price and upon the terms for which the property was originally offered for sale." In Stephens v. Anderson, 36 Cal. App. 199, 171 P. 811, a case where the owner made sale to a purchaser to whom an agent had mentioned the property, and also where the agent had failed to communicate with the owner and inform the owner that he had called the attention of the property to the person to whom the owner thereafter sold, the court held the agent not entitled to commissions, and in so doing used the following language, which is according to the facts of this case: "There was no evidence that Stephens communicated to her any offer to purchase the property, and in these particulars we think there was a failure of proof necessary to sustain the plaintiff's case. We think the rule is fundamental and well understood that before an agent may be said to have earned a commission he is required to show that he produced to the vendor a purchaser ready, able, and willing to buy for the price and upon the terms proposed by the vendor in the agency contract. The alleged agency was in nowise an exclusive agency, and, under the conditions shown, Mrs. Anderson had the right to deal independently with anyone who desired to purchase directly from her," etc.

In the case of Brown v. Mason, 155 Cal. 155, 99 P. 867, 21 L. R. A. (N. S.) 328, a case which we have heretofore cited, the rule is affirmed that an agent, by merely calling the attention of the property to one who subsequently purchases the same, is not entitled to commissions unless there is some fault or fraud on the part of the owner.

In McCoy v. Zahn Corporation, 183 Cal. 191, 191 P. 20, the quotation which we have taken from Cone v. Keil, supra, is set forth and approved.

In the case of Rosenfield v. Wall, 94 Conn. 418, 109 A. 409, 9 A. L. R. 1189, a number of cases are cited affirming the rule which we have set forth, and then, in the annotations to that case, beginning on page 1194 of 9 A. L. R., a number of cases are quoted showing under what circumstances an owner may make sale without being liable to a broker who has performed acts similar to those testified to by the plaintiff in this cause.

The respondent calls our attention to the following language found in 4 California Jurisprudence, 605: "To entitle a broker to his commissions as the procuring cause of a sale, it is not necessary that he should have personally conducted the negotiations between his principal and the purchaser, leading to the sale, nor that he should have been present when the bargain was completed, nor that the principal, at the time, should have known that the purchaser was one found by the broker. It is indispensable, though, that the broker was the procuring cause of the sale, so where it appears that the seller and buyer were for the first time brought together by the broker, duly authorized to act for the seller, and the sale was subsequently consummated by the seller and buyer acting independently of the broker, the broker not having abandoned his agency, and the seller not having revoked the broker's authorization or done any act from which a revocation might be implied, the inference is a reasonable one that the sale, under such circumstances, is effected through the broker's agency as a procuring cause." The respondent relies upon the first sentence of the above quotation, but a reference to the authorities cited in the subjoined note shows that the contracts upon which that statement, or that portion of the quotation is based, were entirely different from the contract under which the plaintiff was acting, assuming that the original authorization was still in full force and effect.

In the case of Justy v. Erro, 16 Cal. App. 519, 117 P. 575, one of the cases cited to support the statement contained in the first sentence which we have quoted from 4 California Jurisprudence, the contract reads as follows: "This contract to remain in force for a period of ninety days from the date hereof and thereafter until written notice is given to cancel, and if sale is made by me or through me during the term of this contract, or after the expiration of the same, to anyone to whom said property has been submitted by said N. P. Justy Company, I agree to pay them 2½ per cent. commission on said sale." Nothing of that kind appears in any of the papers under which the plaintiff in this action purports to have acted.

The next California case cited to support the first sentence of the quotation taken from California Jurisprudence, supra, is that of Briggs v. Hall, 24 Cal. App. 586, 141 P. 1067. The contract, however, in that case reads as follows: "I reserve the right to sell said property myself, or to sell said property through the agency of anyone else, but I hereby agree that in case such sale be made by myself, or through any other agency, in consideration of their services to pay said Lyman & Briggs a commission of 2 per cent on" said sale. Here, again, the facts are entirely different and justify the statement of the law as set forth in California Jurisprudence, supra, upon a state of facts or upon a contract binding the owner to pay under conditions covered by the language found in California Jurisprudence, which contemplates an entirely different state of facts from those disclosed by the record in the case at bar. The last California case cited in support of the theory that the language which we have quoted from California Jurisprudence is applicable here, is that of Levy v. Wolf, 2 Cal. App. 491, 84 P. 313. The court, however, in its opinion recites the following: "In the case at bar, assuming the testimony" of the "plaintiff to be true, the name of the purchaser was given by the broker to the seller, and his offer accepted within the time allowed by the contract, and a sale consummated in accordance with the offer." That case does refer to some cases with reference to which it was said: "It is also urged that plaintiff cannot recover because he neither procured a written agreement from the purchaser, nor introduced him to the seller; and in support of this contention cites Gunn v. Bank of California, 99 Cal. 349 [33 P. 1105], and Mattingly v. Pennie, 105 Cal. 514 [39 P. 200, 45 Am. St. Rep. 87]," and then the opinion adds: "In neither of these cases was a written agreement obtained from the buyer, nor was he introduced to the seller by the broker, nor his name disclosed, nor any sale" in fact made. Then follows the language which we have heretofore quoted. And further on in the same opinion the rule is thus stated: "It is well settled, if the agent introduces or discloses the name of the purchaser, and such introduction or disclosure is the foundation on which negotiations are begun and the sale effected, he will be entitled to commissions, and this too, although in point of fact the sale may be made by the owner. In other words, he cannot avail himself of the services, and, by making a sale through information derived from the agent, deprive the latter of his commissions." Like the other cases, this discloses a state of facts entirely different from those in the case at bar, and renders respondent's statement of the law and citation of authorities inapplicable.

Nor is there anything in the case of Haun v. Rosenmayer, 46 Cal. App. 353, 189 P. 117, which limits the application of the cases which we have heretofore referred to showing that the plaintiff is not entitled to prevail. In the Haun Case we find this statement: "It is not necessary that a broker should personally conduct negotiations between his principal and the purchaser or that he should be present when the bargain is completed; it is sufficient that his efforts are the producing cause of the sale and that through his agency the purchaser is brought into communication with the seller, although the parties then negotiate in person"—citing some of the cases to which we have referred and some of the cases which are based upon contracts providing for the payment of commissions if sale is made to any one to whom the broker has disclosed the property. But the general statement in the case of Haun v. Rosenmayer, while a correct statement of the law, is not all of the law applicable to this case, because in the case at bar the plaintiff, by his own testimony, stopped the negotiations and made no effort to communicate with the defendants the incident of his conference with Richard Deming, Jr., or that Deming might be considered a possible purchaser.

Nor do we find anything in the case of Sessions v. Pacific Imp. Co., a corporation, 57 Cal. App. 1, 206 P. 653, which limits anything stated in the cases which we have referred to showing that mere disclosure of the property is not sufficient upon which to base an action for commissions when the property is thereafter sold by the owner under circumstances such as appear in the case at bar. The Sessions Case is too long to admit of any quotations therefrom.

In view of the fact that the plaintiff's own testimony shows that he did nothing more than has been held insufficient in the case of Cone v. Keil, supra, which case was affirmed in McCoy v. Zahn Corp., supra; that he did not consummate any sale of the property referred to in this action; that he did not have any exclusive agency; that he knew the defendants claimed the right to sell the property themselves; that there was no communication between the plaintiff and the defendants for more than two months after the receipt of the letter under which the plaintiff claimed the right to act; that the plaintiff made no effort to inform the defendants, or any of them, that he had endeavored to interest Richard Deming, Jr., in the purchase of the defendants' property; that the defendants made the sale of the property without any knowledge that the plaintiff had called it to the attention of the purchaser; that the record shows that the defendants acted in entire good faith without any subterfuge, without any attempt to make a sale of the property so as to deprive the plaintiff of commissions; that the record shows no fraud or delay on the part of the defendants; and in further view of the cases which we have cited applicable to the facts involved in this action—we find no escape from the conclusion that the defendants' motion for a nonsuit should have been granted. The fact that the purchaser, after having his attention called to the property belonging to the defendants, may have come to the conclusion that he did not wish to deal with the agent, or that he could drive a better bargain by dealing directly with the owners, does not alter the situation or give the plaintiff any right of action against the defendants.

[2] As to the alleged errors in the instructions, a general statement in relation thereto will suffice. The jury was instructed upon the theory that the plaintiff, by simply calling the attention of the purchaser to the property and explaining the desirability of its purchase, entitled the plaintiff to a judgment; that such action would constitute a proximate cause, irrespective of whether the vendors, the defendants in this action, had any knowledge that the purchaser was one found by the plaintiff, or that the plaintiff had placed the property in question before the purchaser for consideration, and irrespective of the fact that the sale was consummated by the defendants, when the authority, if any, given to the plaintiff, required him to consummate the sale. Under the facts as disclosed by the record in this case and the contract or authorization under which the plaintiff acted, the California cases which we have cited show that merely calling the attention of a prospective purchaser to the property involved and urging upon him the desirability of its purchase is not sufficient basis to support a judgment awarding any commissions. The cases which we have cited based upon an authorization to a broker such as here presented show the correct theory of the law to be adopted in instructing the jury.

The judgment of the trial court is reversed.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

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98 Cal. App. 126

GIANNINI et al. v. SOUTHERN PAC. CO. et al. (Civ. 6736.)★

District Court of Appeal, First District, Division 1, California. April 4, 1929.

Rehearing Denied May 3, 1929. Hearing Denied by Supreme Court June 3, 1929.

1. Railroads ⚷333(1)—Automobilist, driving on crossing in path of approaching train without looking or listening, was guilty of contributory negligence.

Automobilist, who drove automobile on crossing in path of approaching train when, if he had listened, he could have heard bell and noise of locomotive and car, and if he had looked he could have seen approaching train in ample time to avoid accident, was guilty of contributory negligence as matter of law.

2. Railroads ⚷338—Last clear chance doctrine is inapplicable where negligence of automobilist continued to moment of collision with train and contributed to his own injury.

Doctrine of last clear chance cannot be applied to situation where negligence of automobilist in going upon crossing in path of approaching train continued to moment of impact and actively contributed to his own injury.

★Rehearing denied. Hearing denied by Supreme Court.

3. Railroads 🔑338—Last clear chance doctrine held inapplicable to death of automobilist in crossing collision whose negligence continued and was concurrent with negligence, if any, of defendant.

In action for death in crossing collision of automobilist who was concededly contributorily negligent until moment of impact, doctrine of last clear chance *held* inapplicable under evidence showing that negligence of automobilist, whether killed at instant of impact or not before train had come to a stop, continued and was concurrent with negligence, if any, of defendant.

4. Evidence 🔑571(1)—Opinion of expert engineer as to distance in which train could be stopped, based upon false hypothesis, cannot be given any probative force.

Testimony of expert engineer as to distance in which train could be stopped at speed it was going cannot be given any probative force, where it was based upon false hypothesis that rails and wheels were dry and uncontradicted evidence was that rails were wet and wheels slid distance of 18 feet after they were locked.

5. Evidence 🔑594—Inferences cannot be drawn contrary to uncontradicted testimony and based on speculation or conjecture.

While all reasonable inferences are to be drawn from evidence in favor of conclusion of jury and conflicts are to be resolved in favor of respondents, inferences cannot be drawn contrary to uncontradicted testimony and based upon imagination, speculation, or supposition.

6. Appeal and error 🔑1066—Submitting issue of last clear chance, where not warranted by the evidence, must be held fatally prejudicial.

The giving of instruction submitting an issue on the last clear chance, where there is not sufficient evidence to justify submission of such issue, must be held fatally prejudicial.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Lena B. Giannini, individually and as guardian ad litem for Leroy Giannini and another, against the Southern Pacific Company and another. Judgment for plaintiffs, and defendants appeal. Reversed.

L. L. Cory, of Fresno, for appellants.

Everts, Ewing, Wild & Everts, Dan F. Conway, and C. M. Ozias, all of Fresno, for respondents.

CAMPBELL, Justice pro tem. This is an appeal from a judgment entered upon the verdict of the jury awarding plaintiffs $30,000 damages for the death of Pete Giannini, which occurred in a crossing accident on September 15, 1925, near Kingsburg, in Fresno county. The action was brought by Lena Giannini, the surviving wife of Pete Giannini, on her own behalf, and as guardian ad litem of their two children, Leroy Giannini and Eugene Giannini. It is one of those unfortunate occurrences which arise by reason of the failure of automobile drivers to appreciate the danger involved in crossing railway tracks without observing the duty imposed upon them by law to stop, look, and listen before proceeding upon such tracks—which are themselves signs of danger.

The scene of the accident was near the packing house of the Kingsburg Fruit Growers. At this point the state highway runs approximately north and south. To the east and parallel with the state highway is the main line of the Southern Pacific Company through the San Joaquin Valley, connecting San Francisco and Los Angeles. To the west of the state highway is a spur track of the railway company maintained for the purpose of affording railway service to certain packing houses located along its line. A driveway running west from the state highway gives access to two packing houses: One the Kingsburg Fruit Growers, which is west of and adjacent to the spur track and north of the driveway, and the other the Alamo Packing Company, which is west of and adjacent to the spur track and south of the driveway. The north and south distance between these two packing houses is approximately 48 feet, of which 23 feet is taken up by the driveway. This driveway ends at the westerly lines of the two packing houses, and at this end of the driveway there is space within which automobiles may turn around. At the time of the accident the north half of the crossing was graveled and in the south half the ties projected above the roadway. The accident occurred where this driveway crosses the spur track.

The decedent was a fruit grower, packer, and shipper, who owned and operated a packing house in the vicinity and who on numerous occasions had visited for business purposes the packing house of the Kingsburg Fruit Growers and was familiar with the locality and the driveway and the road across the spur track where the accident occurred, which spur track was used in switching cars on an average of twice daily during the season. The deceased was a man about 30 years of age at the time of his death, in full possession of his faculties, and in good health. Immediately preceding the accident and as the decedent was approaching the spur track, driving his automobile slowly, a Southern Pacific locomotive was backing in a southerly direction along the spur track opposite the Kingsburg Fruit Growers packing house, pushing a water car. The engineer and fireman were in their proper positions in the locomotive, the engineer at the right—the opposite side from which decedent approached the track—and the fireman at the left, and on the stirrup at the front or southerly end of the water car was a brakeman watching out for the crossing.

According to the testimony of F. G. Anderson, an eyewitness to the accident, called by plaintiffs, and upon whose testimony plaintiffs rely and who at the time was in his automobile with his two children, the decedent was driving a light six Studebaker touring automobile; that just prior to the time of the collision both his own automobile and the automobile of decedent were parked side by side, both facing westwardly at a point southwesterly from the Kingsburg Fruit Growers packing house, and that both he and the decedent had been inside that packing house discussing business affairs; that after being in this packing house for about 10 or 15 minutes they came out of the building together and they walked over to and entered their respective automobiles; that it was between 5 and 6 o'clock p. m.; that the automobile of the decedent was closest to the Kingsburg Fruit Growers packing house, and that the decedent got into his car, turned it around, and drove east towards the state highway on the graveled driveway along the southerly side of the Kingsburg Fruit Growers packing house, crossed over the weighing scales with the two left wheels of his car; that the automobile did not change its speed nor swerve, but went straight ahead onto the track; that as the decedent approached the track he (the witness) was about to make the turn in his own car in like manner as the decedent had done; that he looked around and saw the car of decedent was just about on the first two rails; that he saw the train was moving towards decedent; it was then about 4 or 5 feet from decedent's automobile; the railroad crossing had been filled in with gravel and was fairly smooth, that is, flush with the ties, and the automobile was just being skidded slowly and gently along until it struck some ties and then it just dumped right over or crushed right over; this threw it over on its side kind of in a slanting position, not right upside down with the wheels in the air or anything like that; that the witness jumped out of his car and was hollering and waving his hands and was over there about the time the train stopped; that when the train was backed a few feet they found Mr. Giannini's body sort of hanging in the top of the open car "at the bow—that is, the top covering or a sort of framework going up"; that some brains were found on the track close to the corner of the Alamo Packing Company's packing house near where the automobile stopped and was righted after being pushed by the train; and that the automobile from the time it was struck by the train until it stopped must have been pushed 35 feet, possibly a little more.

[1] The accident happened between 5 and 6 in the afternoon of a clear day. It was still broad daylight; the engine bell, according to the testimony of the train crew, was ringing, which testimony is corroborated by Ralph Anderson, who was riding in the automobile with his father, F. G. Anderson. As the decedent's automobile, proceeding at the rate of speed of 4 or 5 miles an hour towards the spur track, came into view, and it seemed obvious that he did not see the train approaching—although he had ample opportunity to see it before going onto the tracks, had he looked—and that he was attempting to cross the track ahead of the train, the brakeman gave the emergency stop signal, jumped from the car, and shouted to attract decedent's attention. Despite these warnings, decedent drove his automobile directly upon the spur track in the path of the approaching train. It must be conceded that had he listened, he could have heard the bell and the noise of the locomotive and car, and that had he looked, he could have seen the approaching train in ample time to avoid the accident, and was therefore guilty of contributory negligence as a matter of law in driving upon the railway tracks. Green v. Southern Pacific Railway Co., 138 Cal. 1, 70 P. 926; Griffin v. San Pedro, Los Angeles & Salt Lake Railroad Co., 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842; Murray v. Southern Pacific Co., 177 Cal. 1, 169 P. 675; Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36; Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992; Thompson v. Southern Pacific Co., 31 Cal. App. 567, 161 P. 21; Bissett v. South San Francisco Belt Railway Co., 67 Cal. App. 325, 227 P. 671.

Respondents concede that decedent was guilty of negligence up to the time of the impact of the water car with his automobile; at least, they present no argument to justify his conduct and cite no authorities in their brief on this issue, stating: "We shall not take up any considerable space in discussing the extent and degree that the decedent was guilty of negligence up to the point of time when the water car collided with decedent's automobile. Suffice it to say that his negligence up to that time was not as gross as contended for by opposing counsel," but rely entirely for support of the judgment on the doctrine of the last clear chance, asserting that the engineer was negligent—did not exercise ordinary care—in bringing his train to a standstill after the collision, and that the decedent met his death not at the point of contact, but where the automobile rested when it ceased being pushed over the ties beyond the graveled portion of the crossing, and where the brains were found on the spur track.

[2, 3] It is apparent that since the deceased was driving his automobile very slowly and could have stopped within a few feet and since the approaching train was proceeding at not to exceed 5 miles an hour the negligence of the deceased continued until the exact moment of the impact and that if the deceased met his death at that point plaintiffs could not recover. Further until this negligence of the deceased terminated the doctrine

of the last clear chance has no application; that "the rule which permits a recovery notwithstanding some negligence on the part of the plaintiff or person injured is only properly applied in those cases where such negligence was the remote and not the proximate cause of the injury—that is, where the negligent acts of the parties were independent of each other." Holmes v. Southern Pacific Ry. Co., 97 Cal. 161, 169, 31 P. 834, 835. It cannot be applied to a situation where the negligence of the deceased continued to the moment of the impact and actively contributed to his own injury. The deceased being actively and contemporaneously at fault until the moment of the collision, the respondents are barred from the right to recover for any act up to that time. Green v. Los Angeles Railway Co., 143 Cal. 41, 76 P. 719, 101 Am. St. Rep. 68.

Respondents rely in support of their contention of appellant's want of ordinary care after becoming aware of decedent's danger and his inability to extricate himself from his position of peril on the testimony of the witness F. G. Anderson, who testified that the water car must have proceeded 35 feet from the time of the impact until it stopped, and that brains were found near where the automobile was righted, and the testimony of Joseph A. Keefer, a locomotive engineer, who, testifying as an expert, gave it as his opinion that cosidering the type of engine, equipped with Westinghouse brakes and also equipped with emergency brakes, the engine backing up on a dry day and the *rails and wheels being dry*, the track being level and the engineer in proper position to stop his engine and carrying eighty pounds of air, and the air on the water car being also connected with the air on the engine, and considering that the engine and water car were backing down that spur track at a rate of speed between 3 and 5 miles an hour and the brakes in proper working condition, the train could have been stopped within 10 feet after applying the emergency brakes.

It is the theory of respondents that the deceased did not meet his death at the time of the impact, but at the point where the automobile stopped and the brains were found on the spur track. It appears that while the automobile was crushed, everything in it, for aught the record shows, remained intact until it was straightened up when the train was moved back. Nothing had fallen out, and the body was hanging at the top or bow of the automobile. Respondents, therefore, in attempting to fix the time the deceased received the injuries which resulted in his death as being after the collision, can only rely upon the fact that brains were found at a particular point on the track, there being no direct evidence in the record as to when the deceased received his injuries—no evidence that his head was struck by or against anything from the time of the impact until he was found dead in the automobile. The evidence is just as consistent with the theory that the deceased received his injuries at the exact moment of the impact as it is that he received them at the time the train was brought to a stop. Deceased was sitting on the left-hand side of the automobile, which was the side struck by the water car. His automobile was flush on the tracks at the time of the impact, and therefore the deceased himself was immediately opposite the water car and in close contact with it. From the time of the impact the speed of the train diminished until at the point where the brains were discovered it had stopped. There was not sufficient force when the wheels of the automobile came in contact with the exposed ties to completely overturn it; it was simply rolled over on its side. Much less force was then in operation than at the moment of the impact. The deceased was not found under the automobile, but his body remained in it when it was righted. No blood was found on the rails, according to the witness Anderson. There is no evidence to show that the deceased received his injury at the time the automobile was turned on its side. Blood and brains would as likely have been present where the automobile overturned had the deceased been injured at the moment of the impact, as though he had been injured at that spot. As to when the deceased was injured requires speculation, conjecture, and surmise.

Under the doctrine of last clear chance upon which respondents rely—and necessarily must rely in order to recover upon the record here presented—the burden is upon them to show, if such be important, that the decedent received his injuries at the time the automobile overturned and not at the time of the collision, and "the facts upon which the liability of the defendant rests must be proved by satisfactory evidence; they can not be established by mere conjecture." Reuter v. San Pedro, Los Angeles & Salt Lake Railroad, 37 Cal. App. 277, 174 P. 927. "'If it appears that the facts and circumstances from which a conclusion is sought to be deduced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for.' Wilbur v. Emergency Hospital Assn., 27 Cal. App. 751, 759, 151 P. 155, 158." Hopkins v. Heller, 59 Cal. App. 447, 454, 210 P. 975, 978. "When the precise cause is left to conjecture and may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then a verdict should be directed against the plaintiff." Ryan v. Fall River Iron Works, 200 Mass. 188, 86 N. E. 310; Rosenbaum v. Luce (Cal. App.) 273 P. 862. Here, as the decedent's brains were knocked out, it is apparent that his death was instantaneous, and that if he were not struck at the time of the impact, with the train moving at a rate of speed of from 3 to 5 miles an hour and the automobile being skidded slowly along and the deceased made no attempt whatever to place himself out of danger, his negligence continued and was concurrent with the negligence of the defendant, if defendant were negligent. The doctrine of last clear chance has no application to a situation where by mutual carelessness an injury ensues to one of two parties. In other words, the doctrine of last clear chance excludes from the operation of its underlying principle every case wherein it may be said that the negligence of the injured party was contemporaneous, concurrent, continuing, and contributory with the negligence of the party inflicting the injury. Gilbert v. Erie R. Co., 97 F. 747, 752, 38 C. C. A. 408; Louisville, etc., R. R. Co. v. Young, 153 Ala. 232, 45 So. 238, 16 L. R. A. (N. S.) 301; Green v. Los Angeles Terminal Ry Co., 143 Cal. 31, 76 P. 719, 101 Am. St. Rep. 68; Tobin v. Omnibus Cable Co., 4 Cal. Unrep. Cas. 214, 34 P. 124. "Obviously, if both parties to an accident could, by the exercise of ordinary care, have avoided it, neither can be said to have had the last clear chance." Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259. In the present case if the deceased were uninjured during the 35 feet in which, according to the testimony of the witness Anderson, the automobile was slowly being pushed along by the train and he made no attempt whatever to extricate himself from his position of peril, such lack of action on his part constituted want of ordinary care.

[4] As to the question of want of care on the part of appellants' employees, it may be said that the testimony of the expert engineer, Joseph A. Keefer, that the train could be stopped in 10 feet at the speed it was going after applying the emergency brakes, is of little or no value, as it is based upon the false hypothesis that the *rails and wheels were dry*, and the uncontradicted evidence is that the rails were wet and that the wheels slid a distance of 18 feet after they were locked with the brakes. The opinion of an expert upon assumed facts so variant from those shown by the uncontradicted evidence cannot be given any probative force. Estate of Purcell, 164 Cal. 308, 128 P. 932. See, also, Hallawell v. Union Oil Co., 36 Cal. App. 685, 173 P. 177; Graves v. Union Oil Co., 36 Cal. App. 770, 173 P. 618. Respondents call our attention to the fact that it was a clear day and that there was dust at the place of the accident. This statement "that there was dust at the place of the accident" is based on the testimony of the witness Anderson, who testified that he reached the scene of the accident a second or two after the train had come to a stop: "After the dust and things had cleared up then I seen the trainmen on the other side." This testimony that there was dust where the train stopped does not refute the positive testimony that the rails along the packing house were wet and that at pressure under the weight of a train they sunk beneath the level of the water. Furthermore, a photograph presented during the argument in this court shows considerable water on the roadbed near the corner of the Kingsburg Fruit Growers packing house, the ground being almost completely covered with water between the rails, and water standing on the outside of the rails on each side, and in at least two places the water is practically level with the top of the rail, indicating strongly that the wheels of the locomotive and water car must have been wet, and as further evidence and corroboration that the rails and wheels were wet is the undisputed fact that the train skidded 18 feet after the emergency brakes were set, established by undisputed testimony and the marks on the rails. The testimony of the train crew, which is uncontradicted, is to the effect that the engine bell was ringing as the deceased drove his automobile at the rate of 4 or 5 miles an hour towards the spur track; that it seemed obvious that he was attempting to cross the track; that the switchman gave the engineer the emergency stop signal, jumped from the car, and shouted to the deceased to attract his attention; that the engineer immediately applied the emergency brakes and did everything he could to bring the train, which was then proceeding at the rate of about 5 miles an hour, to a stop; that despite these warnings the deceased drove his automobile directly upon the spur track in the path of the approaching train; that the engineer did not see the automobile until its hood had passed over the tracks and protruded beyond the water car; that the automobile was struck by the southerly end of the water car, pushed across the driveway, and as the wheels of the automobile struck the ties on the southerly half of the driveway and beyond the graveled portion, it was partially overturned and was on its side when the train was brought to a stop.

[5] While all reasonable inferences are to be drawn from the evidence in favor of the conclusion of the jury and conflicts are to be resolved in favor of respondents, inferences cannot be drawn contrary to uncontradicted testimony and based upon imagination, speculation, or supposition. The jury cannot shut its ears to the only testimony on the question and set up a standard of its own. Vaca, etc., v. Southern Pacific Co. (Cal. App.) 267 P. 346.

The last clear chance doctrine upon facts somewhat analogous to the situation presented here is discussed at some length in the recent case of Bagwill v. Pacific Electric Railway Co. (Cal. App.) 265 P. 517, in which it is said: "This doctrine presupposes that the plaintiff has been negligent; that as a result thereof he is in a situation of danger from which he cannot escape by the exercise of ordinary care; that the defendant is aware of plaintiff's dangerous situation under such cirsumstances that he realizes or ought to realize his inability to escape therefrom; that the defendant then has a clear chance to avoid injuring the plaintiff by the exercise of ordinary care and fails to avail himself of the opportunity so presented. If all of these elements are present, the rule applies and enables the plaintiff to recover notwithstanding his own negligence; but if any of them be absent the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence (Palmer v. Tschudy, 191 Cal. 696, 700 [218 P. 36]; Chappell v. San Diego & Arizona R. R. [201 Cal. 560, 258 P. 73] 74 Cal. Dec. 91). * * * It would be and is a matter of common knowledge that even if we assume that thought and action were simultaneous on the part of the motorman, it would take a little time for the brakes to take hold after the motorman had operated whatever mechanical devices were employed to effectuate the braking * * * Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. There seems still to be some misconception of this doctrine of last clear chance. It was not devised as a last resort to fasten liability on defendants. Like the body of the law of negligence, to which the doctrine is appended, the test remains as that of ordinary care under all of the circumstances. The law in many of its workings indicates great charity and solicitude for individual rights. It says to a negligent plaintiff that in spite of his lack of caution he will be protected against wanton, wilful or avoidable harm. But, on the other hand, it penalizes no innocent person. We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last clear chance, not possible chance. The Supreme Court has not left us to speculate on the application of the doctrine (Palmer v. Tschudy, 191 Cal. 696 [218 P. 36]; Young v. Southern Pacific Co., 182 Cal. 369 [190 P. 36]; Wallis v. Southern Pacific Co., 184 Cal. 662 [195 P. 408, 15 A. L. R. 117]; Gainer v. United Railroads, 58 Cal. App. 459 [208 P. 1013]."

[6] Here, upon authority as well as upon reason, the doctrine of last clear chance has no application to the established facts. That decedent was guilty of negligence in driving onto the track in the path of the approaching train is conceded. As to where he received his injuries, whether at the point of impact or where the train stopped, the evidence is silent. If at the point of impact, clearly respondents cannot recover, and if where the train stopped the burden was upon them to establish such fact and decedent's exercise of ordinary care in the interim. This burden they have failed to assume. The place where the injuries were received and the negligence of defendants' servants in stopping the train in time to avert the injuries, if received after the impact, can be determined only by speculation. Upon the evidence the court in our opinion erroneously instructed the jury that the doctrine of last clear chance applied. The giving of an instruction submitting an issue on the last clear chance, where there is not sufficient evidence to justify the submission of such issue, must be held fatally prejudicial. Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A. L. R. 117.

The judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 218

PHILADELPHIA SHOE CO. v. ELBERG.

(Civ. 6685.)

District Court of Appeal, First District, Division 1, California. April 11, 1929.

1. Landlord and tenant ⚷80(3)—Under lease for specified term providing for continuance of lessee's business while lessor conducted business, lessee's right of occupancy continued for term and was not terminable by lessor's discontinuing business.

Where lease to defendant of portion of store building provided for specified term with right to enjoy possession only so long as lessor shall enjoy possession under its lease, and providing for occupation so long as lessor shall conduct in building a boot and shoe business and lessee was able and willing to perform lease, right of lessee to occupy portion of building could not be terminated by lessor on discontinuance by lessor of shoe business in remaining portion of building, but continued for term specified.

2. Landlord and tenant ⚷80(3)—Lessor cannot plead own breach in discharge of obligations to continue rights granted lessee.

Lessor cannot plead his own breach or wrong in discharge of his obligation to continue in full force and effect rights granted to lessee, where lessee has not breached any part of his covenant agreed to be performed.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action by the Philadelphia Shoe Company against Abraham Elberg, in which defendant filed a cross-complaint. Judgment for defendant on his cross-complaint, and plaintiff appeals. Affirmed.

Norman A. Eisner, of San Francisco, for appellant.

Arnold C. Lackenbach, of San Francisco, for respondent.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

LANDIS, Justice pro tem. The plaintiff appeals from a judgment in favor of defendant, in an action for a judgment determining defendant's right of occupancy of a portion of a store building and requiring defendant to vacate and surrender possession. The appeal is on the judgment roll.

In the month of August, 1922, plaintiff's predecessor in interest made and executed a lease with the defendant, Elberg. A brief history of the transactions involved as shown in and admitted by the pleadings, is: For many years prior to August, 1922, B. Katschinski conducted a retail shoe business on Market street in San Francisco, Cal., under the fictitious name of Philadelphia Shoe Company; that in August, 1922, when the lease in question was executed, he was engaged in the construction of a store building on leased ground on Mission street in said city, with the purpose of conducting therein a shoe business under his trade-name of "Philadelphia Shoe Company"; that the Mission street store was completed about March 1, 1923, and about March 19, 1923, he commenced his shoe business therein and continued to conduct said business until it was transferred to the plaintiff corporation; he transferred to the plaintiff corporation all his interest in both stores and the lease in question; that from the date of the transfer until September 26, 1927, plaintiff conducted the retail shoe business in the Mission street store and defendant continued to conduct therein a stocking department, as provided in said lease; that the lease to B. Katschinski of the land upon which the Mission street store was erected is dated June 15, 1922, is from Clark estate, and the term expires July 21, 1932; that about September 26, 1927, plaintiff discontinued the said Mission street store business and sold its entire stock of shoes and leased the store building to Lieberman Rosencrantz Company; that about January 1, 1928, all of the stock of shoes formerly belonging to plaintiff was removed from said premises by said Lieberman Rosencrantz Company and said company was temporarily occupying said premises for the purpose of selling general merchandise, including some shoes; that on September 22, 1927, plaintiff gave notice to defendant that it had sold its stock of shoes and would cease to conduct a boot and shoe business at said Mission street premises on September 26, 1927, and that defendant's lease and right of occupancy would terminate on said date.

This action is the result of defendant's refusal to accede to said demand. Plaintiff seeks a judgment: (1) That the court determine the right of occupancy by defendant after plaintiff has ceased to conduct a boot and shoe business in said Mission street store; (2) that defendant be required to vacate and surrender possession to plaintiff as soon as Lieberman Rosencrantz Company have ceased to occupy said Mission street store.

Defendant urges and under his answer alleges that the said attempted termination of the tenancy of defendant under said lease and agreement is contrary to the express covenants, terms, and conditions of said lease, contrary to law, and is void and without any legal effect, and by way of cross-complaint, briefly stated, prays: (1) That plaintiff be not awarded any relief under the complaint. (2) That by decree of court it be adjudged that defendant has fully performed all the terms and conditions of said lease agreement; that said lease is still in full force and effect; that by reason of such performance he is entitled to the legal possession of the premises for the term of nine years and five months from March 1, 1923; that upon his continuance of such performance of the covenants of said lease on his part to be performed, and while the lease from Clark estate to B. Katschinski remains in force, he be entitled to continue in the full enjoyment of his possession for the remainder of the term of nine years and five months without any interference by plaintiff, its successors or assigns. And in his cross-complaint defendant alleges that, by reason of the acts of plaintiff, he has reason to fear, and does fear, that, unless his legal rights under said agreement are adjudicated by decree of court, he will, during the remainder of the term, be harassed and annoyed by plaintiff and its successors and assigns and will sustain irreparable injury.

The trial court found as true all and each of the allegations of defendant's cross-complaint, and rendered judgment in favor of defendant: (1) That plaintiff be not awarded the relief or any part thereof prayed for in its complaint; (2) that the lease agreement designated "Exhibit A" is still in full force and effect, so far as the rights of possession and occupancy and all other rights therein, conferred upon defendant, are concerned, and costs of suit.

Constituting the material parts of the lease, it is provided:

(1) "The lessor does hereby lease and demise unto the lessee, and the lessee does hereby take and hire from the lessor [here follows a description of the leased property] for the term of nine years and five months from March 1, 1923."

(2) "It is further understood that the lessee shall have the right to enjoy possession of said portion of said premises only so long as the lessor herein shall enjoy possession under and by virtue of the lease aforesaid [that is, the Clark estate lease]."

It then provides, in substance, that the portion of the building leased to lessee is leased "for the purpose of conducting therein a department for the sale of men's, women's and children's stockings" and that "the lessor is to conduct in said building of which the demised premises is a part, a boot and shoe business under the name 'Philadelphia Shoe Company,'" and making a number of specific provisions regulating the manner in which the lessee shall conduct said stocking department, the amount of rental to be paid by lessee, etc., and it is in the paragraph of the sublease which immediately precedes the final paragraph further provided:

(3) "The lessee does hereby covenant and agree to commence the occupation of said space as soon as the same is ready for occupancy, the contemplated date being on or about the first day of March, 1923, and to continue the occupation thereof and in like manner as a first-class stocking department subject to the directions and guidance of the lessor, so long as the lessor, his heirs, executors, administrators or assigns shall conduct in the said building, of which said demised premises constitute a part, a boot and shoe business, not exceeding the term herein limited."

[1] It is this paragraph 3 that plaintiff contends gives it the right to the relief it seeks. In other words, the contention of plaintiff appears to be that the right of defendant to occupy was only so long as the shoe business of the plaintiff should continue at the location in question—that the right to remain does not survive the obligation to remain.

No sound reason is given and no authority whatever cited to sustain the appellant's contention in this regard. It is quite clear that the language of this paragraph, standing alone, does not warrant the interpretation placed thereon by plaintiff and a fortiori may this conclusion be reached when this paragraph is read and considered in connection with other portions of the lease, particularly with paragraph 1, which clearly and expressly demises the premises to lessee for a term definite and certain, subject only to the conditions of the Clark estate lease, and paragraph 2, which clearly provides that the lessee shall have the right to enjoy possession of the premises only so long as lessor herein shall enjoy possession of the Clark estate lease.

The record shows that defendant has performed and is able and willing and has offered to continue to perform each and every covenant and condition of the lease agreement on his part agreed to be performed, and that the plaintiff under and by his assigns is still in possession of the reserved portion of the building, and that his assigns are occupying the premises, temporarily at least, for the purpose of selling general merchandise, including some shoes.

It must be conceded that leases for terms of years quite often confer upon the lessor an option to terminate the lease before the expiration of the term or reserve to the lessee a similar privilege, and although to create such right or privilege, no particular form of words is necessary, yet certain words, namely, "upon condition," "provided," "reserving." "subject to," or their Latin equivalents, are recognized as apt and customary. No such words are found in the lease; neither are there any words indicating or suggesting the right or option of lessor to terminate the lease before the end of the term except the conditions of the Clark estate lease and which are not here in question.

Lessee agreed to occupy and conduct his department as long as lessor conducted his department. This lessee has done. The effect of the contention of plaintiff is that the provisions of the lease not only reserved to plaintiff the right to discontinue his business before the end of the term, and that he did exercise such right, but that such action on his part ipso facto operated as a termination of defendant's lease.

[2] There is no forfeiture or right of reentry clause in the lease and it is undisputed that the lessee has not breached any of the covenants of the lease and to accept the contention of appellant would be to hold that the lessor could himself terminate the lease by a breach of covenant and might thereby obtain a benefit from his own wrong. The lessor cannot plead his own breach or wrong in discharge of his obligation to continue in full force and effect the rights granted to the lessee under the solemn covenants of the contract, where, as here shown, the lessee has not breached any covenants on his part agreed to be performed. Clearly there is no merit in the contention of appellant.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 225

PEOPLE v. SCHUMANN-HEINK.★
(Cr. 1756.)

District Court of Appeal, Second District, Division 1, California. April 12, 1929.

Hearing Denied by Supreme Court May 9, 1929.

1. Criminal law 🔑742(2)—On undisputed facts and admitted acts of witness, whether he was accomplice is law question for court.

Where the facts are not in dispute and witness' acts and conduct are admitted, it becomes a question of law for the court whether those acts and facts make witness an accomplice.

2. Criminal law 🔑742(2)—Leaving to jury question of witness being accomplice of defendant in embezzlement held error, under evidence, and prejudicial.

Leaving to jury question whether witness was accomplice of defendant in embezzlement of stock owned by corporation of which they were officers, witness with knowledge of all the facts, and at the claimed direction of defendant, having pledged it as security for defendant's

★Hearing denied by Supreme Court.

personal note indorsed by witness, and it afterwards being sold by pledgee with claimed consent of defendant, *held* error, and prejudicial.

Appeal from Superior Court, San Diego County; Homer G. Ames, Judge.

Henry Schumann-Heink was convicted of grand theft, and he appeals. Reversed.

Curtis Hillyer, of San Francisco, and Irve C. Boldman, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and W. Augustine, of San Francisco, for the People.

CONREY, P. J. The Schumann-Heink Company, Inc., a corporation of which the defendant and appellant was the president, was organized for the purpose of carrying on a general stock and bond brokerage business. Its main office was in the city of San Diego, but later an office was opened in the city of Los Angeles. The defendant and appellant devoted most of his time to the management of the latter office, while the active management of the business in San Diego was in the hands of Wilfred M. Clare, who was secretary and treasurer of the corporation.

Prior to the transaction under investigation appellant had executed his personal note to the United States National Bank, at San Diego, for $3,500, which was unsecured. After a time he paid $500 on this note and gave the bank a new demand note for $3,000 to cover the balance. Thereafter, while appellant was in Los Angeles, the bank demanded payment of the note and communicated with Clare, who thereupon endorsed the note and offered to secure the same. His offer was accepted, and Clare brought to the bank a list of personal securities from which the bank selected twelve shares of stock of the Security Commercial and Savings Bank of San Diego, which stock was issued in the name of Clare, but which actually was owned by the Schumann-Heink corporation.

Clare testified that he was instructed by appellant to so deliver this stock as collateral to the bank, while appellant denied that he ever gave such instructions or that he knew anything about the deposit having been made until some time thereafter. There was testimony on the part of officials of the bank to the effect that a considerable time after the stock had been deposited with them they sent for appellant and told him they could sell the stock at $200 per share, and he told them to sell it, which they did, crediting the amount received to appellant's personal indebtedness to the bank.

Defendant and appellant was indicted, charged with grand theft, and the case was tried upon the theory that the theft was of the character described as embezzlement. Clare was also indicted for the same offense.

Appellant relies upon the following points for a reversal of the judgment:

(1) If a crime was committed, Clare was an accomplice.

(2) That the court erred in refusing to give certain instructions requested by appellant.

(3) That the court erred in giving certain instructions requested by the people.

(4) That the district attorney was guilty of misconduct.

[1, 2] The court instructed the jury as follows: "The court instructs the jury that an accomplice is one who knowing that a crime is being committed willfully and with criminal intent intentionally, aids, abets and assists another in the commission of such crime or criminal act, and whether or not one is an accomplice as defined in these instructions is for the jury to determine from all the testimony and circumstances in proof in the case." In thus leaving to the jury the question as to whether Clare was an accomplice, the court assumed that the facts bearing upon the question were in dispute. For the rule is that "where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice." People v. Allison, 200 Cal. 404, 408, 253 P. 318, 319. In the present case the acts constituting the commission of the alleged crime were actually done by Clare at San Diego at a time when the defendant was in Los Angeles. Clare knew that the certificate, although issued in his own name, was the property of the corporation. He knew that the note to the bank was the personal note of the defendant to the bank. He knew that the certificate of stock was the property of the Schumann-Heink corporation. With all of that knowledge, he took the certificate from the office of the corporation and deposited it with the bank as collateral for the note, and thereby secured an extension of time on the note which Clare himself had endorsed. The only additional element necessary to make these acts a crime would consist in the fact that the corporation had not authorized the pledge. We assume, as appears to be the case, that there is sufficient evidence to justify the jury in finding that the corporation had not authorized the making of the pledge. This being so, the embezzlement was accomplished by Clare alone, unless the additional alleged fact be true that these acts were done by Clare pursuant to directions received from the defendant. The assertion by Clare that in pledging the stock as collateral for said note he was acting in the belief that this was for the benefit of the corporation is too flimsy for use as basis for a possible finding that Clare's acts in the transaction were not criminal as to him. In this state of the evidence the defendant was entitled to have the case presented to the jury under an instruction that Clare must be re-

garded as an accomplice, and that the defendant should not be convicted unless the testimony of Clare was corroborated by other evidence tending to connect the defendant with the commission of the crime charged. The court did correctly state the rule concerning the corporation required by law in relation to the testimony of an accomplice. The error consisted in leaving it open to the jury to determine that Clare was not an accomplice, and that the defendant, therefore, might be convicted on the testimony of Clare alone. This the jury may have done. They may have believed the testimony of the defendant wherein he denied that at a time subsequent to the making of the pledge he had consented that the bank might sell the stock. If they did so believe, then they must have convicted the defendant in sole reliance upon the testimony of Clare to the effect that he had made the pledge pursuant to instructions of the defendant.

That the error of the court, in the matter above mentioned, was prejudicial to the rights of the defendant, seems clear. It is quite possible, and might easily have been, that if the testimony of the witness Clare had been definitely placed before the jury as the testimony of an accomplice, a different verdict would have been returned.

The judgment and order are reversed.

I concur: YORK, J.

HOUSER, J. I concur. However, in addition thereto, I am of the opinion that prejudicial error was committed by the trial court in its refusal to give to the jury, at the request of defendant, the following instruction: "I instruct you that if you are satisfied from the evidence that the stock of the Security Commercial and Savings Bank which it is claimed was pledged to the United States National Bank, was in fact the property of Schumann-Heink & Company and was pledged by Clare as security for the note of the defendant which he, Clare, had indorsed, that is not sufficient of itself to justify you in finding the defendant guilty, but in addition to that unless you find from the evidence that Clare was acting under instructions and with the knowledge of the defendant, your verdict must be not guilty."

Particular attention is directed to that part of the instruction by which it was proposed to tell the jury that unless from the evidence it found that Clare was acting under instructions and with the knowledge of the defendant in the transaction, the defendant was entitled to an acquittal of the charge against him. No instruction given by the court to the jury covered the point in question or dealt with it in any way. Manifestly, if in pledging the certificate of stock referred to in the instruction, Clare was acting on his own initiative and without any instructions from defendant so to do, defendant would be in no wise criminally liable for the act of Clare. On the other hand, if in pledging the stock Clare was acting under the instructions of defendant, the knowledge of defendant of the commission of the act would be imputed to him. 1 Cal. Jur. 846, and cases cited. As a matter of law, the words "with the knowledge of the defendant" added nothing to the instruction. In order adequately to protect defendant's rights it was therefore necessary that the jury should be instructed that, unless it found "from the evidence that Clare was acting under instructions and with the knowledge of the defendant," its verdict should be "not guilty."

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98 Cal. App. 203

McLACHLAN v. McLACHLAN. (Civ. 3766.)

District Court of Appeal, Third District, California. April 10, 1929.

1. Appeal and error 🔑161—Party accepting benefits of decree waives right of appeal.

Acceptance of benefits of a decree by a party thereto constitutes a waiver of right to appeal.

2. Divorce 🔑182—Allowance to wife of $300 for counsel fees and costs of appeal held not excessive.

Allowance to wife of $300 for costs and counsel fees in prosecuting appeal from divorce decree *held* not excessive, where costs of appeal, exclusive of counsel fees, amounted to $131.75.

3. Divorce 🔑182—Allowance to wife of $300 for counsel fees and costs of appeal held not abuse of discretion, where husband was earning $6,400 per year.

Allowance of $300 to wife for counsel fees and costs of appeal from divorce judgment *held* not abuse of discretion, as beyond plaintiff's financial ability to pay, where he earned $6,400 per year.

Appeal from Superior Court, Imperial County; L. S. Larew, Judge.

Divorce action by Argyle McLachlan against Pauline Viola McLachlan. From an order requiring plaintiff to pay to defendant costs and counsel fees in the prosecution of her appeal from a judgment of divorce in plaintiff's favor, plaintiff appeals. Order affirmed.

Ault & MacKinnon, of Calexico, for appellant.

M. C. Atchison, of Calexico, for respondent.

FINCH, P. J. This is an appeal by the plaintiff from an order requiring him to pay the defendant the sum of $300 as costs and counsel fees in the prosecution of her appeal from the judgment of divorce in favor of the plaintiff.

It appears from the affidavit of the plaintiff, presented in opposition to the motion for counsel fees and subscribed to May 2, 1927, that the action was commenced February 19, 1926, and tried October 26, 27, and 28, 1926; that an interlocutory decree of divorce was granted November 19, 1926; that the defendant was given the custody of the minor child of the parties, the plaintiff to pay the defendant $75 a month for its support; that the plaintiff was to pay the defendant $2,500 in installments; that she was to have as her separate property the additional sum of $1,000 of community funds then in her hands; and that at the time of the trial she had from $500 to $700 in cash, which was her separate property. All other property was awarded to the plaintiff. In appellant's brief it is said that the property awarded to the plaintiff is of the value of $23,774.15, against which there is an indebtedness of $18,238.49. Plaintiff is in receipt of a salary of $6,400 a year. From the foregoing, it appears that, aside from the property awarded her by the decree, the defendant had only $500 to $700 at the time of the trial.

In the defendant's affidavit in support of her motion for such costs and counsel fees the defendant states that at the time of the trial she had saved "some money that was intended for the education of their son, but * * * she has been required to use said funds for her own existence and also for medical attention and support of their child, as the amount allowed by the court was insufficient; that this defendant has been sick a great deal since the birth of their child and being frail and delicate has not been able to perform any work that will produce an income; * * * that * * * by being very careful as to the actual necessaries she has been able to keep the expenses down to $198 per month on an average; * * * that she paid the sum of $10 as a filing fee in the Supreme Court, and that she has become liable for $61.75 as a printer's fee in printing the transcript on appeal"; and that the cost of printing briefs on appeal will be $60 additional.

[1, 2] It clearly appears from the foregoing facts that this appeal is wholly without merit. Acceptance of the benefits of the decree by the defendant would have constituted a waiver of her right to appeal. Storke v. Storke, 132 Cal. 349, 352, 64 P. 578; McCaleb v. McCaleb, 32 Cal. App. 648, 163 P. 1045. According to the facts stated in her affidavit, the $500 to $700 which the plaintiff states she had at the time of the trial must have been practically exhausted at the time of the hearing herein, May 2, 1927, and she was then without means to prosecute her appeal. It appears from such affidavit that her costs of appeal, exclusive of counsel fees, amounted to the sum of $131.75. The remainder left after deducting that sum from the allowance of $300 cannot be said, as a matter of law, to be an unreasonable attorney fee on appeal.

[3] The appellant contends that "the allowance was beyond the financial ability of the plaintiff to comply with." It would be an extreme case which would justify an appellate court in holding that the trial court abused its discretion in finding that a party in receipt of a salary of $6,400 a year is financially unable to pay the sum of $300, as provided by the order herein, "the sum of $100 within ten days * * * and the balance of $200 payable within thirty days." It is deemed sufficient to say that this is not such a case.

The order is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

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98 Cal. App. 106

LAMB v. OWEN, Judge. (Civ. 6600.)★

District Court of Appeal, First District, Division 1, California. April 2, 1929.

Rehearing Denied May 2, 1929. Hearing Denied by Supreme Court May 29, 1929.

Mandamus ⚷58—Trial judge will be required to enter judgment in conformity with mandate of appellate court.

Where trial judge entered decree at variance with judgment directed to be entered by reviewing court he will be ordered to vacate and set aside judgment signed and entered by him and to enter judgment in conformity with mandate.

Application by Josephine M. Lamb, administratrix of the estate of D. H. McEwen, for writ of mandate prayed to be directed to Hon. Erwin W. Owen, Judge of the Superior Court of Kern County requiring entry of judgment in conformity with the mandate of the District Court of Appeal. Writ granted.

Byron Coleman, of San Francisco, for petitioner.

W. W. Kaye, of Los Angeles, for respondent.

TYLER, P. J. Mandamus to require the superior court of Kern county to enter a judgment in conformity to the mandate of this court. On December 21, 1927, a decision in the cause entitled W. S. Lierly v. David H. McEwen was rendered herein reversing the judgment of the superior court of Kern county, and thereafter a remittitur was issued to such court on the 20th day of February, 1928. The remittitur directed respondent herein to enter judgment in accordance with said decision. 54 Cal. App. Dec. 90.[1] McEwen has since died and petitioner herein is the duly appointed administratrix of his estate. The case involved the proportionate interest which certain locators of oil lands were entitled to under a leasing agreement with the Associated Oil Company and their interest in certain funds paid by the oil company and held by a banking company under a trust agreement. It was there determined by the judgment that defendant McEwen was entitled to $\frac{1}{384}$ of 75 per cent. of all oil realized by said oil company from the lands in question and $\frac{1}{48}$ of all sums of money paid to the banking company by it for the use and benefit of all the locators. As pointed out in our opinion there were 24 locators, one of whom was F. B. Wilson. McEwen acquired ½ of Wilson's share or $\frac{1}{48}$ interest. Under the agreement with the oil company each locator was entitled to $\frac{1}{192}$ of 75 per cent. of the net production of oil produced from the lands in question. McEwen having acquired ½ of Wilson's interest, he was entitled under the agreement to $\frac{1}{384}$ interest of all oil realized by said oil company from the lands, and this court so determined. For like reasons it was also determined that he was further entitled to $\frac{1}{48}$ of all sums paid to the trust company by the oil company for the use and benefit of all the locators mentioned in the agreement with the oil company. It appears from the present proceeding that the respondent court entered a decree at variance with the judgment directed to be entered by this court, under which decree McEwen is given a less amount of the production of oil and a less interest in the fund than that to which he was entitled under the judgment.

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[1] Superseded by opinion 262 P. 457.

★Rehearing denied. Hearing denied by Supreme Court.

It is therefore ordered that respondent judge vacate and set aside the judgment signed and entered by him in said action of W. S. Lierly v. D. H. McEwen on June 28, 1928, and sign and enter in lieu thereof a judgment awarding McEwen $\frac{1}{384}$ of 75 per cent. of all oil produced by the oil company from the lands in question, and that he also award petitioner $\frac{1}{48}$ part of all sums of money paid by the oil company and held by the trust company for the use and benefit of those entitled thereto.

We concur: KNIGHT, J.; CASHIN, J.

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98 Cal. App. 165

PACIFIC RYS. ADVERTISING CO. et al. v. CITY OF OAKLAND et al.★

(Civ. 6558.)

District Court of Appeal, First District, Division 2. California. April 8, 1929.

Rehearing Denied May 8, 1929. Hearing Denied by Supreme Court June 5, 1929.

1. Municipal corporations 🔑63(1)—Where ordinance purporting to have been enacted to protect public health, morals, or safety has no substantial relation to those objects, court must so adjudge.

Although every intendment and presumption is in favor of validity of ordinance, it is settled principle that if ordinance purporting to have been enacted to protect public health, morals, or safety has no real or substantial relation to those objects, it is duty of courts to so adjudge.

2. Municipal corporations 🔑122(3)—Plaintiff may show by extrinsic evidence that ordinance is unreasonable, oppressive, and void as to him.

In determining whether ordinance has any real or substantial relation to protection of public health, morals, or safety, courts are not limited to consideration of face of ordinance alone, but plaintiff may show by extrinsic evidence that ordinance by reason of particular facts and circumstances is unreasonable, oppressive, and void as to him.

3. Municipal corporations 🔑122(4)—Ordinance will be upheld unless it is shown beyond reasonable doubt that it bears no relation to exercise of police power.

Only slight showing by city is required to uphold ordinance, since ordinance will be upheld unless it is shown beyond reasonable doubt that it bears no relation to exercise of police power, and, if question is debatable, ordinance should be *held* valid.

4. Municipal corporations 🔑602—Ordinance prohibiting commercial advertising on exterior sides of street cars held invalid.

Ordinance prohibiting commercial advertising on exterior sides of street cars *held* invalid, since it was not reasonable regulation, but absolute prohibition.

5. Municipal corporations 🔑602—Ordinance prohibiting commercial advertising on exterior sides of street cars cannot be justified by mere possibility of danger which it seeks to avert.

Legislation such as ordinance prohibiting commercial advertising on exterior sides of street cars, which imposes burden of expense on lawful and meritorious business, cannot be justified by mere possibility of danger which it seeks to avert, but must rest upon fact that experience has demonstrated that such danger is one which may reasonably be anticipated.

6. Injunction 🔑65—In suit to restrain enforcement of ordinance prohibiting advertising on street cars, transit company's power, under articles or franchises, to engage in advertising business, should be determined as of time of trial.

In suit to enjoin enforcement of ordinance prohibiting commercial advertising on exterior sides of street cars, transit company *held* empowered under its articles or franchises to engage in advertising business, though original articles gave no such power where it was given by amendment of articles after commencement of suit, since it is state of things as of time of trial, rather than of commencement of action, which governs.

7. Street railroads 🔑61(4)—Misuser of transit company's franchise by engaging in advertising business can be taken advantage of by government alone.

Rule that misuser of franchise by exceeding corporate powers is cause of forfeiture which

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★Rehearing denied. Hearing denied by Supreme Court.

can be taken advantage of by government alone *held* applicable to transit company, as regards its power to engage in advertising business.

8. Street railroads ⚷18—Advertising held within powers granted to street railway by franchises which were silent on such matter.

Advertising *held* to be within powers granted by franchises to street railroad company in view of common practice of using street railway cars for advertising purposes, since franchise by silence on matter of advertising did not contemplate restriction on common and customary use of similar franchises under similar circumstances.

Appeal from Superior Court, Alameda County; Stanley Murray, Judge.

Suit by the Pacific Railways Advertising Company and another against the City of Oakland and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Preston Higgins, City Atty., and C. Stanley Wood, Asst. City Atty., both of Oakland, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, for respondent Transit Company.

Chapman, Trefethen & Chapman, of Oakland, for respondent Advertising Company.

GOODELL, Justice pro tem. This appeal was taken from a judgment and decree permanently enjoining the city of Oakland, the members of its council, its chief of police, and its city attorney from enforcing an ordinance prohibiting commercial advertising on the exterior sides of street cars. The decree declared the ordinance to be unconstitutional and void.

The following facts are alleged in the complaint and not denied: The plaintiff Key System Transit Company, a California corporation, operating a street railway system under franchises from the city of Oakland and the county of Alameda, made a contract with its coplaintiff, Pacific Railways Advertising Company, whereby the transit company granted to the advertising company the exclusive right to advertise in, upon, and about all its cars from October 30, 1925, to December 31, 1931, for a consideration of $40,000 a year.

The advertising company, at an expense of more than $8,000, placed upon each side of every car two sheet metal frames approximately 22 inches wide, 28 inches long, and 1/32 inch thick, to hold advertising matter. Thereafter the council enacted ordinance No. 3568 (N. S.), making it unlawful to operate a street car within the city "while there is attached to the exterior sides thereof, * * * any frame or device made of metal, wood or other substance, for the insertion or for the purpose of holding and displaying any reading matter" or with "any bill, poster, notice, or advertisement advertising the business, or goods, wares or merchandise of any merchant, manufacturer or any person other than the owner or lessee of the street railway" on such sides, whether posted, stuck, stamped, painted, or otherwise affixed thereon. None of the frames project from the sides of the cars more than 3/4 inch and the grab rails, steps, rivets, and other such parts of the car itself project beyond the frames. The frames match the cars in color.

Other allegations (hereafter discussed), designed to show wherein the ordinance was unreasonable and void, and, particularly, to show that what the plaintiffs had done constituted no menace to the public safety, comfort, or morals, were denied, and on all the issues thus made the court found in favor of the plaintiffs. The answer also raised an issue as to the transit company's authority "to carry or maintain advertisements for hire on the exterior sides of its cars," on which issue the court also found in favor of the plaintiffs.

The appellants seek a reversal on the grounds: (1) That the ordinance is a valid exercise of the police power, and (2) that the transit company has no power or authority under its articles or franchises to engage in advertising business.

[1, 2] In entering upon the inquiry as to the validity of the ordinance, we are, of course, mindful of the rule, stressed by appellants, that every intendment and presumption is in favor of its validity. But we have in mind, also, the settled principle that if a statute or ordinance "purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects," it is the duty of the courts to so adjudge. Mugler v. Kansas, 123 U. S. 661, 8 S. Ct. 273, 31 L. Ed. 205; Ex parte Whitwell, 98 Cal. 73, 79, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. And in pursuing this inquiry the courts are not limited to a consideration of the face of the ordinance alone. It is settled law that a plaintiff may show by extrinsic evidence that an ordinance, by reason of particular facts and circumstances, is unreasonable, oppressive, and void as to him. In re Smith, 143 Cal. 368, 370, 77 P. 180; Ex parte Elam, 6 Cal. App. 233, 238, 91 P. 811; Abbey Land, etc., Co. v. San Mateo, 167 Cal. 434, 437, 139 P. 1068, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804.

In the Smith Case, supra, the ordinance prohibited gas works, gas tanks, etc., within a defined area. The works had been built before the passage of the ordinance, and the petitioner alleged and proved the physical and geographical surroundings as well as the safeguards provided and the precautions taken respecting the works, all addressed to the question of the reasonableness of the ordinance. The court said: "It being within the powers of the board of supervisors in proper cases to regulate, or even to prohibit, the manufacture of gas within prescribed limits, this ordinance upon its face would appear to be innocuous and valid. It became necessary, therefore, for the pleader in his petition to set forth the matters dehors the ordinance, by virtue of which he contends that the ordinance is unreasonable, oppressive, and void."

Thus, in the case at bar, to establish that the ordinance bears no relation to the police power, and to show that it is unreasonable in its operation and application to them, the plaintiffs alleged that the frames, and the advertisements in them, are of a type generally and customarily used upon street cars in the principal cities of the United States and Canada; that the advertisements are sightly, and always have been those of reputable persons conducting legitimate businesses; that the "frames are so constructed that they cannot possibly endanger the safety or comfort of passersby or of any persons"; that neither the frames nor the advertising have caused, or can cause, or tend to cause, any congestion or obstruction of traffic; further, that none of the provisions of the ordinance are necessary to protect the public health, comfort, morals, safety, or general welfare. The allegation respecting the alleged custom was denied for want of information or belief. The allegations that the frames endangered no one and that the advertisements did not cause, or tend to cause, congestion of traffic were not only specifically denied, but the city affirmatively alleged that the frames constitute a menace to the safety and comfort of pedestrians and motorists, and that they are so placed "as to catch and hold the clothing of passersby and pedestrians and portions of passing vehicles, and particularly to catch the clothing" of traffic officers on the streets and between the cars; also, that the advertisements were designed to, and do, attract the attention of pedestrians and motorists and so cause them "to become careless and disobedient of traffic rules and regulations and neglectful of their own safety." The city also alleged that the colors of the advertisements were "antagonistic to, unharmonious and contrasting with the colors of the street cars"; "gaudy, striking and unpleasing"; "all colors of the rainbow." The answer denied that the provisions of the ordinance were not necessary to protect the public safety, comfort, morals, etc.

To prove the custom of advertising by means of similar frames, photographs were introduced of street cars operating in St. Joseph, Cincinnati, Washington, D. C., and Winnipeg. To establish that the grab rails, steps, and rivets of the transit company's cars project beyond the frames, the plaintiffs introduced oral testimony and photographs. The plaintiffs proved that the frames are securely fastened to the sides of the cars, the edges of the frames being smoothed so that they cannot catch or engage anything. None of this evidence was contradicted.

The appellants introduced a chart showing that the frames project from the sides of the cars, ½ inch, ⅝ inch, and at most ¾ inch (which was conceded by the respondents) and showing the colors of the advertising matter. The trial judge, on stipulation, inspected the cars.

Findings on all these issues were in favor of the plaintiffs, concluding that "none of the provisions of said ordinance are necessary to protect the public health, comfort, morals, safety, or general welfare."

[3] The respondents take the position that these findings define and control the legal questions presented on the appeal, and a careful consideration of the case convinces us that they do. The plaintiffs' proof showed the frames to be safe and the advertisements to be neither immoral nor offensive. The appellants had ample opportunity to show every element and factor going to make the frames dangerous or to render the advertisements offensive to decency or morality, or having even a tendency to do so. The frames had been in use for some months at the time of the trial, and if, in that interval, anything had happened to demonstrate that there was any hazard, proof of such experience certainly would have been admissible. Indeed but a slight showing by the city would have been necessary to overcome the case made by the plaintiffs, for it is well settled that an ordinance or statute will be upheld unless it be shown beyond a reasonable doubt that it bears no relation to the exercise of the police power. If the question be debatable—one on which reasonable minds might differ—the ordinance should be held valid.

[4] We are satisfied that the case at bar falls into that class of cases where a legislative body, in seeking to prevent some real or fancied evil or danger, in a business or activity not in itself wrong or unlawful, has gone about it not by reasonable regulation but by absolute prohibition. What the council was really concerned with was the protection of the public from harm or injury from dangerous or improper signs or advertisements on street cars.

In Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, an ordinance of San Mateo county required a license as a prerequisite to the operation of any hospital or asylum for the insane, and prohibited its maintenance at all unless the buildings were not more than two stories high and constructed of brick or stone and iron and surrounded by a brick or stone wall 12 feet high and 18 inches thick, etc. The court found that the class of inmates rendered it wholly unnecessary that their confinement be insured by any such type of construction, and that therefore there was no relation between these provisions and the proper exercise of the police power. It was held that the ordinance imposed upon the petitioner's business "such burdensome, oppressive, and unreasonable conditions as in effect to amount to its prohibition."

In the Smith Case, supra, it was held that the prohibition by the supervisors of gas works in the rural district there described was wholly unnecessary. That ordinance sought not to *regulate* gas works which might, admittedly, become a menace, but to *prohibit* all gas works in a given area.

In Abbey Land, etc., Co. v. San Mateo, supra, the supervisors of San Mateo county attempted to prohibit the maintenance of more than one crematory in any one township. The court held that as it prohibited the plaintiffs "from using their property in a lawful business and in an innocent manner, it must be declared void as an unwarranted infringement of the right of acquiring, possessing, and protecting property." It was "conceded, of course, that if a crematory is, or may be, operated in a manner which may cause injury to the public health, comfort, or convenience, the local legislative authority may make reasonable regulations of the manner of conducting it so as to decrease or prevent such injury." The decision emphasizes, very clearly, the difference between outright and absolute prohibition and reasonable and necessary regulation, and its application to the case at bar is obvious.

Another case pointing out this distinction is San Diego Tuberculosis Association v. East San Diego, 186 Cal. 252, 200 P. 393, 17 A. L. R. 513, where it was attempted to prohibit within the city limits any hospital for the treatment of contagious or infectious diseases. "Such prohibition," says the court, "is very different from regulation and can be justified only on the ground that such a hospital, no matter how well conducted, is a menace," etc.

The attempts which have been made in this state and elsewhere to prohibit billboards seem to us to be, in their essentials, not unlike the attempt to prohibit this exterior street car advertising. True, a billboard is a stationary thing on private property, while a street car moves over public streets. But both are subject to regulation when there is any threat of harm to the public safety, comfort or morality. In the case of Varney & Green v. Williams, 155 Cal. 318, 320, 100 P. 867 (21 L. R. A. [N. S.] 741, 132 Am. St. Rep. 88), the ordinance made "no attempt to restrict the operation of the enactment to billboards that may be insecure or otherwise dangerous, or to advertising that may be indecent," but prohibited all billboards, just as this ordinance prohibits *all* advertising and *all* frames. In holding the ordinance invalid the Supreme Court said: "The town trustees have undertaken to make criminal the maintenance of any billboard, however securely it may be built, and however unobjectionable may be the advertising matter displayed upon it. Such prohibition, involving a very substantial interference with the rights of property, can be justified, if at all, only to the extent that the subject matter of the legislation is embraced within the police power of the state. Bearing in mind that the ordinance does not purport to have any relation to the protection of passers-by from injury by reason of unsafe structures, to the diminution of hazard of fire, or to the prevention of immoral displays, we find that the one ground upon which the town council may be thought to have acted is that the appearance of billboards is, or may be, offensive to the sight of persons of refined taste. * * * We are not here, however, concerned with the extent to which the legislative power may, in the effort to protect the public safety or morals, regulate the manner of erecting or using billboards. The ordinance in question does not attempt such regulation, but undertakes to absolutely forbid the erection or maintenance of any billboard for advertising purposes. We have no doubt that this sweeping prohibition was beyond the power of the town trustees."

It is manifest from a reading of the ordinance alone that what the council did was to absolutely prohibit *all* frames and *all* advertising on the sides of street cars, rather than to regulate dangerous frames, signs, or devices and immoral or otherwise improper displays. And when the provisions of the ordinance are considered in the light of the evidence and findings, it is all the more obvious that when the ordinance was passed no threat of public injury or danger existed (and none has developed since) which would warrant or justify the calling into play of an exercise of the police power in the broad and sweeping form which this ordinance takes.

[5] Appellants contend that "the validity of a statute is not to be determined by what has been done in any particular instance, but what may be done under it," the argument being that if this judgment stands "the respondents might go far beyond what they have so far done." The answer to that is found in the Whitwell Case, 98 Cal. 73, at page 82, 32 P. 870, 873 (19 L. R. A. 727, 35 Am. St. Rep. 152), where it is said: "Legislation of this character, which imposes an onerous burden of expense upon a lawful and highly meritorious business, cannot be justified by the mere possibility of the danger which it ostensibly seeks to avert. It must rest upon the fact that experience has demonstrated that such danger, in the absence of such legislative regulation, is one which may reasonably be anticipated as the probable result of conducting such business, notwithstanding the exercise of ordinary care to prevent it." See, also, in the same connection, Varney & Green v. Wil-

liams, supra, and particularly In re Wilshire (C. C.) 103 F. 620.

Within the record in this case is found an illustration of what the city may do, and has done, by way of regulation. In elaborate detail, by Ordinance No. 2794 (New Series), the council has prescribed in various ways for the regulation of billboards and electrical and other advertising signs and devices. It has not prohibited these things on the theory that advertisers, uncurbed, might put up dangerous signs, and that therefore all signs and billboards should be banned, but it has prescribed just where the signs may go, how large they may be, at what distance from the sidewalk, building line, or roof they may be anchored or fixed, and otherwise how they shall conform, all in the interest of the public security, health, morality, etc.

Much reliance is placed by the appellants upon the case of Fifth Avenue Coach Co. v. City of New York, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695, affirmed in 58 Misc. Rep. 401, 111 N. Y. S. 759, and 221 U. S. 467, 31 S. Ct. 709, 55 L. Ed. 815. The ordinance there provides that "no advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan." The coach company used the sides of its automobile omnibuses for advertising signs, two of which were "13 feet by 2 feet 7 inches; another, 2 by 6½ feet; another, 4 by 2 feet; another, 8 feet by 20 inches; another, 2 feet 4 inches square; and others, 2 feet in length." The advertisements were made up of "painted figures of animals, men in oriental costume, busts of men and women, all made conspicuous by contrasted coloring." It clearly appeared that the signs covered "the whole or a large part of the exterior" of the stages and that the tendency would be to produce congestion upon streets already overburdened with traffic. The court in the Fifth Avenue Coach Case held the stages of the coach company to be within the prohibition of the ordinance respecting "advertising * * * wagons," and it is not difficult to understand this when it is borne in mind that practically the entire exterior of the stages was covered with gaudy signs designed to attract such attention from pedestrians as to block traffic. The findings in the case at bar show that here no such consequence was to be feared, and the admitted facts show the signs to occupy comparatively little space on the sides of the cars. We do not consider this case, or the other cases cited from outside jurisdictions, applicable to the case at bar, particularly in view of the settled law in California enunciated in the cases to which we have referred.

[6, 7] The second ground urged by the appellants is that the transit company has no power under its articles or franchises to engage in advertising business. The respondent transit company virtually conceded that under its original articles no such power was expressly given. Its amended articles, however, contain this power and authority in broad and ample terms. We are satisfied that although the amendment to the articles was made after the commencement of this suit, it is the state of things as of the time of trial, rather than at the commencement of the action, which should govern in a proceeding of this nature. 14 R. C. L. 308; Parker v. P. G. & E. Co., 50 Cal. App. 264, 195 P. 60. But we are satisfied that appellants' contention that the making of an advertising contract is beyond, and not within, the corporate powers of the transit company, cannot be urged by them. The other party to the contract, the advertising company, is not only raising the objection, but is litigating herein on the side of the transit company. We fail to see why the ordinary rule that, "The misuser of a franchise by exceeding the corporate powers is a cause of forfeiture which can be taken advantage of by the government alone" (7 Cal. Jur. p. 63, and cases there cited), does not apply here.

[8] This brings us to the last contention of the appellants, namely, that advertising is not within the powers granted by the franchises which the transit company holds and enjoys. The point is without merit. It appears here that the practice of using street railway cars for advertising purposes is the common and usual practice—one recognized by the very ordinance in question here when it permitted advertising upon the inside portions of street cars and upon the outside front and rear ends. Manifestly the franchise, which was silent on the matter of advertising, did not by mere silence contemplate a restriction upon the common and customary use of similar franchises under similar circumstances.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

98 Cal. App. 180

GALLAGHER v. GALLAGHER et al.

(Civ. 3703.)

District Court of Appeal, Third District, California. April 9, 1929.

1. **Husband and wife ⚷250—No understanding of repayment existing when advances to parents were made, property subsequently given married son did not become community estate.**

Property given by father and mother to married son, did not become part of son's community estate, contrary to expressed intention at time of conveyance, though son had made advances for parent's support, where there was no understanding of repayment at time advancements were made.

2. **Evidence ⚷313—Expressed intention at time of execution and delivery of deed could not be controlled by subsequent statements regarding intention of grantor.**

Statements made by grantor in deed after execution and delivery thereof, relating to intention of grantor, could not affect or control expressed intention at time of conveyance.

3. **Appeal and error ⚷1011(1)—Findings of court, where evidence is conflicting and there is evidence to support findings, will not be disturbed.**

Where evidence is conflicting, and there is evidence to support the findings of the court, such findings should not be disturbed.

4. **Husband and wife ⚷270(1)—Wife may maintain action to recover community property conveyed by husband without her consent, and reinstate it in community estate (Civ. Code, § 172a).**

Wife's interest in community property, under Civ. Code, § 172a, being tangible and enforceable interest which is not dependent upon what has been defined as her expectancy, she can maintain action to recover property conveyed by husband without her consent, and reinstate it in community estate.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Edna J. Gallagher against Hugh P. Gallagher and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Horace M. Street, of San Francisco, for appellant.

J. C. Webster, of Sonora, for respondents.

MONCUR, Justice pro tem. This is an action brought by plaintiff Edna J. Gallagher, wife of defendant Hugh P. Gallagher, against her husband and his two sisters to cancel a deed made by plaintiff's said husband to the two sisters of a two-thirds interest in certain real property in Tuolumne county. Hugh P. Gallagher defaulted. The two sisters answered and obtained judgment from which plaintiff appeals. The complaint alleges that the property described in the deed sought to be set aside was the community property of plaintiff and her said husband, and that said deed was without consideration and was made without plaintiff's consent, and was an attempt to make a gift of the said interest in said property to the said sisters. The defendants Rose Rachford and Jane Phillips in their answer to the complaint denied the property was community property, and set up as an affirmative defense the following: That Patrick Gallagher and Eliza Gallagher, the father and mother of Hugh Gallagher, Rose Rachford, Jane Phillips, and also Henry Gallagher, the latter not being a party to this action, on October 13, 1909, by deed, conveyed the property in suit to Hugh P. Gallagher to hold the same in trust; that said Patrick and Eliza Gallagher intended to convey the property to Hugh Gallagher to take and hold a one-fourth interest as his own and to hold in trust a one-fourth interest for his brother Henry and a like interest for each Rose and Jane. Briefly, the facts in the case are as follows: Appellant and Hugh Gallagher married March 18, 1903, and have continued since that time to be husband and wife. All of the property involved belonged to Eliza Gallagher as her separate property, except a 20-acre tract known as the Gallagher placer mine, the latter property being community property of Patrick and Eliza Gallagher. On October 13, 1909, by ordinary form of grant, bargain, and sale deed Patrick and Eliza Gallagher conveyed all of the property to Hugh Gallagher. The deed recites a consideration of $2,500. From 1915 to 1920, appellant and Hugh Gallagher were living together, but in a strained and unhappy relation. From 1920 to February, 1925, they lived separate and apart. In March, 1917, Hugh made the deed attacked to his sisters. It was made without appellant's knowledge or consent. Appellant and Hugh Gallagher became reconciled after a serious illness of appellant in February, 1925. Appellant did not know of the deed sought to be annulled herein until February, 1925; and at the time said deed from Hugh Gallagher to his sisters was made divorce proceedings were in contemplation between said Hugh and his wife. It further appears that prior to Hugh's marriage to appellant he had contributed from time to time amounts for the support of his mother and father and after his marriage he continued to contribute sums from time to time for their support, the total amount of such contribution from Hugh after his marriage to appellant exceeding the sum of $2,200; also the sisters contributed some amounts for the support of their parents. Eliza Gallagher died September 25, 1913, and Patrick Gallagher died November 19, 1917.

[1] The court found that the property was not community property, but was acquired as a gift from the father and mother by said

Hugh. If by the deed of conveyance to Hugh Gallagher a community interest in the property vested in the plaintiff, it must have vested by reason of the advances out of their community funds made by Hugh to his parents subsequent to his marriage to plaintiff. However, the testimony clearly shows that there was no understanding of repayment at the times the advancements were made by Hugh to his parents. Under these circumstances what is said in the case of Crane v. Derrick, 157 Cal. 667, at page 672, 109 P. 31, 33, seems to be particularly applicable: "It has been said may times that the question is one that must be determined on the circumstances of the particular case, the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered or the support was furnished. (See 21 Am. & Eng. Ency. of Law, 2d Ed., p. 1061; Murdock v. Murdock, 7 Cal. 513; Friermuth v. Friermuth, 46 Cal. 42, 45.) * * * Our own decisions appear to support the doctrine that to authorize compensation in such cases the circumstances must be such as to warrant the inference that it was the expectation of both parties that compensation should be made. (Murdock v. Murdock, 7 Cal. 513; Friermuth v. Friermuth, 46 Cal. 42.) And it is emphatically declared in Murdock v. Murdock, that it is the expectations of the parties existing while the relation continued that is to control, and that no circumstance occurring afterwards can convert that into an implied contract, that was not so before."

[2] It appears that Hugh was not at home at the time the deed to him was executed by his parents. Mrs. Rachford, Mrs. Phillips, and Henry Gallagher all testified that their parents had discussed the matter of the conveyance with them on the day before the conveyance was made, and had expressed a desire to convey the property to Rose, their daughter, in trust for all of their children, but that Rose declined to accept the deed to her and suggested that it be made to Hugh. This was done, but the deed was not delivered to Hugh until April, 1913, after his return from Alaska. So far as Eliza Gallagher is concerned this is the only occasion where she appears to have participated at all in any of the discussions in relation to a disposal of the property. There is a sharp conflict in the evidence as to what occurred between Patrick Gallagher, Rose, and Hugh in April, 1913, when the deed was actually delivered to Hugh for recording, but in view of the findings of the trial court this conflict becomes immaterial. It may be remarked here, however, that the expressed intention of Patrick Gallagher and Eliza Gallagher at the time of the execution and delivery of the deed in question as to what they intended by the conveyance should be controlling, and any statements made by Patrick Gallagher thereafter to the effect that "he had deeded his property to Hugh to repay him for what he had spent on the place years before" or "I am so sorry I have let Hugh spend so much money on the place; he will never get back all that he has spent on it, although I have deeded everything I own to him" could not affect or control the expressed intention at the time of the conveyance.

[3] There is evidence in the record sufficient to support the finding of the court that the conveyance to Hugh by his parents was intended as a gift, and, as the court also found that by reason of such deed to Hugh the property did not become the community property of plaintiff and Hugh, it is immaterial so far as plaintiff is concerned whether the evidence does in fact establish that the property was conveyed as a gift or in trust to Hugh for all of the children. In either event, the result to plaintiff will be the same. It appears unnecessary to cite any authorities in support of the rule that, where evidence is conflicting and that where there is evidence to support the findings of the court, such findings should not be disturbed.

[4] Respondents urge that plaintiff was not entitled at the time of the commencement of the action to have the deed of the said two-thirds interest set aside, even though the court should determine that the property conveyed thereby was the community property of herself and Hugh. However, we think the question involved herein has been practically set at rest by recent decisions of the courts of this state. It would serve no useful purpose to go at any length into the many decisions of our courts in respect to these matters involved in our community property laws. It seems sufficient in reference to such rights of a wife to quote the following from the case of Spreckels v. Spreckels, 172 Cal. 775, at page 782, 158 P. 537, 539: "If it confers upon her, during the marriage, any right respecting such gifts, it is nothing more than a right to revoke the gift and, if necessary, sue to recover the property, not as her separate estate, but to reinstate it as a part of the community property with the title vested in the husband and subject to sale by him as before."

And to quote also from the case of Bone v. Dwyer, 74 Cal. App. 363, at page 370, 240 P. 796, 798, as follows: "Whatever the wife's interest may be, we hold that under the section it is a tangible, enforceable interest, and is not dependent upon the maturity of what has been defined as her expectancy in community property."

Section 172a of the Civil Code is the section referred to, and, while it is true that said section had not been enacted at the time of the transactions involved herein, nevertheless the effect, so far as the application of the above-quoted language is concerned, must be the same.

It, therefore, appearing that the evidence supports the findings and the judgment and no prejudicial error appearing in the record, it follows that the judgment must be, and it is hereby, affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

98 Cal. App. 230

NOBLE et al. v. CALIFORNIA PRUNE & APRICOT GROWERS' ASS'N et al.
(Civ. 5571.)

District Court of Appeal, Second District, Division 1, California. April 12, 1929.

1. Appeal and error 🔑917(2)—Trial court is assumed to have sustained general demurrer, where defendants demurred generally and specially and demurrer was sustained without leave to amend.

Where defendants demurred generally and specially to plaintiffs' petition and demurrer was sustained without leave to amend, it is assumed that trial court sustained general demurrer.

2. Agriculture 🔑6—Attempted amendment, adding withdrawal clause to by-laws of co-operative marketing association adopted by voting board and majority of members and not two-thirds, as required, held ineffective (Civ. Code, § 304).

Where by-laws of co-operative marketing association provided that on written demand or vote of sixteen members of voting board any particular problem of association should be referred to membership, and that voting board should thereupon vote as unit as majority of association's members should determine, resolution so adopted by voting board and by majority of members of association attempting to amend by-laws by adding withdrawal clause was of no force or effect as amendment under provisions of by-laws and Civ. Code, § 304, requiring two-thirds of members of corporation to consent to amendment.

3. Agriculture 🔑6—By-laws to be amended require substantial compliance with provisions of law for amending by-laws (Civ. Code, § 304).

Before by-laws of co-operative marketing association can be amended, there must be substantial compliance with provisions of Civ. Code, § 304, providing for amendment of by-laws.

4. Corporations 🔑56—Mode prescribed by general law or corporation charter for amending by-laws must be adopted, for by-laws to be valid.

When either general law or charter of corporation describes mode in which by-laws may be adopted, by-laws which corporation seeks to amend must be adopted in such mode in order to be valid.

5. Mandamus 🔑137—Incorporation of withdrawal clause in by-laws of association involved discretion, where requiring determination of terms of withdrawal, and could not be enforced by mandamus.

In mandamus to compel co-operative marketing association to incorporate into by-laws withdrawal clause, and to compel association to permit plaintiff members to withdraw, resolution for withdrawal providing for submission to members for their vote, question as to whether or not they want withdrawal clause did not constitute amendment to by-laws, but merely submitted proposal to membership, and duty sought to be enforced was not ministerial but discretionary, since members of board were required to use their discretion in drawing up amendment containing terms of withdrawal, which discretion trial court could not control by mandamus.

6. Mandamus 🔑12—Mandamus lies only to enforce performance of act enjoined by law and not to enforce obligation of contracts (Code Civ. Proc. § 1085).

Mandamus does not lie to enforce obligation of contracts, but lies only to enforce performance of an act which law specially enjoins under Code Civ. Proc. § 1085, except where contracts create relation on which law imposes rights and duties enforceable by mandamus.

7. Mandamus 🔑138—Mandamus held inapplicable to compel co-operative marketing association, having only contractual relation with members, to amend by-laws by adding withdrawal clause adopted by majority of members (Civ. Code, § 304).

Where membership and marketing agreements showed that relation between members of co-operative marketing association and association was purely contractual, and there was no law requiring or permitting corporation to amend its by-laws so as to provide for withdrawal of its members at least without consent of at least two-thirds of its members, as required by Civ. Code, § 304, and no duty was enjoined by law on officers to adopt such amendments to by-laws, and by-laws prohibited withdrawal from membership during term of marketing agreement, association could not be compelled by mandamus to amend by-laws by adding withdrawal clause adopted by majority of members.

8. Agriculture 🔑6—Members of co-operative marketing association, if entitled to withdraw, could set up withdrawal as defense to action by association to enforce contract.

Members of co-operative marketing association, if entitled to withdraw from association under claim that withdrawal clause was approved by majority of members and voting board and should have been made part of by-laws, could set up such withdrawal as defense to any action brought by association to enforce its contract rights.

Appeal from Superior Court, Ventura County; L. D. Jennings, Judge.

Mandamus by Frederick Noble and others against the California Prune & Apricot Growers' Association, a corporation, and oth-

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ers. Judgment for defendants, and plaintiffs appeal. Affirmed.

Chas. F. Blackstock, of Oxnard, for appellants.

Sapiro & Hayes, of San Francisco, for respondents.

McLUCAS, Justice pro tem. Plaintiffs appeal from a judgment sustaining defendants' and respondents' demurrer to an amended petition for a peremptory writ of mandamus, without leave to amend.

The amended petition, in substance, alleges as follows: That petitioners are residents of the county of Ventura, state of California, and owners of apricot orchards and growers of apricots in said county and and state. That defendant California Prune & Apricot Growers' Association is a nonprofit co-operative association without capital stock, organized under the laws of the state of California, and has its principal place of business at San Jose, Cal. That the articles of incorporation of said defendant provide, among other things, that the number of directors of said defendant corporation shall be fifteen. That a copy of said articles of incorporation is attached to the petition and made a part thereof. That prior to June 29, 1925, each of the plaintiffs became members of said California Prune & Apricot Growers' Association by executing with said association a certain membership agreement. That in said membership agreement it is provided substantially as follows: "The undersigned hereby appoint the Voting Board heretofore selected by the members of California Prune and Apricot Growers Association as his attorney to vote in his name, place and stead, for him and representing his interests and the joint interests of all other growers at all annual, regular or special meetings of the members of the association, or otherwise, where a member may be called on to vote in or for the association with the same powers and rights as the undersigned himself would have if personally present from the date of the execution of this proxy to and including July 31, 1928. The Voting Board shall consist of thirty-nine members as provided in the original membership agreement of the California Prune and Apricot Growers Association and article four of the by-laws thereof, representing the various districts as therein set forth. Said board shall annually select the directors of the association. No person may serve as director and as a member of the Voting Board at the same time. The Voting Board shall determine all questions by majority vote. On written demand or vote of sixteen members of the Voting Board any particular problem or problems of the association shall be referred to the full membership of the association. In such event the proxy and power of attorney shall be temporarily suspended; and the entire membership shall be requested to vote thereon. The voting Board shall thereupon vote as a unit as a majority of the association members so voting shall determine." That a copy of said membership agreement is attached to the petition and made a part thereof. That article 8 of the articles of incorporation of said association is as follows: "The association may provide in its by-laws the terms and conditions upon which membership may be transferred or assigned and conditions upon which, and at the time when, membership may cease, and the mode, manner and effect of the expulsion of a member, and the method, time and manner of withdrawal, and the right of members to vote by proxy or by mail and any other thing in furtherance of, but not in conflict with, these articles." That article 4 of the by-laws of said association is as follows: "(a) The Voting Board, consisting of thirty-nine members, elected by the members of the voting districts, shall be the proxy and attorney of each member of the association, to vote in his name, place and stead, and represent his interests and the joint interest of all other members of the association at all annual, regular or special meetings of the members of the association, or otherwise, where a member of the association may be called upon to act in or for the association, with the same powers and right as the member himself would have if personally present, which said proxy and power of attorney shall remain and continue in force for a full period of seven years from July 31, 1921. The personnel of the Voting Board may change from time to time without affecting or impairing such proxy and power of attorney vested in the Voting Board. The thirty-nine members of the Voting Board shall represent the various districts of the state as follows: (Enumerating districts.) (b) The members of the Voting Board shall be selected by the members in their respective districts. The Voting Board shall have such powers and duties as set forth in the membership agreement and these by-laws. * * * (d) The Voting Board shall determine all questions by majority vote. Twenty members shall constitute a quorum of the Voting Board, but no action except as provided in subdivision (f) of article four of these by-laws, or a vote to adjourn shall be taken by the Voting Board, except by the affirmative vote of at least twenty members. * * * (f) On written demand or vote of sixteen of the Voting Board any particular problem or problems of the association shall be referred to the full membership of the association. In such event, the proxy and power of attorney shall be temporarily suspended; and the entire membership shall be requested to vote thereon. The Voting Board shall thereupon vote as a unit as a majority of the association members so voting shall determine. * * *" That a copy of the by-laws is attached to the petition and made a part thereof. That at a meeting of said voting board, held in San Jose, Cal., on the 29th day of June, 1925, a quorum being present and voting, the following resolution was adopted, more than twenty of the said voting board voting in favor thereof: "Resolved, that we submit to the members for their vote the question as to whether or not they want a withdrawal clause providing for withdrawal in March, 1926, and that the report of the reorganization committee be printed in the 'Sunsweet Standard' with proper comments."

The petition further alleges: "That said resolution was intended to mean and in fact did mean that it was resolved by the said Voting Board that the proposition of withdrawal should be formally submitted and referred to the membership of the association pursuant to and because of the terms of said membership agreement and said by-laws, which said membership should determine by a majority vote of the members so voting whether or not it should incorporate into the membership agreement of the association and the marketing agreement of the association and the by-laws of the association a provision to the effect that any member of the association might withdraw from the association and from said membership agreement and said marketing agreement by giving notice of his withdrawal in the period of March 15th to March 31st, inclusive, of the year 1926. Said marketing agreement is attached hereto marked 'Exhibit D' and is hereby made a part hereof. That said proposition of withdrawal was pursuant to said resolution so adopted by said Voting Board on the 29th day of June, 1925, duly submitted by referendum ballot to the entire membership of said association, and a majority of the members who voted on said proposition voted for and declared in favor of said proposition of withdrawal. That said proposition of withdrawal was referred and submitted to the membership regularly and in the manner provided by the by-laws of said association; and that the votes of the members so voting on said proposition of withdrawal were duly and regularly counted and canvassed in the manner provided by the by-laws of the association. That notwithstanding that a majority of said members so voting for said proposition of withdrawal voted in favor of said proposition, the said Voting Board and the directors of said association and the said association have failed, neglected and refused to abide by the said vote of the majority of said members so voting for said withdrawal proposition, and have refused to act pursuant to the vote of the majority of said members so voting in favor of said withdrawal proposition, and have failed, neglected and refused to incorporate into the membership agreement of the association or into the marketing agreement of the association, or into the by-laws of the association any clause permitting any member of the association to withdraw from the association by giving notice of his withdrawal in the period between the 15th day of March, and the 31st day of March, inclusive, 1926, or at any other time, or in any manner or at all. That the said Voting Board and the directors of said association and said association wholly and absolutely ignored the vote of a majority of the members so voting for said withdrawal proposition and this notwithstanding the fact that a majority of the members so voting voted in favor of said withdrawal proposition as aforesaid. That in the period of March 15th to March 31st, inclusive, of the year 1926, each of the plaintiffs hereinabove named duly and regularly gave notice to said association of his withdrawal from membership in said association and from the membership agreement in said association, but that said defendants have failed, neglected and refused to act upon said notices or any of them, and said association has announced that its Voting Board and its board of directors and the association have refused to adopt in any form any proposition of withdrawal or any proposition which will permit any of its members to withdraw by giving notice in any form or at any time, and the said association, contrary to the vote of a majority of its members so voting upon the said proposition of withdrawal, has refused and still refuses to permit any of its members to withdraw upon notice, or otherwise, or at all, and the said association has threatened to file suit against any member of said association whether such member has given notice of withdrawal or not in accordance with the vote of a majority of the members so voting in favor of said withdrawal proposition, and said association in fact will carry out its threat and will file suit against any member who fails to deliver his fruit to the said association in accordance with the terms of said membership agreement and said marketing agreement of said association, and that said association will file such suit against any member failing to deliver his said fruit in an effort to collect from such member the amount of penalty provided by the membership agreement and/or the said marketing agreement and/or the by-laws of said association, and this whether or not such member has duly and regularly given notice of withdrawal from the association. That at the time each of the plaintiffs herein gave his notice of withdrawal from said association, each of the said plaintiffs was a member in good standing of said association, and that each of the plaintiffs has performed on his part all of the terms, covenants and conditions of said membership agreement and the said marketing agreement on his part to be performed; and that each of the plaintiffs has complied with all of the provisions of the by-laws of the said California Prune and Apricot Growers Association, a corporation, on his part to be complied with. That prior to the filing of this petition demand has been made upon said defendants and each of them that it act pursuant to and in accordance with the vote of the majority of the members so voting on said withdrawal proposition, but notwithstanding said demand the said association has failed, neglected and refused to act in accordance with and pursuant to the vote of a majority of the members so voting on said withdrawal proposition, and has refused to permit any of its members to withdraw from said association upon notice or otherwise, or at all. That said plaintiffs do not have, nor does any of them have any plain, speedy and adequate remedy at law; that if the question as to whether or not the said notice of withdrawal given by each of said plaintiffs is or was effective for the purpose of accomplishing the withdrawal of each of said plaintiffs from said association is not promptly determined, the fact that said question remains open and in doubt will affect the credit of each of said plaintiffs and will hamper him in his business operations and will render it hazardous for any of said plaintiffs to sell his apricots and deliver the same to any independent purchaser, or to anyone at all, other than to said association, and will cause each of said members irreparable loss and injury; and that a determination of the right of each or any of the plaintiffs hereinabove named will avoid and prevent a multiplicity of suits."

The petition prays for a judgment that a peremptory writ of mandamus issue "commanding the said defendant association, its Voting Board and its board of directors to abide by the vote of the majority of the members so voting at said referendum election, and commanding the said association, its Voting Board and its board of directors to incorporate into the by-laws a clause to the effect that any of its members duly and regularly giving notice of withdrawal in the period between March 15th and March 31st, inclusive, 1926, may withdraw from the association and from membership therein; and commanding the said association to permit each of the plaintiffs hereinabove named to withdraw from said association in accordance with the notice of each of said plaintiffs heretofore duly and regularly given to said association; and for such other judgment or order as may be proper."

[1] Defendants and respondents demurred generally and specially to the petition. It is to be assumed that the trial court sustained the general demurrer, since the demurrer was sustained without leave to amend. We therefore proceed to the discussion whether the petition states a cause of action. Article 8 of the articles of incorporation of said association states that the association may provide in its by-laws "the conditions upon which, and the time when, membership may cease," and the mode, time, and manner of withdrawal. The by-laws of the association created a voting board with proxy and power of attorney to represent the interests of all members of the association, which said proxy and power of attorney was to remain in force for the full period of seven years from July 31, 1921. Article 8 of the by-laws provides that "no member shall be permitted to withdraw from membership in the association during the term of any marketing agreement signed by him." The by-laws further require that "each member must agree to market the prunes and apricots grown or owned by him in accordance with the provisions of the standard marketing agreements" referred to therein, and provide for stipulated damages in accordance with said marketing agreements. A copy of the marketing agreement is attached to the by-laws, and is required to be signed by each member of the association. Paragraph 2 of the marketing agreement provides as follows: "The association agrees to buy and the grower agrees to sell and deliver to the association all of the prunes and apricots and apricot pits produced or acquired by or for him in California, during the years 1922, 1923, 1924 and 1925; and, at the option of the association, the years 1926, 1927 and 1928. This option shall be irrevocable; and shall cover the total period of three years. * * *" The marketing agreement further provides that the association shall grade and classify the prunes and apricots, and the grower agrees to accept the gradings and standards established by the association. Sections 6 and 7 of the marketing agreement provide that: "The association agrees to resell such prunes and apricots together with prunes and apricots of like quality, grade and classification, delivered by other growers under similar contracts, at the best prices obtainable by it under market conditions; and to pay over the net amount received therefrom, as payment in full, to the grower and growers named in contracts similar hereto, according to the value of the prunes and apricots delivered by each of them after deducting therefrom, within the discretion of the association, the costs of packing, processing, manufacturing, handling, storing, depreciation, advertising and marketing, and an association charge of not to exceed three per cent. of the gross resale proceeds. * * * The grower agrees that his prunes and apricots shall be so mingled and that the net returns therefrom, less all costs, advances and charges, shall be credited and paid to him on a proportional basis, considering all differentials and adjustments, out of the receipts from the sale of all prunes and apricots of like quality, grade and classification." Section 12 of the marketing agreement reads as follows: "This agreement shall be binding upon the grower as long as he produces or acquires any prunes or apricots directly or indirectly, or has the legal right to exercise control of any prunes or apricots or any interest therein during the

term of this contract." Section 15 of the marketing agreement states that: "This agreement is one of a series generally similar in terms, comprising with all such agreements, signed by individual grower, or otherwise, one single contract between the association and the said growers, mutually and individually obligated under all of the terms thereof. The association shall be deemed to be acting, in its own name, for all such growers in any action or legal proceedings on or arising out of this contract." Section 16 of the marketing agreement contains the following provision: "* * * The grower hereby agrees to pay to the association for all prunes and apricots and pits withheld, delivered, sold, consigned or marketed by or for him other than in accordance with the terms hereof the sum of two cents per pound of prunes, and particularly the sum of four cents per pound of prunes running larger than thirty to the pound and the sum of four cents per pound of apricots and one-half cent per pound of apricot pits, as liquidated damages for the breach of this contract, all parties agreeing that this contract is one of a series dependent for its true value upon the adherence of each and all of the growers to each and all of the said contracts."

[2-5] As alleged in the petition, on June 29, 1925, the said voting board adopted the resolution hereinbefore mentioned relating to a proposed right of withdrawal in March, 1926. While the resolution is not in form a proposed amendment of the by-laws, yet the petitioners urge that in effect the by-laws were amended in a manner provided therein, for the reason that the by-laws provide that on written demand or vote of sixteen of the voting board any particular problem of the association shall be referred to the full membership of the association, and that the voting board shall thereupon vote as a unit as a majority of the association members so voting shall determine. It may well be questioned whether the resolution so adopted by the voting board and by a majority of the members of the association constituted an attempted amendment of the by-laws; but, conceding that it was attempted to amend the by-laws in the manner stated, we are of the opinion that such attempted amendment was of no force or effect, for the reason that the provisions of the by-laws and of section 304 of the Civil Code expressly state that the by-laws may be amended by the vote or written consent of two-thirds of the members of the corporation. To permit a majority of the members of the association voting to require the voting board to vote as a unit for the amendment of the by-laws would, in effect, permit an indirect amendment of the by-laws by a minority of the members of the association, when both the Civil Code and the by-laws require the vote or written consent of two-thirds of the members of the association in order to amend the by-laws. There must be a substantial compliance with the provisions of the law before the by-laws can be amended. When either the general law or the charter of the corporation prescribes the mode in which by-laws may be adopted, the by-laws which the corporation seeks to make must be adopted in such mode in order to be valid. Powers v. Marine Engineers' Beneficial Ass'n, 52 Cal. App. 551, 199 P. 353. Further, it should be noted that the duty which appellants are seeking to enforce is not a ministerial duty. The proposition of withdrawal set out in appellants' petition does not constitute an amendment to the by-laws, but merely submits a proposal to the membership "whether or not they want a withdrawal clause providing for withdrawal in March, 1926." If a by-law permitting withdrawal were to be ordered adopted, who is to determine the terms and conditions upon which withdrawal is to be permitted? Certainly the trial court has no authority to control the discretion to be exercised by the respondent members in framing a by-law containing the terms and conditions of withdrawal. As stated in Bassett v. Atwater, 65 Conn. 355, 32 A. 937, 32 L. R. A. 575, one of the requisite conditions for the issuance of the writ of mandamus is that "the party against whom the writ is sought must be under an obligation imposed by law to perform some such duty, that is, a duty in respect to the performance of which he may not exercise any discretion."

[6, 7] It is fundamental and conceded by appellants that mandamus does not lie to enforce the obligation of contracts. It lies only to enforce the performance of an act which the law specially enjoins. Howe v. Southrey, 144 Cal. 767, 769, 78 P. 259; Barber v. Mulford, 117 Cal. 356, 49 P. 206; Moreing v. Shields, 28 Cal. App. 513, 152 P. 964; Code Civ. Proc. § 1085. There is an exception to the foregoing rule where a contract creates a relation upon which the law imposes rights and duties enforceable by mandamus. Appellants contend that they are only asking the court to compel the performance of a duty which the law specially enjoins. We cannot agree with this contention. As appears from the membership and marketing agreements, the relation between the members of the California Prune & Apricot Growers' Association was purely contractual. As stated in California Canning Peach Growers v. Downey, 76 Cal. App. 1, at page 15, 243 P. 679, 684: "Every member of the association must, of course, be held to have knowledge of all of these elements which enter into cooperative marketing agreements. They are not simple agreements entered into with an agent, although a few people may be selected to act in the capacity of officers to manage the business of the association. The agreements are essentially to and with all the other members of the cooperative association and the inter-

ests of every member rest upon the same foundation, and no member can be advantaged to the detriment of any other member. Of all this each member must also be held to have full knowledge, as the contract sets forth all of these facts in equalizing burdens and advantages." We know of no statute or law requiring or permitting a corporation to amend its by-laws so as to provide for withdrawal of its members, or at all, without the consent of at least two-thirds of its members. Neither are we cognizant of any duty enjoined by law upon any officer of any corporation requiring them to adopt such amendments to by-laws. Neither do we believe this case comes within the exception to the rule, since we do not find that the contract between the members created any relation upon which the law enjoins rights and duties enforceable by mandamus. In fact, the contract between the members expressly provides that the agreement shall be binding, at the option of the association, for the year 1926, and that this option shall be irrevocable, and the by-laws further prohibit withdrawal from membership during the term of any marketing agreement.

[8] Appellants urge that plaintiffs did not have a plain, speedy, and adequate remedy at law. If the appellants, as they claim, were entitled to withdraw from respondent association, such a withdrawal could be set up as a defense to any action brought by respondent association to enforce its contract rights for the delivery of apricots.

For the reasons hereinbefore stated, the complaint, in our opinion, does not state facts sufficient to constitute a cause of action; and it further appears from the record that it is not possible to amend the complaint so as to state a cause of action in this proceeding.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

PEOPLE v. VAN CLEAVE. (Cr. 1749.)★

District Court of Appeal, Second District, Division 2, California. April 3, 1929.

Hearing Granted by Supreme Court May 3, 1929.

1. Burglary 🔑41(1)—Evidence held to sustain conviction.

Evidence *held* to sustain conviction of burglary.

2. Judges 🔑21—Trial judge's intemperate public criticism of decision of District Court of Appeal as unreasonable held deserving of censure (Code Civ. Proc. § 282).

Language of trial judge in passing on question of amending information, denouncing decision of District Court of Appeal as unreasonable, *held* serious breach of ethics, violative of judge's obligation under Code Civ. Proc. § 282, as an attorney at law, and deserving of such censure.

3. Judges 🔑21—Judge is bound by obligation as attorney to maintain respect due courts and judicial officers (Code Civ. Proc. § 282).

Code Civ. Proc. § 282, providing that it is duty of an attorney to maintain the respect due the courts and judicial officers, is applicable and binding on the judges of district court.

4. Criminal law 🔑1035(3)—Intemperate criticism by judge of decision of District Court of Appeal, not objected to, held not prejudicial to accused.

Improper and disrespectful language of trial judge in passing on question of amending information, consisting of adverse criticism of decision of District Court of Appeal as unreasonable, not assigned as misconduct at trial, *held* not prejudicial to accused charged with burglary.

5. Criminal law 🔑656(1)—Judge's statement in presence of jury as to conduct of witness in violation of admonition not to talk with others held prejudicial misconduct; he not being witness in case.

In burglary prosecution, where court had cautioned witness not to talk with others during recess, and after recess it appeared that she had violated injunction, statements of judge in presence of jury that he saw her talking with defendant's wife and another *held* misconduct; he not being a witness in the case, and no necessity being apparent why he should be called as a witness.

6. Criminal law 🔑404(1)—Old finger print card in police records consulted in investigation before arresting accused held inadmissible in burglary prosecution.

In burglary prosecution, old finger print card in possession of police before commission of burglary *held* inadmissible; the fact that it was inspected by finger print expert during investigation preceding arrest of accused not authorizing its introduction for sole purpose of showing that accused had previously been in hands of police.

7. Criminal law 🔑829(15, 18)—Refusal of instructions on circumstantial evidence and reasonable doubt was not erroneous, where subject-matter was adequately covered in court's charge.

Refusal of instructions on circumstantial evidence and reasonable doubt *held* not erroneous, where the jury were adequately instructed on such matters.

8. Criminal law 🔑1186(4)—Errors in trial of burglary prosecution held not harmless (Const. art. 6, § 4½).

Errors in trial of burglary prosecution, particularly introduction of old finger print apparently merely for purpose of showing that accused had previously been in hands of police, *held* not harmless error, under Const. art. 6, § 4½, in view of the unsatisfactory character of the evidence.

★Hearing granted. 280 P. 983.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Dallas D. Van Cleave was convicted of burglary, and he appeals. Reversed.

Irvin C. Taplin, Ivan Miller, and Harry M. Hunt, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

WORKS, P. J. Defendant was convicted of the crime of burglary. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

[1] It is first contended by appellant that the evidence was insufficient to support the verdict. The complaining witness, a woman, left an apartment in which she resided at about 10 o'clock on a certain evening. Before she departed, she saw in their accustomed places in the apartment certain articles which were ascertained, later in the night, to have been abstracted therefrom. It was because of the disappearance of these articles that the charge was made against appellant upon which he was convicted. When the complaining witness left her apartment, she drove in her automobile to a certain residence, where she met appellant, who theretofore had been her associate and friend, and some other persons, among whom was one Akins. Shortly after she arrived at this place of meeting, the complaining witness discovered that a dog she had brought with her had disappeared. She then gave to appellant a bunch of keys, including those to her car, to the exterior door of the apartment house in which she lived, to her apartment, and to her trunk, and she asked appellant to drive her car about the neighborhood of the residence mentioned, in an endeavor to find the missing dog. This was the purpose of the delivery of the keys. Appellant immediately departed upon the quest, taking Akins with him. The two returned, after an absence of from 25 to 45 minutes, with the dog. After some considerable time spent at the residence, and after having been to a restaurant for supper, together with Akins and a fourth person, appellant and the prosecuting witness drove to the latter's apartment and entered it by means of her keys, which had meanwhile been returned to her. They reached the apartment at about 2:30 in the morning. From certain appearances about the rooms it was apparent to the prosecuting witness that the place had been entered during her absence. She at once unlocked her trunk with a key on the bunch she had earlier intrusted to appellant. She testified that four diamond rings, of the value of $4,000, together with $140 in currency, had been taken from drawers in the trunk.

The evidence tended to show that the burglar had entered the apartment by means of a key, as there was no indication that the place had been broken into, in the ordinary acceptation of that term. The drawers in the trunk, five in number, were held in place by a metal bar which passed across their front and which it was necessary to move before they could be opened. The police found a print of appellant's thumb upon this bar. Other finger prints were upon it also, but none of them could be identified or plainly discerned. All the prints, except that alone of appellant's thumb, were, in the language of an expert upon the witness stand, but "smears." Before the night on which the burglary occurred, appellant was familiar with the "lay" of the apartment of the prosecuting witness. He had visited her there at least as often as every other day for a period of two months. Particularly, according to some of the evidence, he was familiar with the trunk and the mechanism by means of which it was opened, for he had often gone into it to get articles desired by the complaining witness when he was in the apartment with her, or to get articles which he himself desired. Indeed, it is contended by appellant that the sole distinguishable finger print on the metal bar was made by him upon some occasion earlier than the night upon which the burlary occurred. It will be remembered that the owner of the trunk had opened the drawers before she left her apartment at 10 o'clock and had seen the rings and money in their places. She had been compelled, necessarily, to handle the metal bar in order to open the drawers. Under all these circumstances the inference is perhaps possible that appellant's thumb print was impressed on the bar between 10 in the evening and 2:30 in the early morning of the night upon which the burglary was committed, although more will be said on that subject later. There was evidence also that, after appellant's arrest, and while he was in the county jail, he said to a police officer and to the complaining witness: "If you would let me out for twenty-four hours I believe I can get the diamonds back for you." It was testified by the officer that he further said that, if he was unable to produce the diamonds, "he would pay her back in the way of an installment from time to time." Appellant was not allowed to leave the jail, because he was unwilling to go after the diamonds in the company of an officer. We think there was sufficient evidence to support the verdict.

[2, 3] During the hearing of the cause, the trial judge, in the presence of the jury and in the hearing of such persons as may have been in the courtroom, indulged in language of a most unusual character, so unusual and improper that our duty requires that we accord it some notice. In considering the form of the information under which appellant was prosecuted, and in determining to grant leave

to the district attorney to amend it, the judge had occasion to refer to an opinion of one of the divisions of the District Court of Appeal rendered less than 40 days before the day upon which the judge spoke. We mention this period of time for the reason that the circumstance shows that the cause in which the opinion was rendered was still pending, as under the law as it then stood the judgment pronounced in it did not become final until 60 days after the filing of the opinion. Indeed, the judge referred to the opinion as one rendered in a case which had been "decided by the District Court of Appeal, but is not yet final." Immediately after this reference, he proceeded: "We don't know what the Supreme Court may do with it if it goes to the Supreme Court, inasmuch as it is not final, and it seems to me to do violence to every process of reasoning, and for that reason I should decline entirely to follow it, if I were put to a place where I had to decide either one thing or another, because I think the reasoning there is absolutely absurd." The judge then proceeded to an elaborate exposition of his view that the opinion was absurd, citing many examples whereby to illustrate his meaning. He characterized the opinion as "just as absurd" as one of the examples he gave. He said also, in referring to the view he had adopted, in opposition to that expressed in the opinion: "I am drawn to that conclusion by using what I think is ordinary common sense." In his strictures upon the opinion the trial judge was guilty of a breach of the ethics which govern the conduct of the judiciary. If he had addressed to the justices of the Supreme Court a letter containing what he said from his bench in an open courtroom, he might have been adjudged guilty of a contempt of that court on two distinct grounds. Friedlander v. Sumner Gold Co., 61 Cal. 116; In re Arnold (Cal. Sup.) 267 P. 316. Irrespective of this particular question, however, the judge's remarks were an offense against ethics, because they showed disrespect for the justices of the District Court of Appeal who had rendered the opinion against which he pronounced his diatribe. Section 282 of the Code of Civil Procedure provides that it is the duty of an attorney to "maintain the respect due to the courts * * * and judicial officers," and no lawyer is released from this obligation merely because he has become a judge. If one of the counsel in the present case had used at the trial the same language which the judge uttered from the bench, it would have been the plain duty of the latter to reprimand him for it. Indeed, if the counsel had so far forgotten himself as to speak in similar terms of one of the judges of the superior court, the trial judge could not justly have overlooked the assault upon his associate. We have occasionally found it necessary to rebuke counsel, at the bar of this court, for expressions directed at judges of the superior court, in no stronger terms than the language uttered from the bench by the judge before whom this cause was tried and aimed at the District Court of Appeal. If such offenses are to be noticed when committed by attorneys at the bar, they are deserving of even more severe censure when perpetrated by a judge on the bench. The remarks of the judge who tried this action were reprehensible to a degree. They were calculated to bring the courts and the administration of justice into disrepute. They were a violation of the duty of the judge, both as an attorney at law and as a judicial officer.

[4] The discussion contained in the last preceding paragraph, and the conclusion announced in it, were made necessary, not only by the remarks of the judge there mentioned, but because he continued further to offend. Immediately following the comment we have already noticed, he uttered language which appellant assigns as prejudicial misconduct, thus: "They [the legislature, in adopting certain code amendments in 1927], want to get away from petty technicalities that are raised. Unfortunately, I think there are some judges who try to find the smallest loophole that can be found in order to give the defendant the benefit of every reasonable doubt, which is given by the law anyhow; and the smallest error seems to be sufficient to justify the courts in reversing decisions or in granting new trials. Now, my mind has not run along that line. Maybe I am a little too extreme the other way, but I feel this, that if a defendant is informed by the information in language that can be understood by persons of reasonable and ordinary understanding, then he is enabled to know just what charge he has to meet, and I think that is sufficient. And I think further that in a trial of a case the court is here to get the facts and not to obscure the facts, not to hide them, not to mix up a case so when we get through nobody knows what the case is about. I think all the facts, all the pertinent facts relating to a case should go before a court or a jury, no matter whether it is a civil or a criminal case or whether it is tried by a court or by a jury. Now, I am stating this because of the decision in this case [decided by the District Court of Appeal]. The Supreme Court may take a different view of it if a rehearing is granted; but if a rehearing is not applied for, or, if applied for, it is not granted, then that becomes the law of the state, and I do not believe that it is necessary to take any chances with an information where by amending it in this way it can satisfy the most technical mind that might be called upon to decide this case at any further stage of the proceedings." While the judge showed very bad taste and violated the duties of his position in employing this language, we think there was no misconduct of which appellant may complain. While the re-

marks besmirched the courts, practically wholesale, we can see nothing in them which was prejudicial to appellant. It is worthy of note that the remarks were not assigned as misconduct at the trial.

[5] Another claim is made that the trial judge was guilty of misconduct. A witness for the defense, a Mrs. Howard, was on the stand when the time for a noon recess arrived. As the recess was about to be taken, and after the judge had given the usual admonition to the jury, counsel on both sides joined in the unusual request that "this witness be instructed not to talk about this trial during the recess." Thereupon the judge said to the witness: "You are instructed not to discuss with any one or allow any one to discuss with you any subject connected with this trial between now and 2:00 o'clock, when you resume the witness stand." Some time after Mrs. Howard had taken the stand following the recess, the district attorney, while conducting his cross-examination, charged in his questions that she had answered interrogations which she had failed to answer before noon, or had answered them differently. The officer then inquired whether she had talked with any one during the recess, the trial judge examined her at some length upon the same subject, and it seemed to appear that she had indulged in some conversation with at least two persons. It was suggested by counsel that the judge ask her the specific question whether she had conversed about the case, and it was stated that she had been admonished not to talk upon that subject. The judge then said: "I think that was made clear. At the request of both counsel the court admonished her to that effect, and I myself saw her talking in the back of the courtroom with Mrs. Van Cleave, the wife of the defendant, after court adjourned and while counsel was making an offer of proof, and also saw her walk into the courtroom with the lady dressed in black sitting in the front row; I don't know who she is, but they came into the courtroom together. Is that the mother of the defendant? It is this statement of the judge which is assigned as misconduct. After making the statement, the judge questioned the witness further, and it developed plainly that she had talked with the two persons named by him, but she denied that her conversations were in relation to the case. It also transpired that the "lady dressed in black" was the mother of appellant. The judge was in error in making the statement to which exception is taken. The matters of fact recited by him, if given a place in the record at all, should have come from the mouth of a witness, and he was no witness. He was neither called as a witness nor was he sworn. He could have become a witness, of course, but a judge should not be put even into such a position except as a matter of final necessity, especially in a criminal case, where there is always a likelihood that the judge who is made a witness will be deemed by the jury to have espoused one side or the other in the controversy being tried before him. The statements of fact made by the judge were intrinsically harmless. He said merely that he had seen the witness talking with the wife and mother of appellant, and she herself admitted that she had talked with them. Notwithstanding this truth, we think the remarks of the court constituted misconduct. Taking the context, as shown by the record, we think the jury must have believed that the judge held the view that the conversation related to the facts of the case. His remarks, therefore, operated to impeach the witness in the estimation of the jury. It is true that his observations were not assigned as misconduct at the trial, but we doubt whether their effect could have been wholly removed by an admonition to disregard them. When a jury believes that a judge has embraced the cause of the prosecution in a criminal case, it is most difficult to remove the impression.

[6] After appellant's arrest, his finger prints were taken by an expert in the police department. The expert testified that the distinguishable thumb print on the metal bar which held in place the drawers in the trunk of the complaining witness was the counterpart of a thumb print taken by himself from appellant, and that it was made by appellant. Some time later the prosecution offered in evidence finger prints upon a card found in the identification bureau of the police department, and bearing the name of appellant. The expert testified, over the objections of appellant, that he had examined this card as a part of the investigation leading up to the arrest of appellant, and that a thumb print upon it was made by the same thumb which made the print on the metal bar and the one taken by him from appellant after his arrest. The finger prints on the card were taken at some time before the burglary was committed with which appellant was charged and for which he was convicted in the present action. The card was admitted in evidence over the objection of appellant. This was error. The exhibit was offered merely because it was inspected by the finger print expert during the investigation which preceded appellant's arrest. It was not admissible for that reason, nor can we conceive of any other ground upon which it was entitled to a place in the record, and it demonstrated to the jury that appellant once before had been in the hands of the police.

[7] Appellant asked the trial judge to give five instructions, each of which, he says, was designed to inform the jury "that conviction on circumstantial evidence must exclude any and every reasonable hypothesis of innocence based on the adduced facts," and each of

them was refused. We think the proffered instructions, although they were differently phrased, related only to the question of reasonable doubt, and the judge instructed the jury amply upon that subject. The requested instructions were therefore unnecessary.

[8] In order to determine whether there has probably been a miscarriage of justice because of the errors committed at the trial, and in accordance with the provisions of section 4½ of article 6 of the Constitution, we have examined the entire cause, including the evidence. It will be observed that, with the exception of the testimony to the effect that appellant, after his arrest, made an offer to return the stolen diamonds if he were released, or to pay for them in installments, the evidence is purely circumstantial. Let us consider this excepted testimony first. Appellant denies that he made the offer. Not only so, but the testimony came from a police officer who said that the offer was made in the presence of the complaining witness, and she did not testify on the subject. The testimony concerning appellant's thumb print on the metal bar of the trunk was not as satisfactory as the prosecution might have desired. The trunk was of the wardrobe variety. It stood on end when it was to be opened. One side of it was arranged to accommodate clothing on hangers. The other side was completely occupied by five drawers, extending from top to bottom of the side. It was from the second of these drawers that the rings and money were taken. The metal bar ran from top to bottom of the trunk and extended, when in place, across one end of the five drawers. It was fastened at the top by a lock. The sole distinguishable finger print, that of appellant's thumb, was found near this lock. The other prints, "smears," as the expert called them, were at various places along the bar, and it is to be noticed that the record fails to show just where any of them was located and especially whether any of them was under the thumb print of appellant. It is particularly worthy of note that the expert declared that he could not determine whether the print of appellant's thumb was impressed upon the bar before or after any other of the prints upon it. Appellant denied strenuously that he committed the burglary, and in the denial he was fully supported by Akins.

One other circumstance of the case deserves mention. Appellant was a married man, but it is evident from the record that the complaining witness was his paramour. The alleged burglary was committed on the night of July 11. Appellant's wife had left him on July 2 or 3. Before the burglary she had caused divorce papers to be served upon him. On the night of the burglary, appellant occupied the apartment of the complaining witness with her, and she drove him to another place in the morning. On this ride, before any charge was made against him and before the record shows that he was suspected of the burglary, appellant says he told the complaining witness that he was to go that morning to the office of his wife's counsel in order to effect, if possible, a reconciliation with her. He says that the complaining witness asked him not to do so. The mother of appellant, with whom the complaining witness was well acquainted, and another witness, testified that the complaining witness said, later in the same day, that things had gone so far between her and appellant that, if he returned to his wife, he would be sorry, that she would see that he never lived with her. Akins testified that on this same occasion the complaining witness said that appellant had been "cheating" on her and that she would "fix him" for it. Appellant and his wife had apparently become reconciled at the time of the trial, as there was testimony that they were then living together.

It will be seen from all these circumstances that the case was a close one. It is quite likely that a miscarriage of justice has resulted from the errors committed at the trial. Appellant must have been harmed materially by the reception in evidence of the old finger print record found in the police archives. It is quite probable that this item of damaging evidence turned the scale against him.

Judgment and order reversed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

207 Cal. 102

TAYLOR v. HOPPER et al. (S. F. 12808.)★

Supreme Court of California. April 23, 1929.

Rehearing Denied May 23, 1929.

1. Cancellation of instruments ⇨37(4)—Complaint held not to state cause of action for rescission of compromise of personal injury action for failure to allege return of consideration (Civ. Code, § 1691).

Complaint alleging that plaintiff was induced to settle and compromise her cause of action for personal injuries for grossly inadequate consideration by defendants' false representations that her injuries were not of permanent character, and by defendants' taking advantage of plaintiff's great financial distress and fact that she was in great bodily pain and much distressed and confused in mind, *held* not to state a cause of action for rescission of compromise agreement, in absence of allegations of a return of the consideration received, as required by Civ. Code, § 1691, and demurrer thereto was properly sustained.

2. Fraud ⇨28—Action for fraudulently inducing plaintiff to settle her personal injury action for grossly inadequate consideration held not maintainable.

Action to recover difference between amount prayed for in complaint in personal injury action and amount for which action was settled for an alleged grossly inadequate consideration *held* not maintainable on theory that it was action for damages for fraud, and that plaintiff had right to affirm compromise agreement, retaining money received thereunder, and sue for her damages caused by fraud, since compromise involved a disputed claim, unliquidated in amount, rendering difficulty in determining plaintiff's damages insurmountable.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Ida M. Taylor against F. W. Hopper and others. From an adverse judgment, plaintiff appeals. Affirmed.

Ernest Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

Charles W. Haswell, of San Francisco, for respondents.

LANGDON, J. This is an appeal by the plaintiff from a judgment against her, entered after a demurrer to her complaint had been sustained without leave to amend. The complaint in substance alleges: That in February, 1926, the plaintiff herein, in the county of Santa Clara, California, commenced an action in the superior court against the defendants herein, praying for damages in the sum of $51,223.80, alleged to have been suffered by plaintiff by reason of personal injuries sustained by her by reason of being run over by defendants' automobile, operated in a careless and negligent manner; that plaintiff suffered severe injuries by reason of such alleged negligent conduct on the part of defendants; that thereafter, on October 5, 1926, plaintiff entered into a compromise agreement with the defendants by which, in consideration of the sum of $5,750, she settled and compromised said cause of action, and authorized and directed the clerk of the said superior court to dismiss of record said action, so that the same would operate as a retraxit of all causes of action arising out of said injuries, and said action was accordingly dismissed on October 5, 1926. It is then alleged that, on numerous occasions between the date of plaintiff's injury and the date of said compromise, the defendants made efforts to compromise plaintiff's said claim for damages, offering varying amounts in settlement thereof, and "defendants and their agents made numerous attempts to falsely convince plaintiff, and did finally convince her, well knowing the falsity thereof, that her injuries were not of a permanent character." It is also alleged that during the negotiations for compromise "plaintiff was in great financial distress, with no resources or credit, and in great bodily pain and much distressed and confused in mind; that defendant induced plaintiff to execute said agreement of settlement and compromise by taking a grossly oppressive and unfair advantage of plaintiff's necessities and distress and her weakened state of mind, and thereby caused said release and compromise to be entered into for a grossly inadequate consideration." It is alleged, also, that plaintiff's injuries are permanent, and that the consideration for the compromise should have been the amount asked for in the complaint filed in the original action. Plaintiff prays for $45,473.80, the difference between said amount prayed in the original action and the amount she received in the compromise.

[1, 2] If the complaint be considered as one for rescission of the compromise agreement, it clearly does not state a cause of action, for there are no allegations of a return of the consideration received, as required by section 1691, Civil Code, of this state. Appellant, appreciating this difficulty, contends that the complaint is not one for the equitable remedy of rescission, but for damages for fraud, and that plaintiff is entitled to affirm the compromise agreement, retaining the money received thereunder, and sue for her damages caused by the fraud. It seems clear upon principle that such a remedy does not exist in a case such as we are considering. The difficulty in determining the amount of damages is insurmountable. If the jury found a fraud had been committed upon plaintiff to induce her to give up her cause of action, how would it determine what amount, if any, she would have received from another jury, had she not compromised her action, but had proceeded to trial? And how could damages in the instant case be assessed without some measure of what would have been accorded to plaintiff in the original action, had she proceeded to trial?

A well-reasoned case (Urtz v. New York Central, etc., Co., 202 N. Y. 170, 95 N. E. 711) has considered this identical problem. The plaintiff therein alleged that upon the death of her husband, caused by the negligence of the defendant, she had been induced by false and fraudulent representations as to the facts to enter into an agreement compromising her right of action for $500, and she sought recovery of damages for the fraud practiced upon her. The action was not to enforce or vacate the compromise, but to recover the actual pecuniary loss alleged to have been suffered by plaintiff by being induced to enter into the compromise. The court said: "The jury were bound, having found the fraud, to determine whether the plaintiff was injured through the fraud, and, if injured, the sum of her damages. In case the right of action had no value, she had gained by the transaction and was not injured. It had no value whatever, if the true state of facts disclosed that it was an invalid and nonexisting claim, or, in other words, that the defendant was not negligent, or, if the defendant was negligent, that the intestate was not free from contributory negligence. If, however, the true state of facts would have established that the defendant was negligent, and the intestate free from contributory negligence, then the plaintiff had a valuable right of action, the acquirement of which through the fraud may have injured her. Until the jury found the real facts, and that they created a valid claim against the defendant, they had not a basis for estimating the damages the plaintiff had sustained. The action is not to enforce or vacate the compromise but to recover the actual pecuniary loss sustained by the plaintiff. *An alleged value of the claim, based upon the accident and the death or facts sufficient to warrant the reasonable belief of the plaintiff that she had a just claim, is of a nature too speculative and wagering to be recognized by the law in this action for fraud.*"

In the case of Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708, a situation similar to the instant case was considered by this court, and it was held that it was necessary for the plaintiff to promptly rescind the agreement alleged to have been entered into by him through the fraud of the defendant, and to restore to the defendant the consideration received thereunder, before action could be brought on the original cause of action. The court quoted from Fox v. Hudson, 150 Ky. 115, 150 S. W. 49, Ann. Cas. 1914A, 832, as follows: "Where the claim is for unliquidated damages, or when the settlement is made to adjust a matter in dispute, or where there is a controversy as to the amount owing, and the parties agree upon a sum that shall be paid in settlement, the amount so paid must be returned, if the party settled with seeks to avoid the settlement on the ground of fraud. Where there is no dispute as to the sum due, and the creditor is induced by fraud to accept a less amount than his whole debt, he may attack the settlement without returning what he has received."

The case of Westerfield v. N. Y. Life Ins. Co., 129 Cal. 68, 58 P. 92, 61 P. 667, relied upon by appellant, is not helpful to her cause, for that case holds that, for the plaintiff to maintain such an action as we are here considering, the compromise sought to be avoided must have been of an undisputed claim. In the decision of the court commissioner, adopted by the court, it was said: "Cases of that nature [where one who seeks to rescind a compromise agreement on the ground of fraud is not required to restore the money he has received] arise when a party has been led by fraudulent contrivance to accept less money than was due him on an *undisputed* claim, as in Gilson, etc., Co. v. Gilson, 47 Cal. 597." The compromise made in the case before us was of a disputed claim, unliquidated in amount, and there is no practicable measure of damages for the action sought to be maintained. The demurrer, therefore, was properly sustained without leave to amend.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

I concur in the judgment: PRESTON, J.

207 Cal. 112

In re BARKER'S ESTATE. (L. A. 10967.)★

Supreme Court of California. April 24, 1929.

Rehearing Denied May 23, 1929.

Appeal and error ⚩345(1)—Motion for new trial, filed before findings and conclusion, was premature, and ineffectual to extend time for appeal (Code Civ. Proc. §§ 656, 657, 659).

Under Code Civ. Proc. §§ 656, 657, 659, motion for new trial, filed after decision reciting informally court's conclusion that petitioner was entitled to decree, but before filing of more extensive findings of fact and conclusion of law that petitioner was entitled to such decree, was premature, and ineffectual to extend time for appeal.

In Bank.

Appeal from Superior Court, Santa Barbara County; William D. Dehy, Judge.

In the matter of the estate of James L. Barker, deceased. From an order directing a decree of partial distribution, certain parties appeal. On motion to dismiss the appeal. Motion granted, and appeal dismissed.

John Beardsley, of Los Angeles, for appellants.

Heaney, Price & Postel, of Santa Barbara, for respondent.

LANGDON, J. This is a motion to dismiss an appeal upon the ground that it has been filed too late. The only question involved is whether or not a valid motion for a new trial was ever filed. If the purported motion for new trial was properly filed, thus extending the time for appeal, the appeal has been taken in time. This leads to another inquiry as to when the actual decision of the trial court was filed.

The facts are undisputed. On March 14, 1928, a decision of the trial court was filed, reciting informally the conclusion to which the court had come on the facts, and ending with the statement that "the petitioner is entitled to a decree of partial distribution herein." A minute order was entered, directing that "an order be prepared accordingly." Notice of motion for new trial was served and filed March 30, 1928, and called for hearing on July 13, 1928. In the interim, and on April 17, 1928, more extensive findings of fact and the conclusion of law that petitioner is entitled to a decree of partial distribution as prayed for were filed. When the motion for new trial came on for hearing, it was objected by the defendants and respondents here that it was improperly before the court, and should be dismissed, as it had been filed before the decision of April 17, 1928. This objection was overruled, apparently, and the motion for new trial was passed upon and denied.

Respondents now seek to have this court dismiss the appeal upon this same contention. The case of Root v. Daugherty, 201 Cal. 12, 255 P. 181, seems to be directly in point; therein it was said: "We are of the opinion, however, that said notice of intention to move for a new trial was prematurely filed, and therefore ineffectual for any purpose. Chronologically the history of this litigation reveals that the notice of intention to move for a new trial was filed on June 13, 1924. Thereafter, and on June 20, 1924, the findings of fact and conclusions of law were signed and filed. On June 23, 1924, the judgment was duly entered. Subsequently, and on October 23, 1924, the motion for a new trial was denied. The notice of appeal from the judgment was filed on November 21, 1924. It is apparent from the foregoing that the filing of the notice of intention to move for a new trial preceded by seven days the signing and filing of the findings of fact and conclusions of law. * * * We are called upon to determine herein whether proceedings on motion for new trial are prematurely taken, when the notice of intention to move for such relief is filed, not only 'before the entry of judgment,' but prior to the signing and filing of the findings of fact and conclusions of law. Our research has failed to disclose any decision of this court upon this question, in the light of the 1923 amendment to section 659 of the Code of Civil Procedure. In Hughes v. De Mund, 70 Cal. App. 265, 267 [233 P. 93], it is declared, however, that section 659 of the Code of Civil Procedure and those sections preceding and following it having to do with new trials, 'presuppose that the action has been prosecuted to a point where ultimate findings have been made as the basis for a final judgment.' With this reasoning we are in accord. Section 656 of the Code of Civil Procedure defines a new trial as a 're-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee.' It has repeatedly been held that, where findings of fact are required and are not waived, the decision is not rendered until said findings are signed and filed. Aspegren & Co. v. Sherwood, Swan & Co., 199 Cal. 532 [250 P. 400], and

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★Rehearing denied.

authorities therein cited. Section 657 of the same Code provides that 'the party aggrieved' may apply for a new trial. The opinion in the early case of Dominquez v. Mascotti, supra, declares that 'until the findings are signed and filed there is no decision, and nobody is "aggrieved," within the meaning of section 657 of the Code of Civil Procedure.' We are of the opinion, therefore, that proceedings on motion for a new trial instituted by the filing of a notice of intention prior to the signing and filing of the findings of fact and conclusions of law are premature and ineffectual for any purpose."

In accordance with the rule of the foregoing case, the proceedings on motion for a new trial were premature in the instant case, and they were ineffectual to extend the time for appeal.

The motion to dismiss the appeal is granted, and said appeal is hereby dismissed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.

207 Cal. 39

STRAUSS v. KROOP. (L. A. 9853.)★

Supreme Court of California. April 9, 1929.

Rehearing Denied May 9, 1929.

1. Appeal and error 🔑662(2)—That court based findings and conclusions on stricken testimony held negatived by record showing court set forth in findings that it based findings and conclusions upon remaining testimony (Code Civ. Proc. § 1880, subd. 3).

That trial court, notwithstanding fact that it had stricken from record certain testimony in action on creditor's claim against estate as to matters occurring prior to death of decedent, under inhibition of Code Civ. Proc. § 1880, subd. 3, based in large measure its later findings and conclusions thereon, *held* negatived by record in which court set forth in its findings, fact that having stricken testimony from record it based its findings and conclusions upon testimony other than that stricken.

2. Appeal and error 🔑767(1)—Motion to strike from record appellant's reply brief commenting on stricken testimony will be denied, court preferring to rest decision upon merits.

Motion to strike from the record on appeal the appellant's reply brief commenting upon testimony stricken at trial will be denied, court preferring to rest decision upon merits.

3. Appeal and error 🔑1135—Judgment should be affirmed, defendant's specifications appended to bill of exceptions not showing error of law.

Judgment for plaintiff in an action to recover upon an alleged creditor's claim after rejection of claim by executor should be affirmed, where defendant's specifications appended to bill of exceptions contains no specification of any error of law committed during trial of cause.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Winifred D. Strauss against Norbert C. Kroop, executor of the will of Mathew J. Strauss, deceased, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellant.

Caesar A. Roberts and Maynard F. Stiles, both of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff and cross-defendant in an action brought to recover judgment upon an alleged creditor's claim against the estate of Mathew J. Strauss, deceased, after the rejection of said claim by the executor of the last will and testament of said deceased. There are certain facts involving the relations between the plaintiff and the decedent, Strauss, which are practically undisputed, and in the course of which the alleged indebtedness which formed the basis of the plaintiff's claim against the estate of the decedent is alleged to have arisen. The record discloses that for a number of years prior to the coming of these two parties to California they had been living together as husband and wife in Buffalo, N. Y., although unmarried, and in fact unmarriageable for the reason that Mathew J. Strauss had during those years a wife living in New York from whom, though actually, he had never been legally separated. Mathew J. Strauss and the plaintiff, who bore throughout her relation with the former the name of Winifred D. Strauss, came to San Diego, Cal., in about the year 1920, where up to a time shortly before the death of Mathew J. Strauss they maintained their former relation. Each of the parties brought with them some money, which they proceeded to invest in several business enterprises in and about San Diego. The plaintiff was apparently a capable business woman and shortly after their arrival fitted up a beauty shop at a cost of $3,000, which she operated successfully for some time and then sold it for the sum of $5,000, most of which, in the form of cash and of a note and mortgage, was turned over to Mathew J. Strauss. The parties then bought an apartment house at Coronado for the sum of $32,000, paid for partly in cash and in the giving of notes and mortgages, signed by both, for the balance, and which apartment house was operated chiefly by the plaintiff, and from which during the first year of its operation a net profit of about $12,000 was derived, which also went into the hands of Mr. Strauss. The apartment house was later sold

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★Rehearing denied.

for $40,000 in cash and mortgages and a portion of the sum derived therefrom was invested in a tract of unimproved land lying about 35 miles from San Diego, the title to which was taken in the name of Strauss.

About this time Strauss, who was in poor health, went east and while in Buffalo, N. Y., made a will devising all of his property to casual acquaintances, except certain small bequests to his sister and brother, and then returned to California, where after spending considerable sums of money in search of health, he died on March 6, 1923. The defendant and appellant, who was named in his will as executor, caused said will to be admitted to probate in the state of New York; and then coming to California he took out ancillary letters testamentary in the superior court of the county of Los Angeles; whereupon the plaintiff, under the name of Winifred D. Strauss, presented her claim against the estate of said decedent to said executor for approval. In her claim she set forth three items of alleged indebtedness, to wit, an item of $2,500 stated to be the balance belonging to her but retained by Strauss upon the sale of the beauty shop; second, the sum of $4,000 which she stated to be her share of the net profit derived from the purchase and sale of the apartment properties at Coronado; third, the sum of $6,000 alleged to be due her as a result of the operation by her of said apartment properties during the period of joint ownership thereof by the parties. The aggregate of these three items was the sum of $12,500. The plaintiff in her affidavit to said claim averred that this sum was justly due her and against which there were no offsets. Her claim was rejected by the executor, whereupon she commenced this action for the recovery thereof.

The defendant executor appeared and denied any indebtedness on the part of said estate, and also set up by way of counterclaim a promissory note alleged to have been executed by the plaintiff and upon which the sum of $2,000 with interest remained due and unpaid to said estate. The defendant also filed a cross-complaint upon said promissory note praying affirmatively for the recovery of the amount alleged to be due thereon. To the answer and complaint thus filed the plaintiff presented demurrers upon the ground that the cause of action upon said promissory note set forth in each was barred by the statute of limitations. These demurrers were sustained by the trial court with leave to the defendant to amend. The defendant filed an amended answer, again denying any indebtedness on the plaintiff's said claim, but omitting any reference to said note, and also omitting to file either a counterclaim or a cross-complaint praying for affirmative relief. The cause first came to trial upon the issues as thus presented before the court sitting without a jury, and upon the trial the plaintiff took the witness stand and undertook to give testimony in support of her claim; whereupon counsel for the defendant objected to the giving of such testimony on the part of the plaintiff as to any matters occurring prior to the death of the decedent, under the inhibition of section 1880, subd. 3, Code of Civil Procedure, which objection the trial court at first overruled; but after the plaintiff had thus fully testified as to all the details of her business relationship with the deceased, the defendant moved to strike out the whole of her testimony upon the ground stated in his aforesaid objection. The trial court, after taking the matter under advisement for some time, granted the motion. Thereafter the plaintiff moved the court to modify its order in the foregoing regard in certain respects, which motion the court denied, but shortly thereafter granted an application on the part of the plaintiff for leave to reopen the case and offer further testimony in support of her claim, and thereafter, the cause again coming to trial, the plaintiff again resumed the witness stand, but only for the purpose of testifying to the extent of identifying her claim and of stating that no portion thereof had been paid. The defendant moved to strike out this testimony, which motion the trial court denied. Thereupon the plaintiff offered the testimony of other witnesses and also considerable documentary evidence in support of her claim and thereupon rested her case. No evidence was presented on the part of the defendant. The cause being submitted for decision, the trial court filed its findings of fact and conclusions of law, wherein it was found and concluded that the estate of Mathew J. Strauss was indebted to the plaintiff upon each of the items of her claim, aggregating the sum of $12,500, which sum was directed to be paid out of the funds of said estate in the due course of administration thereof. The entry of the judgment followed, from which the defendant has taken this appeal.

The record contains a bill of exceptions whereof a large part is made up of the testimony given by the plaintiff upon the first trial of the cause and which was stricken out on the defendant's motion.

[1] The first contention of the appellant is that the trial court, notwithstanding the fact that it had stricken from the record said testimony, based in a large measure its later findings and conclusions thereon. The record affords no support to said contention, but, on the contrary, negatives the same, since the trial court sets forth in its findings the fact that having stricken said testimony from the record, it bases its findings and conclusions in the cause upon testimony other than that of the plaintiff herself.

[2] The respondent has moved to strike from the record the appellant's reply brief commenting upon said stricken testimony;

but we prefer to rest our decision upon the merits, and hence deny said motion.

The appellant's next and only further contention is that the evidence other than that offered by the plaintiff and stricken from the record was insufficient to sustain the findings and support the judgment of the trial court. We have examined the evidence as set forth in the bill of exceptions herein. It would serve no useful purpose to review the same in detail. We are fully satisfied from an examination thereof that it is sufficient, in the absence of any counter showing on the part of defendant, to sustain the findings, conclusions of law, and the judgment of the trial court.

[3] In the defendant's specifications appended to his bill of exceptions there is to be found no specification of any error of law committed during the trial of the cause, and this being so, we are satisfied that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; LANGDON, J.

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206 Cal. 697

PASADENA ICE CO. v. REEDER et al.
(L. A. 9212.)

Supreme Court of California. April 19, 1929.

Appeal and error ⇨835(2)—Scope of injunction against unfair competition, not having been brought into question on appeal until motion for rehearing, was not considered.

Where scope of injunction against unfair competition by solicitation of business from customers of defendants' former employer was not brought into question on appeal until presentation of petition for rehearing, it was too late and was not considered.

Seawell, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

On petition for rehearing. Petition denied. For former opinion, see 275 P. 944.

Haas & Dunnigan and H. E. Forster, all of Los Angeles, for appellants.

S. J. Parsons, of Los Angeles, and Raymond G. Thompson, of Pasadena, for respondent.

PER CURIAM. The petition for rehearing herein is denied. It sufficiently appears from the record herein that the individual defendants and appellants herein who were all former employees of the plaintiff and respondent herein entered into a combination to do business under the fictitious name of Purity Ice Company, having for its purpose and effect the creation of a competing business to that of their former employer through the combined use of such confidential information and business secrets of their said employer as they had each obtained in the course of their former employment. While not impinging upon the right of an employee to make appropriate use of his knowledge and experience gained in one employment in advancing his interests in entering other employment, we are satisfied that such a combination as that shown to have existed among these several defendants, the direct object and effect of which is to injure or destroy the business of their former employer, comes clearly within the equitable principles relating to unfair competition in conformity with which the injunction here was, we think, properly issued. The scope of such injunction was not brought into question upon this appeal until the presentation of the petition for rehearing, and will not for that reason be given consideration thereof.

SEAWELL, J., voted for a rehearing.

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207 Cal. 96

GUGGENHIME & CO. v. LAMANTIA et al.
(S. F. 12752.)

Supreme Court of California. April 22, 1929.

1. Assignments ⇨49—Statute providing that bill of itself does not operate as assignment applies to negotiable bills of exchange (Civ. Code, § 3208).

Civ. Code, § 3208, providing that bill of itself does not operate as assignment of funds in hands of drawee available for payment thereof, applies to negotiable bills of exchange.

2. Bills and notes ⇨147—Order to pay sum to party named and charge to drawer's account was not negotiable, since it was not payable to bearer or to order (Civ. Code, § 3082, subd. 4).

Order reading "G. & Co., San Jose, Calif. Gentlemen: Please pay to the A. estate the sum of $1593, and charge same to my account. J. L.," *held* not negotiable under Civ. Code, § 3082, subd. 4, since it was not payable to bearer or to order.

3. Assignments ⇨49—Order for payment of money in form of negotiable bill, except it was not payable to bearer or to order, did not operate as assignment, where parties did not so intend.

Order for payment of money, which was in form of negotiable bill, except that it was not payable to bearer or to order, did not operate as assignment, where parties did not so intend.

4. Assignments ⇨49—Party asserting assignment must prove it by other evidence than order or bill.

Order for payment of money or bill of exchange does not of itself import an assignment, and burden is on party asserting assignment to prove it by other evidence than order or bill.

5. Appeal and error ⚷1008(1)—Question whether parties intended that order for payment of money should operate as assignment was for trial court in first instance.

Question whether parties intended that order for payment of money should operate as assignment of title to money due or to become due to drawer was question for trial court in first instance.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action of interpleader by Guggenhime & Co. against John Lamantia, Nelson S. Carman, and Louis W. Armstrong and others, doing business under the firm name and style of the Armstrong Estate. From the judgment, the Armstrong Estate appeals. Affirmed.

Owen D. Richardson, of San Jose, for appellants.

Bohnett, Hill & Campbell, of San Jose, for respondent Guggenhime & Co.

Louis Oneal and Maurice J. Rankin, both of San Jose, for respondent Nelson S. Carman.

SEAWELL, J. This is an action of interpleader brought by Guggenhime & Co., a corporation, to determine the rights of defendants Nelson S. Carman and the Armstrong Estate, adverse claimant, to the sum of $744.40, in the possession of plaintiff as the balance remaining unpaid on the price of dried prunes purchased by said Guggenhime & Co. from defendant John Lamantia, of whom the other defendants are creditors. The court below gave judgment in favor of defendant Nelson S. Carman for said sum of $744.40, from which judgment the Armstrong Estate prosecutes this appeal.

Defendant Nelson S. Carman is a judgment creditor of Lamantia. Said Carman garnished all moneys due from Guggenhime & Co. to Lamantia by writ of attachment issued on September 24, 1926, and procured a writ of execution to be levied on said moneys on October 19, 1926, in pursuance of a judgment for $1,000 recovered on October 14, 1926. Defendant Armstrong Estate is the holder of an order for $1,593 drawn by Lamantia upon Guggenhime & Co. in favor of the Armstrong Estate prior to the issuance of said writ of attachment. Said company paid $800 on said order on September 7, before the garnishment of Guggenhime & Co. by defendant and respondent Carman. The order is in the following form:

"San Jose, Calif., Sept. 1, 1926.

"Guggenhime & Company, San Jose, Calif.—Gentlemen: Please pay to the Armstrong Estate the sum of Fifteen Hundred Ninety-three (1593.00) Dollars, and charge same to my account. John Lamantia."

The rights of the Armstrong Estate to the balance remaining unpaid for the prunes purchased by the company from Lamantia are superior to the rights of Carman under his subsequent attachment and execution levies only if the transaction between Lamantia and the Armstrong Estate, in the course of which the above order was issued, involved an assignment pro tanto by Lamantia to the Armstrong Estate of his claim against Guggenhime & Company. Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 71 P. 93, 94 Am. St. Rep. 28.

[1-3] Section 3208, Civil Code, which provides that a "bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof," applies to negotiable bills of exchange and is not controlling herein for the reason that the order issued by Lamantia in favor of the Armstrong Estate is not payable to bearer or to order, and hence lacks one of the essentials or negotiability. Section 3082, subd. 4, Civ. Code. However, it was the rule in this state, even before the adoption in 1917 of the Uniform Negotiable Instruments Law, of which section 3208, Civil Code, is a part, that a negotiable check or bill of exchange drawn for a portion of the indebtedness of the drawee to the drawer, before written acceptance, did not of itself operate as an assignment pro tanto in favor of the payee. Cashman v. Harrison, 90 Cal. 297, 27 P. 283; Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, 71 P. 93, 94 Am. St. Rep. 28; Pullen v. Placer County Bank, 138 Cal. 169, 66 P. 740, 71 P. 83, 94 Am. St. Rep. 19; John M. C. Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347, 115 P. 59; Le Breton v. Stanley Contracting Co., 15 Cal. App. 429, 114 P. 1028; Harlan v. Gladding McBean & Co., 7 Cal. App. 49, 93 P. 400. We believe this rule equally applicable in the case of an order for the payment of money which is in the form of a negotiable bill, except that it is not payable to bearer or to order. The negotiable bill constitutes an order or authorization to the drawee named which transfers no title or property in the claim to the payee. Hence it is automatically revoked by the death of the drawer. Sneider v. Bank of Italy, 184 Cal. 595, 194 P. 1021, 12 A. L. R. 993; Pullen v. Placer County Bank, supra. The fund upon which it is drawn may be reached by attachment or execution levied subsequent to the issuance of the bill or order. Donohoe-Kelly Banking Co. v. Southern Pac. Co., supra. A nonnegotiable order in the form of the draft herein lacks those attributes peculiar to the bill of exchange which are embraced within the term "negotiabili-

ty," but in language and effect it is similar in important particulars to the negotiable bill.

[4, 5] Although neither a negotiable or nonnegotiable bill of itself constitutes an assignment, if it clearly appears from the entire transaction that it was the intention of the drawer and payee to transfer title to a chose in action, an assignment will be held to have taken place, and the nature of the transaction is not changed because the assignor in the course of the transaction may have delivered to the assignee an order upon the debtor. Dunlap v. Commercial Nat. Bank, 50 Cal. App. 476, 195 P. 688; Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 P. 517; Title Ins. Co. v. Williamson, 18 Cal. App. 324, 123 P. 245, 247. The rule is simply that the order or bill does not of itself import an assignment, but the contrary, and the burden is upon the party asserting an assignment to prove it by other evidence than the check or bill. In the instant case the court found that it was not intended by John Lamantia or the Armstrong Estate to assign title to any moneys or debt or any portion thereof, due or to become due from said Guggenhime & Co. to John Lamantia, and the parties intended it to be a bill of exchange and nothing more. The question of intent was for the trial court in the first instance. From the facts appearing in the agreed statement of facts in the bill of exceptions before us, it cannot be said that the trial court erred in refusing to find that an assignment had taken place.

While there is broad language in certain cases of this court, principally early decisions (Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522; Pierce v. Robinson, 13 Cal. 116; Pope v. Huth, 14 Cal. 403; Fidelity Savings & Loan Ass'n v. Rodgers, 180 Cal. 683, 182 P. 426; Goldman v. Murray, 164 Cal. 419, 129 P. 462), which may seem to lend support to the claim of the Armstrong Estate, said cases are either distinguishable on the facts as involving situations where there was other evidence of an intent to effect an assignment than the instrument itself, or, in so far as they are in conflict with anything said herein, are disapproved by later cases, particularly Donohoe-Kelly Banking Co. v. Southern Pac. Co., supra, which contains a clear and correct exposition of the law. In Wheatley v. Strobe, supra, the decision is confined to cases where the order is drawn for the full amount of the debt owing by the drawee to the drawer. It is unnecessary here to decide whether it is now the law in this state that an order for the full amount of the debt creates a prima facie case of assignment, as has been intimated, for no claim is here made that the assignment is for the full amount, and it appears from the statement of agreed facts that Lamantia subsequently drew an order on Guggenhime & Co. in favor of respondent Carman for $2,000. This negatives an assignment to the Armstrong Estate of the full amount.

In the more recent decision in Fidelity Savings & Loan Association v. Rodgers, 180 Cal. 683, 182 P. 426, involving an instrument delivered by way of gift and similar in form to the order herein, in that it was not payable to bearer or order, the court stated that, if the instrument had been delivered for a valuable consideration, it would have operated as an equitable assignment. We are of the view that said decision cannot be construed as holding that the order would of itself prove an assignment if it had been given for a valuable consideration, but that under such circumstances parol evidence of the intent to transfer title to a chose in action accompanied by delivery of the order upon the debtor would have been sufficient to effect a transfer. If the written order itself constituted an assignment, it would be sufficient, although given as a gift, for a gift of a chose in action may be accomplished by delivery to the donee of a written instrument transferring title thereto. Burkett v. Doty, 176 Cal. 89, 167 P. 518.

Appellants rely upon statements from 1 Daniel on Negotiable Instruments, § 23, quoted with approval in Goldman v. Murray, 164 Cal. 419, 129 P. 462, as authority for the proposition that a distinction is to be made between negotiable and nonnegotiable orders, the nonnegotiable orders operating as assignments per se. While nonnegotiable orders may be so drawn as to constitute assignments of themselves, we find no warrant on principle or authority in the decisions of this state for making said distinction in the case of such an order as we have before us. The text-writer cited announces the rule of assignment per se as having been applied to nonnegotiable orders drawn for the whole or part of a fund, and admits that he can perceive no sufficient ground for excluding a bill for part of a fund, whether *negotiable or nonnegotiable*, from the rule that a draft or bill operates as an equitable assignment. But such is not the rule in this state. Furthermore, anything said in Goldman v. Murray, supra, as to a distinction between negotiable and nonnegotiable orders in this particular must be regarded as dictum, since that case did not involve an order or bill, but a promissory note executed by a corporation in favor of one Bowen, to whom it was indebted, and by him indorsed to plaintiff. The note was void as a corporate act, but the court held that Bowen's indorsement thereon transferred and assigned to plaintiff Bowen's claim against the corporation to the extent of the principal sum of the note. The facts are not analogous.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.

206 Cal. 758

SAXTON v. BOARD OF EDUCATION OF LOS ANGELES CITY SCHOOL DIST. et al. (L. A. 10919.)★

Supreme Court of California. March 30, 1929.

Rehearing Denied April 29, 1929.

1. Mandamus 🔑174—Court, on mandamus to reinstate permanent teacher, must determine truth of charges, irrespective of evidence heard before board (Pol. Code, § 1609).

The decision of the board of education as to truth of charges preferred against a permanent teacher, and on which she is removed, is not final under Pol. Code, § 1609, but the court, on mandamus to compel reinstatement, must determine the truth of such charges without regard to the evidence heard by the board.

2. Mandamus 🔑79—Mandamus is proper remedy to compel reinstatement of permanent teacher removed after charges filed (Pol. Code, §§ 1609, 1698, 1699).

Under Pol. Code, § 1609, mandamus is the proper remedy to compel reinstatement of permanent teacher removed by school board; the remedy by appeal provided by sections 1698 and 1699 not being exclusive if applicable, and not being such plain, speedy, or adequate remedy at law as precludes mandamus.

3. Mandamus 🔑174—On mandamus to reinstate removed permanent teacher, finding that substantial evidence in support of charges was heard by board does not preclude granting of writ to compel reinstatement.

On mandamus to reinstate permanent teacher, trial court's finding that there was substantial evidence tending to support charges before school board is immaterial, and does not deprive court of power to issue writ to compel reinstatement on finding that charges were untrue.

4. Mandamus 🔑2—Permitting trial de novo on mandamus to compel reinstatement of discharged teacher is not unconstitutional as enlarging scope of writ of mandamus (Pol. Code, § 1609, as amended in 1921).

Pol. Code, § 1609, as amended in 1921, permitting mandamus to compel reinstatement of permanent teacher discharged, and permitting a trial of the charges de novo, does not enlarge scope of the writ of mandamus beyond that which it had at the adoption of the Constitution.

5. Mandamus 🔑2—Legislature cannot enlarge writ of mandamus beyond scope at time of adoption of Constitution.

Legislature cannot enlarge scope of writ of mandamus beyond that which it had at time of adoption of Constitution.

6. Mandamus 🔑174—Statute permitting hearing de novo of charges against teacher on mandamus to compel reinstatement is not invalid as conferring apparent jurisdiction on superior court over decisions of boards or trustees (Pol. Code, § 1609).

Pol. Code, § 1609, permitting trial de novo of charges against school-teacher on mandamus to compel reinstatement is not invalid as conferring appellate jurisdiction on superior court to review proceedings before boards of education or boards of trustees.

In Bank.

Appeal from Superior Court, Los Angeles County; P. E. Keeler, Judge.

Mandamus by Lois S. Saxton against the Board of Education of Los Angeles City School District and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Superseding opinion in 269 P. 764.

Everett W. Mattoon, County Counsel, J. H. O'Connor, Assistant County Counsel, and Pierce Works and C. B. Penn, Deputy County Counsels, all of Los Angeles, for appellants.

William A. Alderson, of Los Angeles, for respondent.

George F. Snyder, of San Francisco, and George R. Nichols, amici curiæ.

CURTIS, J. The plaintiff was a teacher in the public schools of the city of Los Angeles, and prior to the commencement of this action had been classified as a permanent teacher in said public schools, and remained such until her alleged wrongful dismissal by the defendant board of education of said school district. She instituted this action for the purpose of having said order of dismissal declared and adjudged null and void; that she be reinstated and permitted to continue to serve in said public schools as a permanent teacher and for the sum of $286, which amount, it was alleged, was due her as salary for the remainder of the school year 1925–1926, the year of her alleged illegal dismissal. The action was commenced September 7, 1926. The board of education, in its answer to plaintiff's complaint, denied that the plaintiff had been wrongfully or illegally dismissed as a teacher in said schools, and then set forth in its said answer the steps taken by said board prior, and leading up, to the order of said board dismissing the plaintiff from further service as a teacher in said schools. Upon the trial, the court found that written charges had been made against plaintiff by the city superintendent of schools of said district, in which plaintiff was charged with unprofessional conduct; that a hearing upon said charges had been held by said board on the 20th day of May, 1926, at which time said board made said order of dismissal; that, prior to said hearing, said board had given plaintiff written notice thereof, as provided by section 1609 of the Political Code; and that in the holding of said hearing said board had complied in all respects with the provisions of said section of the Political Code. The trial court further found "that substantial evidence was introduced at said hearing which tended to support the said charges," but that "no one of said charges

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★Rehearing denied.

is true and that all of said charges are untrue," and that the order of dismissal "was erroneous, in that the charges above mentioned were wholly false and untrue." Following these findings were those to the effect that plaintiff had no plain, speedy, or adequate remedy at law; that she had not appealed from the decision of said board of education, made at said hearing dismissing her from service as a teacher in said public schools, to the county superintendent of schools under the provisions of section 1698 of said Political Code, nor to the superintendent of public instruction, as provided by section 1699 of said Code. As conclusions of law upon the foregoing findings, the court held that the plaintiff was entitled to judgment in her favor as prayed for. Such judgment was accordingly entered in the trial court in favor of the plaintiff and against the defendant board of education. From this judgment the board of education has appealed upon the judgment roll alone.

Two questions are presented by this appeal. The first is whether the decision of the board of education as to the truth of the charges preferred against the plaintiff after a hearing thereon, of which hearing plaintiff had due and legal notice, and at which she was present with counsel and introduced evidence in her defense, is final and binding upon the plaintiff and upon said board of education. In case it be held that such decision is not final, then a second question is presented, and that is whether under all the facts and circumstances of this case mandamus will lie to compel said board of education to reinstate the plaintiff in her former position as a permanent teacher in said schools. The answers to the questions arising herein are largely controlled by the provisions of the so-called Teachers' Tenure Act as the same is now found in said section 1609 of the Political Code, upon its amendment in 1921. The constitutionality of said act was questioned, and its validity sustained, in a recent decision of this court. Grigsby v. King, 202 Cal. 299, 260 P. 789. This act provides for the classification of public school teachers into three classes, to be known as substitute, probationary, and permanent teachers. As this action involves only the latter class, we will dismiss the other two classes from further consideration. Subdivision fifth (j) of this section provides that permanent teachers, except where the number employed by a school district is decreased by reason of the decrease in the pupils attending the school in such district, or by the discontinuance of a particular kind of teaching service, may be dismissed only after a fair trial and impartial public hearing for certain designated causes particularly mentioned therein. Ten days' notice of said hearing must be given in writing to the teacher against whom charges have been preferred, stating fully the charges and the time and place of such hearing. The accused teacher is given the right to be represented by counsel at said hearing and to call witnesses in his behalf. At the close of said hearing, the board may dismiss said teacher upon proof of any of the charges enumerated in said section and set forth in said written notice to said teacher upon the affirmative vote of a majority of the board. No member of the board shall be qualified to vote who was not present throughout the entire hearing, and such trial shall be concluded, and the decision of the board rendered, within ten days from the beginning of said trial. This subdivision of the section of the Code closes with the following provision: "Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law."

The above provisions of section 1609 of the Political Code have been before the District Court of Appeal upon two different occasions, in each of which the question was squarely presented as to the finality and conclusiveness of the decision of the board of trustees dismissing a teacher for cause. In each of said cases it was held that such decision of the board of trustees was not final nor conclusive upon the teacher accused. Alexander v. Manton, etc., School Dist., 73 Cal. App. 252, 238 P. 742; Hooper v. Wickes et al. (Cal. App.) 263 P. 853. In the first of these two cases the appellate court, after reviewing the facts, stated the position of the trial court in said action as follows: "From the whole record it clearly appears that the [trial] court decided the case upon the theory that the trustees had the right to dismiss plaintiff during the term of his employment for cause only, and after notice and a hearing as provided in section 1609 of the Political Code; that the court was without jurisdiction to determine the truth or falsity of the charges. * * *" After discussing a point not involved in the present action, the opinion of the District Court of Appeal continues: "There are cases holding that the dismissa of a teacher for cause, after a trial by the board of trustees on charges preferred against him, is final and conclusive. There are others holding that where the teacher is given the right of appeal to the superintendent of schools in case of his dismissal, such remedy by appeal is exclusive. Section 1698 of the Political Code provides for such an appeal. Section 1609, subdivision 5, as amended in 1921 (Stats. 1921, p. 1664), however, provides: 'Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law.' Section 1609 prescribes the grounds and the proceedings for the dismissal of a teacher for cause. It would be difficult to give the provision quoted any meaning other than that, upon the discharge of a teacher for any alleged cause, he is entitled to maintain an action in court to determine the truth or falsity of the charges preferred against him. The reasons which may have actuated the legislature in giving a teacher such right are well illustrated by the facts in this case. The trustees, as the representatives of one party to the contract, preferred the charges against plaintiff. One of the charges was abusive language towards a trustee who sat as a judge in the trial of plaintiff. Another charge constituted offensive and unmanly conduct towards the superintendent of schools, to whom the plaintiff had the right to appeal."

The case of Alexander v. Manton was followed by the case of Hooper v. Wickes et al., supra, decided by the said District Court of Appeal. In this latter case the court discussed the effect of section 1609 of the Political Code, and particularly the following provision: "Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law." The conclusion arrived at by the court in that case is stated as follows: "Subdivision 'J' of section 1609 of the Political Code empowers the trustees of a school district to dismiss a principal for one or more of the following causes, after a fair and impartial hearing, to-wit: Immoral or unprofessional conduct; incompetence; evident unfitness for teaching; persistent violation of, or refusal to obey the school laws of California or reasonable rules prescribed for the government of public schools. This subdivision of the section is followed by others relating to procedure not material here for the reason that no question is raised as to the procedure in this cause. We come then to the subdivision pertaining to this action, which reads: 'Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law.' This subdivision of section 1609 of the Political Code was under consideration by this court in the case of Alexander v. Manton Joint Union School District, 73 Cal. App. 252, 238 P. 742, and this court, speaking through Mr. Presiding Justice Finch, said: 'It would be difficult to give the provision quoted any meaning other than that, upon the discharge of a teacher for any alleged cause, he is entitled to maintain an action in court to determine the truth or falsity of the charges preferred against him. The reasons which may have actuated the Legislature in giving a teacher such rights are well illustrated by the facts in this case. The trustees, as the representatives of one party to the contract, preferred the charges against plaintiff.' * * * The substance of the holding in the case of Alexander v. Manton, supra, is that upon an action such as is being presented to us upon this appeal, the trial court is vested with authority to hear all pertinent testimony relative to the support of the charges preferred against the plaintiff as principal of the high school district, to show the propriety, correctness and justness of the action of the board of trustees in ordering his dismissal. The holding in the Alexander case, as we read it, is also further to the effect that subdivision 5 of section 1609 of the Political Code lays the whole matter open before the trial court for inquiry and investigation as to the truthfulness of the charges, as though no testimony had been taken before the board of trustees and no action had thereon. The very wording of the subdivision seems to necessitate such holding in providing that 'nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law.' That is equivalent to saying that none of the provisions contained in section 1609 of the Political Code shall be so construed as to prevent a teacher from bringing an action for a violation of a contract held by him with a board of school trustees which necessitates the further holding, as would be the case in any ordinary action, that all that is necessary for a plaintiff to do is to prove the contract of employment, his readiness to perform and the breach by the opposite party. That is one of the rights included and referred to in subdivision 5 of said section 1609, because it is one of the rights given to a teacher just the same as to any other party to maintain an action for a violation of contract."

[1] The case of Hooper v. Wickes et al. was before this court upon a petition for a hearing herein. After a careful consideration of the opinion therein, we denied said petition. At that time we were of the opinion that the District Court of Appeal had placed a correct construction upon the provisions of section 1609 of the Political Code in its decision of said cause. We have not been shown any reason why we should change the opinion at which we arrived at the time of the consideration by us of said petition. The plain effect of the ruling in each of the above causes is that the decision of the board of education, or board of trustees, as the case might be, is not final, but that, in an action brought under the provisions of section 1609 of the Political Code, the whole matter of the truthfulness of the charge against an accused teacher is laid open in the trial court for inquiry and investigation. If for inquiry and investigation, it must be for determination also. It follows, therefore, in the present action that it was the right of the trial court to determine the truth or falsity of the charges preferred against the plaintiff by the city superintendent of schools and which had

been previously passed upon by said board of education. This right on the part of the trial court was in no way restrained or restricted by the fact that the board of education had previously acted upon said charges and had found the same to be true, as the action of said board by the plain terms of the statute is expressly made subject to the right of the teacher to resort to a court of competent jurisdiction and there have determined every "question of fact and law." The foregoing, we think, affords a complete answer to the first question above referred to as presented by the appeal in this action.

[2] The other question, as already stated, involves the right of plaintiff to a writ of mandamus in a proceeding of this nature under the facts as found by the court in this action. It is first contended that a discharged teacher has the right to appeal to the county superintendent of schools under section 1698 of the Political Code, and that, in case the salary of a teacher is withheld by a board of education or board of school trustees, the teacher may appeal to the superintendent of public instruction. These sections of the Code were adopted long prior to the enactment of the Teachers' Tenure Act as the same is found in section 1609 of the Political Code, and it may be seriously doubted whether they have any application to a teacher holding his position under the provisions of said act. This was clearly intimated in Alexander v. Manton, supra. As to section 1698, we think that it is in no way applicable to the plaintiff, nor does it affect her right to maintain this action. It applies only "in case of the dismissal of any teacher before the expiration of any oral or written contract," and has no reference to a permanent teacher acting as such under the provisions of section 1609 of the Political Code. We have already noted the fact that the plaintiff was, at the time of her purported dismissal, a permanent teacher in the public schools of said district. As to section 1699 of the Political Code, by its provisions the right is given to a teacher whose salary is withheld to appeal to the superintendent of public instruction. This section of the Code in no way purports to afford any remedy to a teacher wrongfully dismissed or discharged. Neither of these sections of the Code, therefore, afford plaintiff any plain, speedy, or adequate remedy at law, and they accordingly do not in themselves present any legal obstacle in this action to the issuance of a writ of mandamus. On the other hand, the courts of this state have frequently held that mandamus is the proper remedy to be invoked by a teacher, wrongfully dismissed from his position, and who holds it, not under contract, but by virtue of statutory authority. Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042; Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26; Barthel v. Board of Education, 153 Cal. 376, 95 P. 892; Blalock v. Ridgway et al. (Cal. App.) 267 P. 713. See, also, Raisch v. Board of Education, 81 Cal. 542, 22 P. 890; Keller v. Hewitt, 109 Cal. 146, 41 P. 871; Davenport v. City of Los Angeles, 146 Cal. 508, 80 P. 684; Sheehan v. Board of Police Comrs., 47 Cal. App. 29, 190 P. 51; Loehr v. Board of Education, 12 Cal. App. 671, 108 P. 325, and Ross v. Board of Education, 18 Cal. App. 222, 122 P. 967.

The case of Kennedy v. Board of Education, supra, contains an apt and comprehensive statement of the law upon the subject, which we think is virtually conclusive of the present action. On page 491 of 82 Cal. (22 P. 1044) the court says:

"The writ of *mandamus* may issue in this state 'to compel the admission of a party to the use and enjoyment of a *right* or *office* to which he is entitled, and from which he is unlawfully precluded.' Code Civ. Proc., § 1085.

"It may be conceded that a right to hold the position of teacher in the public schools would not be a '*right*,' within the meaning of this section, if such right depended solely upon a contract with the board of education, and the term for which such position should be held were not fixed by the statute. But such is not the case. As we have seen, the term for which the respondent was entitled to hold her position was not fixed by any contract with the appellant. The duration of her term of service is fixed by the *statute;* and her removal from it was not merely a violation of a contract, but of an *express provision of law forbidding such removal.* Although her right to take the position depended upon the act of the appellant, the right to continue in it was preserved to her by the statute; and to take it from her was to deprive her of a right given her by law, and to which she has a right to be restored by mandamus. People v. Van Siclen, 43 Hun, 537.

"The object being to restore her to a right given her by law, *mandamus* is the proper remedy; and, as her term of service is uncertain, and depends upon the action of the board of education, based upon the causes named in the statute, her damages could not be ascertained with certainty, and an action for such damages would not be an adequate remedy."

[3] The finding of the trial court that there was substantial evidence introduced at the hearing of the charges before the board of education "which tended to support said charges" would not deprive said court of the power to issue its writ of mandamus to compel said board to reinstate the plaintiff. The trial court found that said order of dismissal "was erroneous in that the charges above mentioned were untrue." The trial court further found that "no one of said charges is true and that all of said charges are untrue."

We have already held that under the provisions of section 1609 of the Political Code the power of finally passing upon the truth or falsity of the charges preferred against the plaintiff was in the trial court, and not in the board of education. The purpose of this action, therefore, was to determine whether the plaintiff had been wrongfully dismissed from her position as a permanent teacher, and this would depend upon whether the charges preferred against her were true or false. The evidence taken at the hearing before the defendant board of education could not in any way affect the present action nor the remedy to which the facts herein might disclose the plaintiff to be entitled. This is so for the reason, as held in Hooper v. Wickes, supra, that the whole matter was laid "open before the trial court for inquiry and investigation as to the truthfulness of the charges, as though no testimony had been taken before the board of trustees and no action had thereon." The finding of the court, therefore, as to the character of evidence before the board of education, was upon an issue not material to the controversy before the court. The trial court having found that plaintiff had been wrongfully dismissed from her position, under the authority of Kennedy v. Board of Education and kindred cases, was authorized to compel by writ of mandamus her reinstatement to the position from which she had thus wrongfully been dismissed.

[4-6] There is no merit, we think, in the contention of the defendants that by the amendment of 1921 of section 1609 of the Political Code the Legislature has enlarged the scope of the writ of mandamus beyond that which it had at the time the Constitution was adopted. The law is well settled that the Legislature has no such power. Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. Section 1609 of the Political Code, since its amendment in 1921, at most gives to a discharged teacher a trial de novo before the superior court, after a hearing before the board of education. By this amendment the board of education has been deprived of the power to pass finally upon the dismissal of a teacher in the public schools. The effect of the amendment, therefore, is not to enlarge the power of the court in matters of mandamus, but to diminish the effectiveness of orders of boards of education and boards of trustees in dismissing teachers. The scope of the writ of mandamus remains the same after such amendment as it was before the adoption thereof. Neither are we able to agree with defendants in their contention that the construction we have given to section 1609 of the Political Code as amended would result in conferring appellate jurisdiction upon superior courts to review proceedings taken before boards of education or boards of trustees. In support of this contention the defendants cite the case of Lemen et al. v. Edmunson, 202 Cal. 760, 262 P. 735. That action involved a provision of the act of the Legislature expressly giving the right of appeal from an order of the real estate commissioner to the superior court to any party aggrieved by such order. No right of appeal is given by section 1609 of the Political Code, either expressly or impliedly, to the dismissed teacher. He, however, is given the right to have the superior court determine the truth of the charges preferred against him without reference to the decision of a board of education as to the merits of said charges. Accordingly, the proceeding before the superior court cannot be considered in any sense as an appeal from the decision of the board of education.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.

207 Cal. 7

HORAN v. VARIAN et al. (L. A. 8700.)

Supreme Court of California. April 8, 1929.

Appeal and error 🔑1218—Motion will be granted to recall remittitur providing that respondents recover cost on appeal, where judgment was silent as to costs (Supreme Court Rule No. 23).

Where judgment as modified and affirmed on appeal was silent as to costs, but through mistake and inadvertence remittitur contained provision that respondents recover costs on appeal, motion will be granted to recall remittitur for purpose of correction as prayed for and order given that correct remittitur be issued in its place nunc pro tunc to comply with requirements of Supreme Court Rule No. 23, that where judgment or order appealed from is reversed or modified without direction as to costs of appeal, clerk will enter upon record and insert in remittitur judgment that appellant recover costs.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

On motion by appellant to recall remittitur for purpose of correction. Granted.

For main opinion, see 268 P. 637.

George D. Collins, Jr., of San Francisco, for appellant.

Loyd Wright, of Los Angeles, and Ford, Johnson & Bourquin, of San Francisco, for respondent H. M. Driscoll.

PER CURIAM. On appeal by the defendant from a judgment in an action in partition, this court modified the interlocutory decree

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

by striking out two whole paragraphs thereof and inserting new provisions in their stead. The interlocutory decree, as modified, was affirmed. The judgment was silent as to costs, but, through mistake and inadvertence, and contrary to the provisions of rule 23 of this court, the remittitur, when issued, contained a provision that respondents recover costs on appeal. The appellant has made a motion to recall the remittitur for the purpose of striking therefrom the provision, "the respondents to recover costs on appeal," and inserting therein the provision that the appellant recover the costs of appeal.

Rule 23 of this court provides: "In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to the costs of appeal, the clerk will enter upon the record, and insert in the remittitur, a judgment that the appellant recover the costs of appeal. * * *"

The motion is, therefore, granted. The remittitur is recalled for the purpose of correction as prayed for, and it is ordered that a correct remittitur be issued in its place, nunc pro tunc, pursuant to the requirements of rule 23, supra. See San Joaquin, etc., Irr. Co. v. Stevinson, 165 Cal. 540, 132 P. 1021; Estate of Steehler, 197 Cal. 67, 239 P. 718; Estate of Johnson, 200 Cal. 307, 252 P. 1052.

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207 Cal. 47

PEOPLE v. BARRETT. (Cr. 3196.)

Supreme Court of California. April 10, 1929.

Criminal law 🔑1186(4)—Court's examination of panel before drawing jurors and restricting counsel's examination to matters not covered held reversible error, where defendant denied guilt (Const. art. 6, § 4½; Pen. Code, § 1078, as amended by St. 1927, p. 1039).

Judge's action of collectively examining entire jury panel before drawing names and then restricting counsel's examination to matters not covered by him *held* sufficient to warrant reversal of conviction and order denying new trial under Const. art. 6, § 4½, and as denying right secured to defendant by Pen. Code, § 1078, as amended by St. 1927, p. 1039, requiring trial when facts are denied, and reasonable examination of jurors, where defendant's denial of guilt and statements of wife as state's witness raised conflict.

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Louis C. Barrett was convicted of permitting his wife to remain in a house of prostitution, and of pimping, and was found to have suffered three prior convictions of felonies, and he appeals. Reversed and remanded for a new trial.

Superseding opinion in 270 P. 1010.

H. Wenzlaff, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

PER CURIAM. An information filed against the defendant in the county of San Bernardino charged him with having permitted his wife to remain in a house of prostitution, and with pimping. The jury found him guilty as charged, and also found that he had suffered three prior felony convictions, as specified in the information. He was thereupon adjudged to be an habitual criminal, and sentenced to the penitentiary for "not less than life" for each offense. From the judgment and order denying his motion for a new trial, this appeal has been prosecuted.

The principal point urged on the appeal has to do with the trial court's method of conducting the voir dire examination of the talesmen summoned to try the cause, it being contended by the appellant that he was denied the right secured to him by the provisions of section 1078 of the Penal Code, as amended in 1927 (Stats. 1927, p. 1039), of reasonably examining the prospective jurors. In this particular there is presented a situation strikingly similar to the one developed upon the trial of the case of People v. Estorga, 273 P. 575, recently decided by this court. This similarity is attributable to the fact that both causes arose in the same county, and were tried before the same judge. In fairness to the trial judge, however, it must be said that the trial of this cause antedated the filing of our decision in the Estorga Case, supra, wherein we expressed our disapproval of his method of collectively examining the entire panel before the drawing of any names from the jury box, and then restricting counsel's examination to such matters as had not been covered by the court's rather general examination. Primarily because the defendant in the Estorga Case had taken the stand and admitted the commission of the grave offenses with which he stood charged, we hesitated to declare the error so prejudicial, within the meaning of section 4½ of article 6 of the Constitution, as to require a reversal. We, therefore, affirmed the judgment and order in that case.

In the case now before us the situation differs somewhat in that, while there is ample evidence in the record to support appellant's conviction on each count of the information, his denial on the stand of the commission of the offenses charged against him, together with certain statements of his wife, the prosecution's chief witness, contained in letters written by her prior to the trial of the cause, wherein she declared the appellant to be innocent of wrongdoing, served not only to create a conflict in the evidence, but also tended in some measure to destroy the credibility of the state's leading witness. In the light of these circumstances, it must be held that the error now under consideration is of sufficient gravity to warrant a reversal of the judgment and order, for it cannot now be positively asserted that "the result was just, and that it would have been reached if the error had not been committed. * * *" People v. Estorga, supra, 273 P. 575. The effect of the trial court's procedure in the matter of the examination of jurors on voir dire was to effectively stifle any attempted detailed examination of the talesmen by counsel for the purpose of developing possible grounds for challenge for cause, thus depriving appellant of the constitutionally guaranteed right of a trial by jury, including the right to the selection of a fair and impartial jury. We are not prepared to say that the prejudicial character of the error was in any way lessened or destroyed by defense counsel's rather passive acceptance of, and virtual acquiescence in, the course dictated by the lower court.

The judgment and order are, and each is, reversed, and the cause is remanded to the superior court in and for the county of San Bernardino for a new trial.

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207 Cal. 50

OGBURN v. TRAVELERS' INS. CO.

(S. F. 12130.)

Supreme Court of California. April 11, 1929.

1. Contracts 🔑147(1)—Primary object in interpretation of written instrument is to ascertain and carry out intention of parties (Civ. Code, §§ 1636, 1648).

In the interpretation of a written instrument, the primary object is to ascertain and carry out the intention of the parties thereto under Civ. Code, § 1648, providing that contract extends only to those things concerning which it appears parties intended to contract, and section 1636, requiring interpretation that will give effect to intention of parties at time of contract.

2. Contracts 🔑143—Courts are not concerned with advantages or disadvantages which may result in construction of written instrument.

The courts have nothing to do with hardships, advantages, and disadvantages which may result from construction of a written instrument; primary object of which is to ascertain and carry out intention of parties.

3. Contracts 🔑147(2)—Intentions of parties to written instrument must be ascertained from consideration of language and subject-matter of agreement.

The intention of the parties to a written instrument is to be ascertained from a consideration of the language employed by them and the subject-matter of the agreement.

4. Contracts 🔑143—Contract should be construed as entirety giving some effect to every part (Civ. Code, § 1641).

A contract should be construed as an entirety, the intention being gathered from the whole instrument taking it by its four corners, so that every part thereof is given some effect under Civ. Code, § 1641, providing that whole of contract is to be taken together so as to give effect to every part if reasonably practical; each clause helping to interpret the other.

5. Insurance 🔑452—Policy covering injuries sustained while passenger on common carrier's conveyance did not include injuries insured sustained when falling into elevator shaft in hotel.

Travel accident ticket policy, insuring against bodily injuries effected solely by external, violent, and accidental means and sustained while riding as passenger on any public conveyance provided by common carrier which is propelled on land or water by mechanical power, *held* not to include insurance against injuries which caused death of insured, and which were sustained when insured stepped through open door into elevator shaft in hotel after elevator had risen from floor level.

6. Insurance 🔑146(3)—Uncertainties and ambiguities in policy must be resolved against insurer who is presumed to have selected language employed therein.

All uncertainties and ambiguities in policy of insurance must be resolved against the insurer who is presumed to have selected and incorporated into policy language employed therein.

7. Insurance 🔑146(1)—Court must give effect to contract of insurance as executed by parties, in absence of uncertainties and ambiguities required to be resolved against insurer.

In the absence of uncertainties or ambiguities in policy of insurance required to be resolved against insurer, courts have no alternative but to give effect to contract of insurance as executed by the parties.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Carl Ogburn, as administrator of the estate of Byron C. Ogburn, deceased, against the Travelers' Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Superseding opinion in 269 P. 728.

Joseph T. O'Connor, of San Francisco, for appellant.

Burbank & Spence, Daniel W. Burbank, and Homer R. Spence, all of San Francisco, for respondent.

WASTE, C. J. The defendant appeals from a judgment entered in favor of plaintiff as administrator of the estate of Byron

C. Ogburn, deceased, in an action brought upon a policy of accident insurance. The deceased purchased a "Travel Accident Ticket Policy" from the agent of the defendant insurance company at San Antonio, Tex. While in San Francisco he was killed in an accident occurring in the Hotel Flower, which hotel maintained an elevator service used by guests, visitors, employees, tradesmen, and waiters. The evidence discloses that on the day of the accident the deceased, in company with a friend, summoned the elevator to the ground floor for the purpose of being conveyed to the fifth floor. In response to the summons, the elevator was brought to the ground floor by its operator. As the door of the elevator was opened, the deceased's companion stepped into the car, which immediately started upward, without the operator having previously closed the door. Deceased, apparently following close upon the heels of his friend, stepped through the open door into the elevator shaft, and fell to the basement, receiving the injuries which resulted in his death.

The introductory clause or caption of the policy issued to the deceased by the defendant company states that it "Covers Accidents Only While a Passenger on Passenger Conveyances and While in or About Railroad Passenger Stations. Age 18 to 70." In the body of the policy it is declared that: "The Travelers Insurance Company hereby insures * * * against bodily injuries effected solely by external, violent and accidental means, and sustained while riding as a passenger on any public conveyance provided by a common carrier and such conveyance is being propelled on land or water by mechanical power. * * *" In the presentation of the appeal, both sides have devoted considerable portions of their briefs to the following two questions: Whether the introductory clause or caption of an insurance policy is to be read and construed with the provisions appearing in the body of the instrument? And, whether an elevator maintained by a public hotel for the convenience of those having occasion to use the same is a common carrier within the meaning of the particular policy here involved? We need consider only the first.

[1-4] In the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties thereto. Burnett v. Piercy, 149 Cal. 178, 189, 86 P. 603; First Nat. Bank v. Bowers, 141 Cal. 253, 262, 74 P. 856. This fundamental rule finds recognition in section 1636 of our Civil Code, wherein it is provided that: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." As to the hardships, advantages, or disadvantages which may result from such a construction, the courts have nothing to do. Gazos Creek Mill & Lumber Co. v. Coburn, 8 Cal. App. 150, 156, 96 P. 359. The intention of the parties is, of course, to be ascertained from a consideration of the language employed by them and the subject-matter of the agreement. Los Angeles G. & E. Co. v. Amal. Oil Co., 156 Cal. 776, 779, 106 P. 55. A contract should be construed, however, as an entirety, the intention being gathered from the whole instrument taking it by its four corners. Every part thereof should be given some effect. Section 1641, Civil Code. In other words, "the sense and meaning of the parties to any particular instrument should be collected ex antecedentibus et consequentibus; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done." Balfour v. Fresno C. & I. Co., 109 Cal. 221, 227, 41 P. 876, 878. Section 1648 of the Civil Code declares that: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

[5] With these fundamental rules of construction before us, we experience little hesitation in concluding that the parties to the policy of insurance here involved could not have intended it to cover an accident of the nature of the one disclosed by the evidence herein. In arriving at this conclusion, we have duly considered and weighed the entire policy, including the introductory clause or caption. On its face, the instrument is definitely characterized as a "Travel Accident Ticket Policy." A person boarding, riding on, or leaving an elevator maintained by a public hotel, in which he happens to be either permanently or transiently residing, cannot, by any stretch of the imagination, be said to be engaged at the time in "travel," as that term is commonly understood and unquestionably employed in the policy here in question. It is interesting to note, also, that the caption of the policy significantly describes it as covering accidents while a passenger on passenger conveyances, "and while in or about railroad passenger stations," thus lending added substantiation to the conclusion that the parties could only have intended to include within the provisions of the policy those accidents incident to "travel," and could not have had in mind, in executing the contract of insurance, protection to the assured against an accident in or about an hotel lobby or elevator.

[6, 7] In the disposition of this appeal, we have not lost sight of the familiar rule requiring all uncertainties and ambiguities in a policy of insurance to be resolved against the insurer, who is presumed to have selected and incorporated into the policy the language employed therein. That rule can only have application when the policy actually

presents some uncertainty or ambiguity. In the absence thereof, the courts have no alternative but to give effect to the contract of insurance as executed by the parties. As pertinently declared in First Nat. Bank v. Maryland Cas. Co., 162 Cal. 61, 69, 121 P. 321, 325 (Ann. Cas. 1913C, 1170): "Before one is entitled to recover upon a policy of insurance it is essential that he bring himself within the express provisions of the policy. While in the construction of insurance policies the rule is that doubtful provisions are to be construed in favor of the insured and in aid of his right to recover thereon, the rule is equally well established that where the terms of the policy are plain and explicit the court can indulge in no forced construction of the contract to cast a liability upon the insurance company which it has not assumed."

The judgment is reversed.

We concur: RICHARDS, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

207 Cal. 73

PEOPLE v. BEITZEL. (Cr. 3187.)

Supreme Court of California. April 16, 1929.

1. Criminal law 🔑657—Court's action in murder case in adjudging defifendant's counsel guilty of contempt for being tardy held not prejudicial to defendant.

In prosecution for murder, defendant *held* not prejudiced by action of trial court in adjudging his counsel guilty of contempt, when counsel offered insufficient excuse for tardiness.

2. Criminal law 🔑1169(2)—Refusal to strike testimony in murder case, describing point on photograph as that where victim's body was found, held not prejudicial under other evidence.

In prosecution for murder, refusal to strike officer's testimony, describing point on photograph as point where body of victim was found, *held* not prejudicial to defendant, in view of other evidence identifying body as that of victim.

3. Criminal law 🔑829(1)—Refusal of instructions covered by instructions given was not erroneous.

In prosecution for murder, refusal of requested instructions on question of motive was not erroneous, where court correctly and adequately covered that subject by other instructions given.

4. Criminal law 🔑627(7)—Failure to serve copy of transcript of testimony before grand jury prior to trial held not prejudicial, in view of waiver of further objection after service of copy (Pen. Code § 925).

Where copy of transcript of testimony taken before grand jury was not served on defendant in murder case prior to trial, as required by Pen. Code, § 925, but was served on formal demand by defendant's counsel on second day of trial, there was no prejudice to defendant, in view of waiver of further objection.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Russell St. Clair Beitzel was convicted of murder in the first degree with a sentence of death, and he appeals. Affirmed.

George E. Stoddard and Joseph L. Fainer, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

SHENK, J. The defendant was convicted of murder of the first degree, and judgment of death was pronounced. He appeals from the judgment and from the order denying his motion for a new trial.

It is not contended on the appeal that the evidence is insufficient to justify the verdict, and there is no suggestion that the defendant did not commit the crime. The homicide was particularly atrocious, as disclosed by the following facts: In the early part of 1927 the defendant was employed as assistant credit manager of a corporation in Philadelphia. He was a married man, and was then living with his family, consisting of a wife and two children, four and six years of age. Barbara Mauger was a young woman then about 20 years of age, and was employed as a cashier by the same company. In the latter part of April or early in May, 1927, the defendant left his home, took up his residence elsewhere in the city of Philadelphia, and began to pay attention to Barbara Mauger at her home where she resided with her parents, and continued to call upon her without disclosing to her or to her parents that he was a married man. On September 10, 1927, the defendant and Miss Mauger disappeared. Two days later the father of the young woman received a note from her stating that she and the defendant had left for South America. Before they disappeared, a considerable assortment of baby clothes was delivered at the Mauger home in Philadelphia. The defendant explained to the elder Maugers that he had purchased the clothes for his brother's expected child. In the note sent by Barbara to her parents, she advised them that she expected to marry the defendant, and that the baby clothes belonged to her, as she expected to have a baby. The defendant and the young woman went direct to Los Angeles, arriving there on September 17, 1927. They resided at various places in that city, representing themselves to be husband and wife under the names of R. Scott and Barbara Burholme. The last place they resided was at 841 Golden avenue in the city of Los Angeles.

On June 24, 1928, the defendant and Barbara were seen to leave their home in an automobile. The defendant returned to his home alone. On the evening of the same day a neighbor called to see Barbara, and was told by the defendant that Barbara had taken a ride down to Long Beach, and that "she wouldn't be back." On the next day the defendant told the neighborhood groceryman that Barbara had gone away. On the same day he told a neighbor that he had taken Barbara to Long Beach, where she had met her aunt from San Diego, and that she had gone to New York with the aunt. A few days later he stated that he had received a telegram from Barbara from Phœnix, Ariz., and later that he had heard from her in Texas.

On the afternoon of August 2, 1928, two boys en route to Scout Camp were traveling along Mulholland highway which follows the crest of the Santa Monica mountains. When the boys were about five miles northwesterly from Hollywood, their suspicions were aroused by a buzzard flying around a point near the highway. They stopped, entered upon an investigation, were met with an "awful smell," discovered clothing that appeared to have been torn, and saw what they thought were blood stains on the ground. They immediately notified the forest ranger, who returned with them to the spot, and found a dismembered and disintegrating body, which was later positively identified as the body of Barbara Mauger. Near the place they also found the skull of a full-time fetus. It was in evidence that the deceased expected to be confined on or about July 27, 1928, which was about a month after the homicide.

The autopsy disclosed that a bullet had entered the right temple of the deceased near the outer angle of the right eye, had passed through the right orbit to the wall of the nose, passed under the bridge of the nose to an exit from the left orbit. A second bullet had penetrated the base of the skull. Another bullet was found in the body.

The day after the discovery the defendant was arrested. He admitted that the statements made to the neighbors shortly after the disappearance of the deceased were false. He also admitted that on the afternoon of June 24, he had taken a ride into the hills with Barbara. He claimed that he had had a petty quarrel with her while on the ride, and that as a result thereof Barbara had gotten out of the automobile and left him. He also admitted that on the day after the disappearance of Barbara he had wrapped her personal effects and some of the baby clothes in a bundle and mailed them to Phœnix, Ariz., to a Mr. Stone, a fictitious person, as addressee, giving a return address in Seattle, Wash. A revolver equipped for the same caliber of bullets as those found in the body of the deceased was shown to have been in the defendant's possession a few days before the homicide. This gun was found in his possession at the time of the arrest. Because of peculiar "spurs" in the nozzle of the gun and "gouges" on the bullets found in the body of the deceased, a firearms expert testified that these bullets were fired from this particular gun.

[1] As grounds for reversal, the defendant urges prejudicial misconduct on the part of the trial judge in admonishing his counsel from time to time during the first half of the trial and finally in adjudging said counsel guilty of contempt. The trial commenced on September 6, 1928. The defendant was then represented by Messrs. Vernon Hamilton and George E. Stoddard, attorneys of his own choice. The trial proceeded on that day and again on September 7th, when an adjournment was taken to September 11th, on which day Mr. Stoddard, by leave of court, and with the defendant's consent, withdrew from the case. The trial continued on the 11th and 12th with Mr. Hamilton as the defendant's sole counsel. He had repeatedly offended by being tardy at the sessions of the court, and had been admonished by the court that he must be on time. At the opening of court on Thursday the 13th he was not present when court convened. The defendant offered to proceed without his counsel, but was advised by the court that, as long as he had an attorney, his attorney must speak for him and try the case. The defendant then said: "If your Honor please, my attorney knows he is going to be dismissed this morning. That may or may not be the reason he is not here." The defendant then expressed a desire to discharge his attorney, and requested an adjournment until 2 o'clock in the afternoon so that he might return with an attorney to continue the trial. Attorney Hamilton then entered the courtroom, and, after offering an excuse for his tardiness, which was deemed insufficient by the court, and we think properly so, was adjudged guilty of contempt and sentenced to three days in jail. The court then inquired of the defendant whether it was still his desire to discharge his counsel. The defendant gave an affirmative answer, and asked for time to engage other counsel. The court then at length admonished the members of the jury that they should in no wise consider what had taken place with reference to Mr. Hamilton as having anything to do with the case, and a recess was taken until 2 o'clock. At the latter hour the defendant appeared with Joseph L. Fainer as his counsel. At the request of the new attorney, the cause was continued for further trial until Monday, September 17th, to enable him to familiarize himself with the case. At the opening of court on the 17th Mr. Stoddard re-entered the case. By proper order

of substitution Mr. Fainer and Mr. Stoddard became counsel for the defendant, and continued to act as such until the close of the trial, which consumed several days.

We find nothing in the incident complained of which is the subject of just criticism. We are unable to conclude that the defendant was prejudiced thereby in any substantial sense. In fact, the impulses of a fair-minded jury might reasonably be said to have reacted in his favor under the circumstances here shown. The trial of the cause was necessarily prolonged by reason of the change in the attorneys for the defendant, but an examination of the record discloses that the defendant was ably represented by counsel, and that he had a fair trial on all of the issues presented.

[2] The next contention is that the court committed error in refusing to strike certain testimony of the officer Sanderson, wherein the witness described a particular point on a photograph as the point "where the body of Barbara Mauger was found." The objection to that portion of the answer was that it assumed that the body found was the body of Barbara Mauger and was a conclusion of the witness. Assuming the objection technically well taken, no possible prejudice resulted from the ruling, for the reason that the body had theretofore been identified as that of Barbara Mauger, and there was and is no evidence in the record to the contrary.

[3] Defendant's counsel offered two instructions on the question of motive. These were refused, but the court correctly and adequately covered that subject by other instructions given.

[4] The last point made for reversal is that a copy of the transcript of the testimony taken before the grand jury was not served on the defendant prior to the trial, as required by section 925 of the Penal Code. The transcript had not been delivered as required by the Code section, and on the second day of the trial the defendant's counsel made formal demand for a copy thereof. The demand was complied with forthwith, whereupon defendant's counsel waived further objection on the point, provided the trial be continued until Tuesday the 11th, which was done. Counsel now make the point that the Code section is mandatory and beyond the power of the defendant to waive. We see no merit in the contention. The purpose of the Code section is to apprise the defendant of the nature of the testimony taken before the grand jury, and it may be assumed that a failure to deliver a copy of the transcript within the time prescribed would, unless the defendant consents otherwise, result in a continuance of the trial on his motion as a matter of right. But where, as here, the defendant waived statutory rights intended for his benefit under circumstances fully affording protection, no harm to him could possibly result.

We find no error in the record, and no doubt of the defendant's guilt may be entertained. The judgment and order are therefore affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

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207 Cal. 63

CHAPMAN v. PITCHER et al. (S. F. 12732.)

Supreme Court of California. April 16, 1929.

1. Executors and administrators ⚷111(1)—Contract of attorney's employment and power of attorney held to sustain implied holding that defendants contracting as executors were not bound personally.

Quotations from contract of employment of attorney and power of attorney *held* to sustain implied holding that parties thereto did not intend to bind defendants personally, but to bind estate of decedent, where such instruments were executed by defendants as executors of will of decedent.

2. Executors and administrators ⚷224—Attorney could not recover from executor for breach of contract of employment binding estate, where no claim against estate had been presented (Code Civ. Proc. § 1619).

Where contract for employment of attorney evidenced intention that defendants executing it as executors were not to be bound personally, but that estate of decedent should be bound, attorney not having made application to probate court for authority to so contract, and not having presented any claim against estate for allowance of fee under Code Civ. Proc. § 1619, or otherwise, *held* not entitled to recover against executors personally for breach of such contract of employment.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by I. F. Chapman against Thomas B. Pitcher and another for damages for breach of contract. Judgment for defendants, and plaintiff appeals. Affirmed.

William Penn Humphreys, of San Francisco, for appellant.

Franklin Swart, of Redwood City, for respondents.

SEAWELL, J. Appeal from a judgment entered upon plaintiff's refusal to amend his amended complaint after demurrer sustained. The trial court held that said amended complaint did not state facts sufficient to sustain a judgment against defendants in their individual capacity.

The facts set forth in said amended complaint are substantially as herein stated in narrative form. Plaintiff was at all the times mentioned in said amended complaint a duly licensed and practicing attorney at law of this state. He was also, on June 20, 1926, admitted to practice law in the probate court of the county of Shoshone, state of Idaho. On February 22, 1913, Edwin Bray Pitcher, known at the time of his death as Edwin Prichard, died intestate in said county of Shoshone, state of Idaho, leaving surviving him as sole heir at law, John Pitcher, his father, a resident of the county of San Mateo, this state. Probate proceedings were had in the probate court of the county of Shoshone in the matter of the estate of said Edwin *Prichard*, and no heirs or other person appeared to claim said estate at the time distribution was ordered. The entire net proceeds of said estate, to wit, the sum of $11,605.57, was, by order of the probate court, made January 6, 1920, deposited with the state treasurer of the state of Idaho to be held by said officer as unclaimed moneys, in accordance with the statute of said state.

John Pitcher, the father of said Edwin Bray Pitcher, aforesaid, died testate in the said county of San Mateo on February 24, 1925, and left an estate therein. Thomas B. Pitcher and Louise Josephine Pitcher, children of said John Pitcher, deceased, were on March 27, 1925, duly appointed executor and executrix, respectively, of the last will and testament of said John Pitcher. It is alleged that to the time of his death said John Pitcher did not know of the decease of his son, Edwin Bray, nor did either of the defendants or any heir or legatee of said John Pitcher know of the death of said Edwin Bray Pitcher until some time after letters testamentary had been issued to said Thomas B. Pitcher and Louise Josephine Pitcher. It is alleged "that plaintiff, subsequent to the death of said John Pitcher, had made extensive investigations, and believed from data which he had collected that Edwin Bray *Pitcher* and Edwin *Prichard* were one and the same individual"; that plaintiff informed defendants of his belief that Edwin Bray Pitcher had predeceased said John Pitcher and had left a net estate of between $11,000 and $12,000; that plaintiff proposed to undertake to recover for the estate of John Pitcher, deceased, the net proceeds of the estate of Edwin Bray Pitcher and "to pay all expenses in connection therewith, in consideration of receiving for such services, expenses and information, an undivided one-half interest in all the property and assets of Edwin Bray Pitcher, deceased, which should be so recovered by said estate of John Pitcher, deceased, and to receive nothing for said services, expenses and information in the event that he should not be able to make such recovery; that defendants, as *executor and executrix* of the will of said John Pitcher, deceased, desired to collect and recover said estate of Edwin Bray Pitcher, deceased, and to have the proceeds of said latter estate paid over to them *as the legal representatives* of the estate of said John Pitcher; that to accomplish the *premises*, defendants, on or about the 28th day of April 1926, entered into a written contract with plaintiff, etc." (Italics supplied.)

Said contract, which is set out in full, after reciting the facts, declares that the executors as such of the estate of John Pitcher had on even date executed a power of attorney in favor of I. F. Chapman, granting to him certain powers in or about the matter of the estate, property, and assets of Edwin Bray Pitcher, and provides as follows: "It is now therefore distinctly understood and agreed that the said I. F. Chapman shall personally pay any and all expenses incident to the within recited matter without obligation to us therefor, and further that for and in consideration of, and as full compensation for, all services rendered and to be rendered by the said I. F. Chapman and in consideration of the information conveyed to us regarding this estate by him, he, the said I. F. Chapman, shall have and receive and we as such executors, do hereby assign, transfer, convey and set over to the said I. F. Chapman an undivided one-half (½) interest in and to any and all the right, title and interest of the estate of John Pitcher, deceased, in and to the property, assets and estate of said deceased."

While this contract bears the simple signatures "Louise Josephine Pitcher, Thomas B. Pitcher," the opening sentence reads: "We the undersigned executors of the last will and testament of John Pitcher, deceased. * * *" Said power of attorney recites the fact of the death of John Pitcher, a resident of the county of San Mateo, and the order made in said matter appointing defendants executors of the will of said John Pitcher, deceased. It then proceeds to obligate the defendants to the performance of the covenants in the following language: "Now, therefore, we, as the executors of the last will and testament of said John Pitcher, deceased, hereby hire and employ I. F. Chapman, attorney at law of the city and county of San Francisco, state of California, to take any and all proceedings which he may deem necessary in the Superior Court of Shoshone County, Idaho, * * * to recover for us *as such executors* from the state of Idaho or from the state treasurer of said state, any and all money now on deposit in the state treasury of the state of Idaho to the credit of Edwin *Prichard*, and in that behalf, we, as such executors, do hereby make, * * * said I. F. Chapman our lawful attorney in fact for us, as such executors, in our name, * * * as such executors, to represent us in all matters and proceedings whatsoever in the above entitled matter and to do and perform under this authority any and all acts and things that our said attorney in fact may deem necessary * * * and particularly to ask, sue for, demand, collect * * * all moneys, * * * inheritances and distributive shares now on deposit in the state treasury of the state of Idaho to the credit of the estate of Edwin *Prichard*, deceased, or in which said estate of Edwin Prichard may have any interest; * * * and generally to say, do, act and transact, accomplish and determine any and all matters and things whatsoever that we, as such executors, might, could or should do if personally in or about the above recited matter." Said power of attorney is signed, "Louise Josephine Pitcher, Thomas B. Pitcher, executors of the last will and testament of John Pitcher, deceased."

Thereafter plaintiff appeared in the probate court of Shoshone county and by proceedings had obtained an order of court directing the state auditor to draw his warrant in favor of said executors and the state treasurer to pay defendants as executors of the estate of said John Pitcher, deceased, and an order of the probate court of Shoshone county was accordingly made. It appears from the allegations of the amended complaint that said proceedings were defective, and upon plaintiff's motion said order was set aside. New proceedings were instituted by plaintiff by the filing of a petition on August 27, 1926, the hearing of which was noticed for September 8, 1926. It was stipulated between plaintiff and the Attorney General of the state of Idaho, the date not being given, that upon the hearing of the petition last named an order might be made directing the auditor of the state of Idaho to authorize the delivery to defendants, as executor and executrix of said estate of John Pitcher, of said moneys on deposit in said state as above related. Three days after the petition was filed in the second proceeding, without assigning any cause therefor, defendants discharged plaintiff from said case, revoked said power of attorney, and employed another attorney in his place, who proceeded to and did collect said moneys, to wit, $11,607.57, deposited in the treasury of said state of Idaho on account of the estate of Edwin Prichard, deceased.

The defendants herein having refused to pay plaintiff any sum for his services, damages equal to one-half of the value of said estate of Edwin Prichard, deceased, to wit, the sum of $5,802.78, for breach of contract are attempted to be recovered by a personal action against said defendants. No relief is sought on the basis of quantum meruit.

[1, 2] The above quotations from the contract of employment and the power of attorney amply sustain the implied holding of the trial court that it was the intention of the parties thereto not to bind the defendants personally, but to bind the estate of John Pitcher, deceased. Prior to the amendments of sections 1616 and 1619, Code of Civil Procedure (Stats. 1905, p. 776; Stats. 1905, p. 727; Stats. 1909, p. 987), the reasonable allowance for legal services was made by the probate court to the executor or administrator, and could not be made to the attorney. The attorney employed by an executor or administrator to assist him in the execution of his trust had no claim that he could enforce against the estate either by action or in any other way. He was not a person interested in the estate. The amount of compensation fixed by the contract of the executor of an estate with his attorney for legal services to be rendered in settlement thereof was a matter of personal obligation on the part of the executor, or representative, with which the probate court had no concern. Estate of Kruger, 143 Cal. 141, 76 P. 891. Volume 11, California Jurisprudence, pp. 1187, 1188, 1193, 1194, 1195, contains a full discussion of this question with numerous citations of authority directly holding that prior to the amendment of 1905 attorneys could not assert a demand against the estate of a deceased person, but were limited to their personal action against the executor or other representative of the estate who had employed them. This rule was changed by the amendment above noticed prior to the present transaction to the form in which it now exists by providing that attorney fees "shall be allowed out of the estate." Code Civ. Proc. § 1619.

At all times prior to said amendments it was competent for an executor by stipulation to exempt himself personally from the payment of a larger fee than the amount to be fixed by the court as a reasonable allowance to the executor for the services of said attorney. The probate court, however, was not bound by the agreement of executor and attorney as to the amount which they may have deemed reasonable or proper. The many earlier cases of this court cited by appellant, to the effect that an administrator or executor of an estate is personally liable for the payment of attorneys' fees in probate matters, were decided before the change was brought about by the adoption of the amendment and the enactment of statutes which revised the whole system of claims against estates and more particularly placed attorneys in their relation to estates on a basis similar to that of executor or administrator. The contract in the instant case purports to obligate the defendants as *executor and executrix* to "assign, transfer, convey and set over" to the plaintiff an undivided one-half interest in the property, estate, and assets of the estate of Edwin Bray Pitcher, deceased, property belonging to the estate of John Pitcher, "in consideration of and as full compensation for all services rendered and to be rendered by the said I. F. Chapman and in consideration of the information conveyed to us [as the legal representatives of the estate of John Pitcher, deceased] regarding this estate by him. * * *" No petition or application of any kind or order was made to the probate court for authority to so contract, nor was any claim presented against the estate or application made to the court for the allowance of reasonable attorney's fee for performance of extraordinary services, as provided by section 1619, Code of Civil Procedure, or otherwise. No attempt was made by plaintiff to observe the procedure prescribed by statute, which is necessary to establish a claim or demand against an estate of a deceased person, nor was an action commenced against the estate to establish the demand, here attempted to be enforced by personal action against the defendants.

Respondents, as further defenses to plaintiff's right of recovery, have urged the issue that the contract was revocable, for the reason that the executor had no authority to assign or transfer an interest in the estate of John Pitcher, deceased, except by order of the probate court, and that the contract was not coupled with an interest; further, that the attorney soliciting the contract possessed knowledge concerning facts about which the contract was made of which the defendants were ignorant; and that the concealment of material facts for the purpose of inducing the execution of a contract amounts to the perpetration of a fraud on the party from whom such facts are withheld.

Our construction of the contract makes it unnecessary to give further consideration to the points raised by counsel.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

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207 Cal. 54

BAYLESS et ux. v. AMES et ux.
(S. F. 12768.)

Supreme Court of California. April 15, 1929.

Judgment ⚷589(1)—Plaintiffs, having recovered from defendants for breaching contract, could not in second action enforce mortgage given to secure performance of such contract (Code Civ. Proc. § 726).

Where defendants breached agreement under which they guaranteed performance of contract by another, and for faithful performance of their contract they had executed and delivered to plaintiffs conveyance in nature of mortgage, plaintiffs, having recovered damages for breach of such agreement in former action, could not, under Code Civ. Proc. § 726, bring second action to foreclose mortgage.

In Bank.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action to foreclose a mortgage by J. R. Bayless and wife against W. E. Ames and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

Mark H. Edwards, of Santa Paula, for appellants.

Walter E. Bruns, of Reedley, for respondents.

CURTIS, J. The defendants were on the 12th day of June, 1921, the owners of two lots in the Navelencia Farms tract in the county of Fresno, which on that day they agreed to sell to Joseph Vaughn for the sum of $12,000, "to be paid by the said Joseph Vaughn by applying to the payment of the interest at the rate of 8 per cent. per annum, and the excess as a payment on the principal sum, 60 per cent. of the gross proceeds received from the sale of all crops to be grown on the premises to be sold." Thereafter, and on the 20th day of June, 1921, the plaintiffs purchased from said defendants said premises, subject to said agreement of sale entered into by defendants and said Joseph Vaughn. At the time of said purchase, and as a part of the same transaction, the parties herein entered into a written agreement, whereby the defendants agreed that, in case Vaughn failed to comply with the terms of his agreement, "they will at their own cost and expense enter upon said premises in his place and stead, and do and perform all and every act or thing by him to be done or performed, and care for and market the crops growing on said premises and apply the proper portion of said proceeds to the payment of the obligation assumed by the said Joseph Vaughn."

At the same time this agreement was entered into, and for the purpose of securing the faithful performance thereof on the part of the defendants, they executed and delivered to the plaintiffs a conveyance in the nature of a mortgage of certain real property owned by them and situated in the city of Reedley, in said county of Fresno. It is recited therein that "this conveyance is intended as a mortgage to secure the payment of certain sums reserved to be paid to the parties of the second part [the plaintiffs herein] under a certain agreement of warranty bearing date of June 20, 1921, under which the parties of the first part herein [the defendants] are the parties of the first part therein and the parties of the second part herein are the parties of the second part therein." This mortgage was duly recorded in the office of the county recorder of the county of Fresno.

Joseph Vaughn, who entered into the agreement of purchase of said land from the defendants, failed to keep the terms of his said agreement, and evidently abandoned said premises and failed to cultivate the same, or to pay to the plaintiffs any of the proceeds from the sale of crops grown thereon. The plaintiffs called upon the defendants to comply with the terms of their agreement of June 20, 1921, wherein defendants had agreed that, in case Vaughn failed to comply with the terms of his contract of June 12, 1921, they (defendants) would "at their own costs and expense enter upon said premises in his place and stead and do and perform all and every act or thing by him to be done or performed," etc. The defendants refused to comply with said request, and thereby violated their said agreement with the plaintiffs. Thereupon the plaintiffs brought an action in damages against the defendants in this action for breach of said contract of warranty, and upon the trial thereof were awarded a judgment against defendants in the sum of $3,000 damages for breach of contract, $250 attorney's fee as provided in said contract, and costs of suit.

Thereafter the plaintiffs instituted the present action to foreclose said mortgage against real property situated in the city of Reedley and owned by the defendants, claiming that there was due them the amount of the judgment recovered in the damage action, certain sums expended by them in payment of taxes on the mortgaged premises, a further attorney's fee for foreclosure of the mortgage and costs of suit. They asked, in addition to the recovery of these several amounts, the foreclosure of their mortgage and the sale of said real property in the city of Reedley, and for judgment against defendants for any deficiency which might remain after applying the proceeds of said sale to the satisfaction of said judgment.

The defendants in their answer to the complaint in this action set up the contract of June 20, 1921, between the parties hereto, the institution of the action brought thereon to recover judgment for damages for the breach thereof, and the judgment rendered therein in favor of plaintiffs and against defendants, and further claimed and alleged in their said answer that "the plaintiffs herein are now debarred from maintaining this action on the mortgage set out and herein sued on by reason of the provisions of section 726 of the Code of Civil Procedure and the law of the state of California." The trial court found the facts as alleged in the answer of defendants, and held that plaintiffs were barred from maintaining this action by virtue of the provisions of said section 726 of the Code of Civil Procedure. We might add that there is no contention but that the facts are as alleged in defendants' answer and as found by the court, the only claim made by the plaintiffs is that the trial court erred in its conclusion of law as to the effect of said section of the Code upon the facts as found by the court.

The provisions of said section 726, relied upon by the defendants as a bar to plaintiffs' maintaining this action, read as follows: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter." It is admitted that the action brought by the plaintiffs against the defendants in which they recovered damages for the breach of the contract of date June 20, 1921, was a simple action for the recovery of damages for the breach of contract, and no attempt was made to foreclose the mortgage given to secure the performance of said contract. Plaintiffs do not question the general applicability of the rule laid down by said section 726. They concede that a person whose debt or right is secured by a mortgage cannot in an action secure a judgment for the debt or the enforcement of the right and thereafter commence an action for the foreclosure of the mortgage given to secure said debt or right. This doctrine, they admit, was clearly confirmed in the case of Ould v. Stoddard, 54 Cal. 613, and has since been strictly adhered to in the decisions of this court. They contend, however, that there are exceptions to the rule thus announced, and that the facts of the present case bring it within an exception to that rule.

In support of this contention plaintiffs assert that the liability of the defendants in the present action is primary, whereas in the original action, although they were the sole defendants, they were sued in a different capacity and that in the former suit the liability of the defendants was secondary to the liability of Vaughn, whose performance of the contract they merely guaranteed. Whether defendants' liability was a primary or secondary liability, it was but one liability—an agreement to answer to plaintiffs for the default or failure of Vaughn to carry out the terms of his contract. We think a proper statement of the legal effect of the contracts of the parties would be to say that Vaughn's liability to the plaintiffs was a primary liability, and defendants' agreement to answer for Vaughn's default was a secondary liability. Had plaintiffs brought action in the first instance against Vaughn to establish his liability, or, expressed in another way, to fix the extent of damages sustained by plaintiffs by reason of Vaughn's default, the defendants would not have been necessary parties to said action, and the prosecution of said action against Vaughn alone might not have been a bar to a subsequent action brought by plaintiffs against defendants on their agreement to answer for Vaughn's default. This we understand to be the effect of Murphy v. Hellman Commercial Trust & Savings Bank, 43 Cal. App. 579, 185 P. 485, and Nuetzel v. Mackie, 80 Cal. App. 768, 253 P. 166. But this is just the procedure the plaintiffs failed to pursue. In the first action they sued the defendants and the defendants alone on their agreement to answer for Vaughn's default, and obtained judgment for the amount of damages which the court found they had sustained by reason of said default. Vaughn was not even made a party to said action. In the second action they sought to foreclose said mortgage and recover again the damage to which the court in the prior action found they were entitled. It would be difficult to conceive of a clearer or more complete and direct violation of the terms of section 726 of the Code of Civil Procedure than that we have here presented.

The action is not sustained by the above authorities or by any others cited by the appellants or of which we have any knowledge. The case of Martin v. Becker, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171, cited by plaintiffs, is of no assistance to them. In that case a materialman, who had furnished materials which were actually used in the construction of a building upon the land of the owner, took from the contractor, to whom the materials were furnished, a mortgage upon real property owned by the contractor to secure their payment. He thereafter brought an action against the owner of the premises to foreclose his lien for materials. In that action it was objected that he could not prosecute his action to foreclose said lien, but was relegated solely to an action to foreclose his mortgage. This objection was not sustained by this court, which held "that the law [section 726 of the Code of Civil Procedure] never contemplated that because a man had taken a mortgage he could not take other independent security for his debt, and, if the contract for such security permitted it, enforce such contract without reference to the mortgage debt." In that action, it is true, the mortgagor, who was also the contractor, was made a party to the action to foreclose the lien of the materialman, but as the court observed, he was not a necessary party to such action. Plaintiffs argue from this that the defendants here were not necessary parties to an action, which might have been brought against Vaughn to determine his liability to the plaintiffs. This is true. But plaintiffs brought no such action. The prior action brought by plaintiffs, as we have already stated, was one brought solely against the defendants to recover against them on their contract of warranty. Neither does the case of Schehr v. Berkey, 166 Cal. 157, 135 P. 41, also cited by plaintiffs, help their case. It was there held that, by resorting to an action of unlawful detainer for nonpayment of rent by the tenant and thus securing the eviction of the latter, the lessor or landlord did not lose the right to foreclose, as against the original tenants, a chattel mortgage given by them as security for the payment of damages sustained by the lessor on account of the breach of contract. The court further held in such a case that section 726 of the Code of Civil Procedure was not applicable, as "the liability of the lessees was one thing; the liability of their assignee, a different and distinct thing."

We think that there can be no question but that the present action was brought for the recovery of the same debt to recover which the prior action was instituted and prosecuted to judgment. It was brought against the same parties, the mortgagors named in the mortgage herein sought to be foreclosed, and upon the same contract of guaranty, upon which the prior action was based. The institution and maintenance of this action, therefore, is expressly prohibited by the provisions of section 726 of the Code of Civil Procedure. Ould v. Stoddard, 54 Cal. 613; Western Fuel Co. v. S. G. Lewald Co., 190 Cal. 25, 210 P. 419.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

SOUTHERN CALIFORNIA BOND & FINANCE CORPORATION v. MATHES.★ (L. A. 8994.)

Supreme Court of California. March 30, 1929.

Rehearing Denied April 29, 1929.

Taxation ⟹796(2)—Owner's written statement to collector before sale that he had charged lots off as not worth assessments held not waiver of irregularities, precluding contest of tax deed (Pol. Code, § 3771a).

Written notice to tax collector returning copy of printed notice of sale sent to owner, pursuant to Pol. Code, § 3771a, in which collector was advised that owner had charged lots off his books as not worth extra cost of assessments, *held* not a waiver of irregularities, precluding owner from contesting validity of tax deed.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Southern California Bond & Finance Corporation, a corporation, against James H. Mathes. Judgment for defendant, and plaintiff appeals. Reversed.

Superseding opinion of Court of Appeals in 269 P. 964.

Benjamin Kirby, of Los Angeles, and Herbert C. Kelly, of San Diego, for appellant.

Rolland C. Springer and Hamilton & Lindley, all of San Diego, for respondent.

CURTIS, J. This action was brought to quiet title to two city lots situated in the city of San Diego. The plaintiff was the record owner thereof, and the defendant relied upon a tax deed issued to him by the tax collector of the county of San Diego. The proceedings,

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★Rehearing denied.

which form the basis for the issuance of the tax deed to the two lots involved herein, were substantially the same or similar to those which were held to be invalid in an opinion this day rendered and filed in the case of Gottstein v. Kelly (L. A. No. 8727; Cal. Sup.) 276 P. 347. In one respect the facts in the Gottstein Case differ from those in the present action. In that case, in the notice of sale, the words "Taxes, percentage and costs" were inserted in place of the words "Taxes, penalties and costs," as provided by the statute. No such defect in the notice of sale in the present action was shown to have existed. Therefore, what was said in the Gottstein Case upon that phase of the case would, of course, not be applicable to the present action. The other points, however, considered in that case are precisely the same as those relied upon by the respondent in this action, and were decided adversely to respondent's contentions.

[1] The respondent in the present action, however, makes the additional claim in support of the judgment sustaining his tax deed that the plaintiff's assignor, who was the owner of the lots at the time they were sold for delinquent taxes, waived all right to object to said tax sale. The facts and circumstances under which this claim of waiver is made are briefly these: L. S. Everts was the owner of said lots at the time they were assessed for taxes in 1918, and he continued to be such owner until after said lots were sold for taxes in 1924. Within the statutory time prior to said tax sale, Everts received by registered mail from Herbert S. Croghan, the tax collector of said county, a copy of the printed notice of sale required to be given by the tax collector pursuant to the provisions of section 3771a of the Political Code, and on receipt thereof he mailed to said tax collector a reply written on the reverse side of said notice, as follows: "Mr. Herbert Croghan. Dear Herb: Thanks for the notice. When I charged these lots off my books several years ago I did so because I did not feel that they were worth the extra cost to me for paving, grading, etc., etc., and I still feel the same way about it. Here's hoping that the party who gets them has a rabbit's foot. Sincerely, Leslie Everts." This letter was received by the tax collector on the 9th day of June, 1924. The sale was made on June 30, 1924. The deed from the tax collector to respondent was dated and recorded on July 10, 1924, and on the 17th day of July, 1924, Everts and wife, by quitclaim deed, conveyed said lots to the appellant, which deed constitutes appellant's ground of title. The trial court based its decision sustaining the tax deed largely upon the ground that by his conduct Everts had waived his right to object to any irregularity in the proceedings leading up to the execution of the tax deed. No direct authority was cited by the trial court in support of its ruling holding that Everts had waived his rights to question the legality of the tax proceedings under which his property was sold to respondent. Nor has respondent, in any of his briefs or other argument presented either to the District Court of Appeal or to this court, been able to cite any authority bearing directly upon this question of waiver. We are confident that none can be found, and that the law upon this subject is not as contended for by the respondent. This question is discussed in Blackwell on Tax Title (4th Ed.), p. 513, in the following manner: "It may be laid down as a general rule of law, that where an irregularity—of such a character as to affect the power of the officer to sell—takes place in any part of the proceedings, and the owner of the land, being aware of the fact, is silent, and takes no steps to prevent the sale but permits it to proceed, or even actually consents to waive the irregularity, a sale under such circumstances will not be recognized in a court of law. The officer derives his authority from the law, and not from the owner. He must obey the law, and not the orders of a private individual."

In Cooley on Taxation, we find the following positive declaration upon the subject: "Consent of the owner of land to a defective publication of notice, it has been held, would not bind him, as he cannot, in that manner, confer an authority upon an officer of the law, nor can he pass a title to his freehold by mere waiver." 3 Cooley on Taxation (4th Ed.) § 1412, p. 2798. See, also, upon the same subject, Scales v. Alvis, 12 Ala. 617, 620, 46 Am. Dec. 269; Blackwell on Tax Titles (5th Ed.) § 138, at page 130, and section 451, at page 409.

Upon the authority of the case of Gottstein v. Kelly, supra, the judgment in the present action is hereby reversed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.

207 Cal. 90

SAIKI v. HAMMOCK et al. (L. A. 9217.)★

Supreme Court of California. April 19, 1929.

As Modified on Denial of Rehearing, May 16, 1929.

Aliens ⟹6(1)—Noneligible alien's transfer to eligible person of rights under contract to purchase realty before 1920 Alien Land Act became effective held valid (Alien Land Law 1913; Alien Land Law 1920).

Though whatever right or title in residence property Japanese ineligible alien may have acquired by payment in full of purchase price was subject to escheat to state, under Alien Land Law 1913 (St. 1913, p. 206), he nevertheless possessed right to transfer right and interest thus obtained to an eligible person, and his transfer thereof to his minor son, who was a native-born citizen of state, prior to adoption and taking effect of Alien Land Law 1920 (St. 1921, p. lxxxiii), was a legitimate transaction, entitling assignee to compel specific performance of contract as though he had been original and direct beneficiary of agreement for purchase of realty, Act 1920 not being retroactive.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Mori Saiki, by T. Saiki, his guardian ad litem, against Luke Hammock and others. Judgment for plaintiff, and defendants appeal. Affirmed.

William A. Alderson, of Los Angeles, for appellants.

H. C. Hopkins, L. E. Dadmun, and J. Marion Wright, all of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment of the superior court in and for the county of Los Angeles in an action instituted by the plaintiff, through his guardian ad litem, to quiet title as against certain alleged claims of the defendants in and to certain property described in the complaint. An amended complaint was later filed, which included a demand on the part of the plaintiff for specific performance, and the action was tried upon the amended complaint and the answer of the defendants thereto, together with a cross-complaint, wherein the defendants sought to have the title of certain of the defendants quieted to said land. The facts of the case, which were in the main undisputed, are these:

On or about June 9, 1920, one T. Saiki, who is the father and guardian ad litem of the plaintiff, and who is a Japanese alien, entered into a contract for the purchase by and sale to him of the real estate described in the complaint for the price of $4,500; the defendants Luke Hammock and Hannah Hammock being at the time the owners thereof and the other parties to said contract. The sum of $50 was paid by T. Saiki as a deposit and part payment upon account of said contract upon the date thereof, and the sum of $4,450, being the balance of the purchase price, was to be paid within 60 days thereafter. The said balance due upon the contract was within said time paid to and received by said defendants, who thereupon delivered to T. Saiki the possession of said property. Thereafter, and on September 9th, T. Saiki assigned to his minor son, Mori Saiki, the plaintiff herein, all of his right, title, and interest in and to said contract and in and to the property described therein. Immediately thereafter the plaintiff, by his guardian ad litem, demanded of the Hammocks, but was refused, a deed to said real estate; whereupon the present action was instituted against the defendants Luke and Hannah Hammock and certain other defendants who are sued in the original and amended complaint by fictitious names.

The defendant Luke Hammock answered separately, setting forth that in the meantime his wife, Hannah Hammock, had died, and that he had succeeded to her community interest in said property. The answer of said defendant, while admitting the payment to him by plaintiff's assignor of the aforesaid sum of money as the purchase price of the property, denies that the plaintiff or his assignor has or ever had any interest or estate in the property. The said defendant further, for want of information or belief, denies the assignment of said contract by T. Saiki to the plaintiff herein. By way of affirmative defense said defendant alleges that, at the time of the execution of the contract with T. Saiki, the latter was a subject of Japan and an alien ineligible to citizenship under the laws of the United States, and was therefore disqualified from owning, holding, possessing, or transferring any interest in real estate of the character of that described in the complaint herein under the laws of the state of California and the treaty between the United States and Japan. The said defendant denies that either himself or his wife had any knowledge of the fact that T. Saiki was such ineligible at the time that they entered into said contract, and also at the time when they received the entire purchase price of the property as provided by the terms thereof. He further alleges that, upon becoming informed that T. Saiki was an ineligible alien, he offered to return to him the entire purchase price of the property, which, however, the latter refused to receive. He admits that T. Saiki was given possession of the real estate at the time of the payment by him of the purchase price thereof, and that he continued in possession, notwithstanding the fact that the same is residential property, which T. Saiki as an ineligible alien is not entitled to

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★Rehearing denied.

hold or possess. Said defendant then proceeds to allege that prior to the commencement of this action, and for a good and valuable consideration, he had conveyed all of his right, title, and interest in said property to his codefendants, Ygnacio Atanay and Elisa A. Atanay, and that his said codefendants have been and now are the owners of said property, to the exclusion of any right, title, or interest of the plaintiff herein.

The defendants Ygnacio Atanay and Elisa A. Atanay have also appeared and filed their separate answer and cross-complaint herein, wherein in their said answer they repeat practically the averments of the answer and affirmative defenses of the defendants Hammock herein, and which are by reference adopted in their cross-complaint. They allege themselves to be the owners in fee and entitled to the possession of said real estate, and pray that the court, as against the plaintiff, should so decree. To the cross-complaint of said latter defendants the plaintiff filed an answer, denying that the cross-complainants were the owners or entitled to any interest in said real estate.

Upon the submission of the cause the court made its findings of fact and conclusions of law, wherein it found the facts substantially to be as those above stated, and further found that on September 9, 1920, T. Saiki had assigned and transferred to the plaintiff Mori Saiki, his minor son, a native-born citizen of the state of California, all his right, title, and interest in the aforesaid contract for the purchase of said real estate, and that said Mori Saiki had thereby become, and had ever since been, and still was the owner thereof, and of all of the interest, right, and title of T. Saiki in and to the whole of said real estate. The court further found that the purchase price of said real estate, as specified in said contract, was at the time of the execution thereof, and had ever since been, the reasonable market value of the property, and that the contract was in all respects a fair, reasonable, just, and equitable agreement between the parties thereto. The court further found that subsequent to September 9, 1920, defendant Luke Hammock had purported to convey the legal title to said real estate unto his codefendants Atanay, but that whatever title or interest said defendants Atanay took by virtue of said conveyance they took with full notice and knowledge that the defendants Hammock had prior thereto executed to T. Saiki the contract above referred to for the purchase of said property, and had fully received the purchase price thereof, and had thereupon delivered to T. Saiki the possession of said real estate.

As conclusions of law from the foregoing findings of fact, the court found that the plaintiff Mori Saiki was and ever since September 9, 1920, had been the owner in fee simple and entitled to the possession of said real estate, and that neither said defendants nor any of them had any right, title, or interest therein, and that the plaintiff was entitled to have a conveyance of said property executed to him by the defendants herein, and that in the event of their refusal to execute such conveyance a commissioner should be appointed by the court, with full power and authority to execute the same. The judgment, following the findings and conclusions of law, was duly made and entered on November 12, 1925, and it is from such judgment that the defendants have taken and now prosecute this appeal.

The contract between T. Saiki and the defendants Luke and Hannah Hammock was made and entered into on June 9, 1920, and the assignment thereof to his minor son, the plaintiff herein, occurred prior to the adoption and taking effect of the Alien Land Law of California, known as the Alien Land Act of 1920 (St. 1921, p. lxxxiii), and which became effective in December of that year. It is undeniable, therefore, that the law applicable to these transactions is the Alien Land Law enacted by the Legislature of California in the year 1913. This being so, the validity of the contract in question and the assignment thereof by T. Saiki to his minor son, Mori Saiki, a native-born citizen of California on September 9, 1920, is to be governed by the decisions of this court recently rendered bearing upon the validity of such an agreement and also of the assignment thereof to persons eligible to take the title to property of this character under the terms of the act of 1913. It is to be noted that the trial court, while it has found that the original contract for the purchase of said real estate was made and entered into with T. Saiki, a Japanese alien, it has also found that the assignment thereof to his minor son, Mori Saiki, on September 9, 1920, was in all respects regular, and that thereby the entire interest of T. Saiki in and to said agreement and in and to the property described therein was regularly transferred to his said minor son.

It would therefore seem that the cases of Estate of Yano, 188 Cal. 645, 206 P. 995, In re Akado, 188 Cal. 739, 207 P. 245, Mott v. Cline, 200 Cal. 434, 253 P. 718, and Suwa v. Johnson, 54 Cal. App. 119, 203 P. 414, cover every phase of the question presented for our consideration upon this appeal, and that any consideration of authorities from other jurisdictions or of cases decided with relation to alien land laws differing in material respects from the California Alien Land Act of 1913 (St. 1913, p. 206), as interpreted by this court in the foregoing cases, has been rendered unnecessary to the determination of this particular appeal. It would further appear to be undeniable that the Alien Land Act of 1920, and which became effective in

December of that year, and which in no respect was made retroactive, can have no effect in the determination of the issues presented upon this appeal. The reasoning and conclusion of the trial court to the effect that, although T. Saiki was an ineligible alien at the time of his entering into the contract in question, and although whatever right or title in or to said property he may have acquired by the payment in full of the purchase price of said property was the subject of escheat to the state under the act of 1913, he nevertheless possessed the right to transfer his right and interest thus obtained therein to an eligible person, and that his transfer thereof to his minor son was, under the findings made by the trial court a legitimate and permissible transaction, is fully sustained by the foregoing authorities.

It follows that the plaintiff became, by virtue of said assignment, as fully entitled to maintain this action and to compel the specific enforcement of the foregoing agreement as though he had been the original and direct beneficiary of the agreement for the purchase of said real estate.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SHENK, J.

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206 Cal. 738

Geo. W. ALLEN, Administrator of Estate of John B. Ryan, Sometimes Known as Jack Ryan, Deceased, Plaintiff and Appellant, v. W. C. WACHTER and J. L. Taylor Company (a Corporation), Defendants and Respondents. (L. A. 9388.)

Supreme Court of California. March 26, 1929.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Jas. W. Glassford, of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondents.

LANGDON, J. This is an appeal from a judgment in which it was determined that the defendants were the owners and entitled to the immediate possession of a large wooden structure known as a "cantaloupe shed," located on leased ground at Imperial, Cal. The contest was between the public administrator, as the personal representative of John B. Ryan, deceased, a former owner of the property, and the defendants, who alleged that deceased had transferred the property to them before his death in payment of an indebtedness due to defendants and equal to the value of the shed.

The appeal presents merely one question of fact: Whether or not the evidence sustains the finding that the transfer of the property from decedent to defendants, by duly executed bill of sale, constituted a sale under all the facts and circumstances. We are not disposed to discuss the evidence in detail; it is apparent that it is not convincing. There are conflicting inferences which might be drawn from the record and the trial court has resolved the conflict in favor of the defendants. In view of the fact that the burden rested upon the plaintiff, the defendants being in possession and having a bill of sale, valid on its face, we cannot say this action of the trial court was not justified.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

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207 Cal. 8

JOERGER v. PACIFIC GAS & ELECTRIC CO. et al.★

SAME v. MT. SHASTA POWER CORPORATION et al.

(Sac. 3865.)

Supreme Court of California. April 9, 1929.

Rehearing Denied May 9, 1929.

1. Action 🔑50(4)—Causes of action, one of which affects all defendants, may be joined, notwithstanding others may affect only some of defendants, where all parties are concerned in main purpose of litigation (Code Civ. Proc. § 427).

Notwithstanding language of Code Civ. Proc. § 427, if one of causes of action affects all of parties, it is no objection that other causes of action affect only some of them, where all the parties are concerned in the main purpose of the litigation, in which case it is not material that they are all affected alike or in the same manner or degree.

2. Appeal and error 🔑1170(4)—Judgment on merits will not be reversed for misjoinder of parties or causes, unless it appears that substantial prejudice has resulted (Const. art. 6, § 4½).

When a case has been tried and judgment rendered on merits, reversal for misjoinder of causes or parties will not be ordered, in view of Const. art. 6, § 4½, unless it appears that some substantial rights of the demurrant have been prejudicially affected.

3. Appeal and error 🔑161—Interrelated corporations represented by same counsel waived objections to misjoinder by appealing only from portions of judgment under which they received no benefits.

Where defendant companies, interrelated and represented by same counsel, received substan-

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★Rehearing denied.

tial benefits under parts of judgment which have become final, and appeal only from other portions, they will be *held* to have waived objection of misjoinder of causes and parties.

4. Trial 🔑345—Defendants, not objecting that form of verdict submitted did not segregate damages as to defendants, could not raise objection after verdict.

Objection of failure of verdict to segregate damages as between several defendants was waived, where no suggestion was made, when court announced form of verdict which he would submit, that such form was insufficient or uncertain.

5. Waters and water courses 🔑152(10)—Quantity of water required to irrigate land is question for court, to be determined on evidence of circumstances.

The quantity of water necessary for irrigation of particular lands is one of fact for the court in a given case to determine on evidence presented, depending on many different conditions.

6. Waters and water courses 🔑143—No exact uniform rule for computing duty or reasonable quantity of water for irrigation can be applied in all cases.

There can be no exact uniform rule for computing duty or reasonable quantity of water for irrigation to be applied in all cases alike.

7. Waters and water courses 🔑143—Greatest public duty from public waters in interest of agriculture and other beneficial purposes is required by public policy (Civ. Code, § 1411).

Under Civ. Code, § 1411, public policy requires the highest and greatest public duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes.

8. Waters and water courses 🔑143—Diversion of water in excess of amount reasonably necessary, no matter how long continued, confers no rights to excess (Civ. Code, § 1411).

Acquired right in waters is limited, in view of Civ. Code, § 1411, to amount reasonably necessary for beneficial purpose for which diverted, and no title can be acquired to that part of diversion, no matter how long continued which is in excess of such needs.

9. Waters and water courses 🔑143—Long-continued use of given quantity of water may raise presumption of necessary and beneficial use of that amount.

Long-continued use of given quantity of water by appropriation may raise a presumption of necessary and beneficial use of that amount; it not being reasonable to suppose that appropriator would injure his land by use of excessive amount.

10. Waters and water courses 🔑143—Appropriator is not required to use best methods of irrigation or take extraordinary precautions to prevent waste.

Appropriator is not bound to adopt best method for utilizing water or take extraordinary precautions to prevent waste, but, as long as he makes reasonable use of water according to custom of locality, other users cannot complain that his methods are wasteful.

11. Waters and water courses 🔑143—Appropriator is not required to abandon flood system of irrigation common to that locality because of waste or in order that others may benefit.

Owner of hilly and porous lands, marked by numerous depressions, irrigating by means of the flood system, is not required to abandon such method common to that locality, or is not to be deprived of the quantity of water appropriated and necessary under that method because of waste in order to benefit others.

12. Appeal and error 🔑994(3), 1012(2)—Weight and credibility of witnesses are for trial court, whose conclusion, supported by substantial evidence, will not be disturbed.

Questions of weight and credibility of witnesses are for the trial court, and its conclusion will not be disturbed, where it has the support of substantial evidence.

13. Waters and water courses 🔑152(8)—Conflicting testimony of experts and practical farmers held to support findings of trial court as to quantity of water reasonably necessary for irrigation.

Conflicting evidence of experts and practical farmers as to quantity of water necessary to irrigate plaintiff's lands *held* to support findings of trial court.

14. Waters and water courses 🔑145—Water right may be enlarged in same manner as new appropriation may be made.

A water right may be enlarged in the same manner as a new appropriation may be made.

15. Waters and water courses 🔑152(8)—Evidence of quantity of water used for prescriptive period held to sustain court's finding, irrespective of amount appropriated by predecessor in title.

Evidence showing amount of water actually used for irrigating plaintiff's lands for more than prescriptive period before commencement of action sufficiently sustained court's findings, irrespective of amount appropriated by plaintiff's predecessor in title.

16. Waters and water courses 🔑77—Evidence of pollution held to support verdict for damages for lower user.

Evidence of pollution of water rendering it unfit for domestic or dairy purposes by upper appropriator and riparian owner *held* to sustain verdict for damages for lower user.

17. Waters and water courses 🔑65—Upper riparian owner cannot use water for generation of electricity so as to seriously injure property and rights of lower user.

An upper riparian proprietor has no right to use water in the generation of electricity in such manner as to seriously and substantially injure the rights and property of a lower owner and user.

18. Waters and water courses 🔑75—Pollution of stream rendering water unwholesome is nuisance, which equity will enjoin, and for which lower riparian owner is entitled to redress.

Any use of stream which materially fouls and adulterates water, or deposit or discharge therein of filthy or noxious substances impairing value of water for ordinary purposes of life, or anything that renders water less wholesome than when in ordinary state, constitutes nuisance, which equity will enjoin, and for which lower riparian owner, injured thereby, is entitled to redress.

19. Evidence 🔑18—It is common knowledge that pure and wholesome water for domestic and farming use is valuable asset, materially affecting farm values.

It is common knowledge that pure and wholesome water for domestic uses and in farming operations is a valuable asset, and that its presence or absence materially affects value of farm property.

20. Waters and water courses 🔑84, 140—Appropriator at time lands at diversion point were part of public domain acquires rights of continued flow of water in original purity prior to rights of subsequent riparian owner.

One who acquires by appropriation the right to use waters at a time when lands at point of diversion were part of public domain has the right to a continued flow of water in its original purity and amount prior and superior to rights of riparian owners subsequently acquiring lands at point of diversion.

21. Waters and water courses 🔑74—Any use which defiles or corrupts water, impairing usefulness for purpose of prior appropriator, is remediable at law and in equity.

So far as the rights of a prior appropriator are concerned, any use which defiles or corrupts the water so as to essentially impair its priority and usefulness for purpose appropriated by prior appropriator is an invasion of his private rights, for which he is entitled to remedy both at law and in equity.

22. Evidence 🔑542—County health officer and physician, not bacteriologist, held qualified, without chemical analysis, to testify that water supply was unfit for domestic use.

Physician and county health officer *held* qualified to testify as to fitness for domestic use of plaintiff's water supply as against objection that he was not bacteriologist and had made no analysis of water; it not requiring bacteriologist to determine whether water is muddy, full of algæ and bugs, and therefore unpalatable.

23. Waters and water courses 🔑152(7)—Testimony that all water used on plaintiff's lands were necessary to produce maximum crops held admissible.

Evidence that all waters used by plaintiff for irrigation were necessary to produce maximum crops, based on their experience or judgment, *held* admissible without reference to amount of water by actual measurement used.

24. Appeal and error 🔑703—On appeal under alternative method, errors in instructions given are not reviewable, where transcript does not contain requested instructions or reveal which instructions were given on court's initiative.

On appeal prepared under alternative method, error predicated on instructions given is not reviewable, where transcript does not contain copies of requested instructions, and does not reveal which instructions were given by court on its own initiative.

25. Pleading 🔑380—Evidence of crop damages subsequent to bringing of water right suit, but due to unlawful acts committed prior to filing amended and supplemental complaint, held admissible (Civ. Code, § 3283).

Under Civ. Code, § 3283, evidence of damage to plaintiff's crops subsequent to commencement of action was properly received, where such damage was in consequence of unlawful acts of defendants committed prior to filing of amended and supplemental complaint.

26. Damages 🔑62(3)—Victim of continuing nuisance need not take expensive measures to prevent further injury and possibly minimize damages.

The rule that plaintiff must minimize damages due to another's negligence does not require one suffering from continuing nuisance to take active measures, involving considerable expense, which may or may not be practical, to prevent further injury in order to possibly minimize damages for which wrongdoer may be liable.

27. Damages 🔑62(3)—Water user held not required to install filter to minimize damages, in absence of evidence of practicability and expense.

Appropriator of water *held* not required to install filter to minimize damages from defendant's pollution of stream, in absence of showing that such filter could be installed at reasonable expense or would be practicable.

28. Waters and water courses 🔑264—Evidence of cost of concrete flume, and that it was necessary to restore ditch to condition prior to defendants' acts, held admissible, notwithstanding ultimate finding that plaintiff was entitled to less water than claimed.

Where evidence tended to show that defendants had destroyed plaintiff's ditch, evidence that concrete flume was necessary to put diversion system in as good condition as it was prior to defendants' acts, and evidence as to cost of such flume, *held* admissible, notwithstanding ultimate finding that plaintiff was entitled to less flow than he claimed.

29. Waters and water courses 🔑264—Owner of ditch destroyed by defendants' wrongful acts is entitled to restoration of property destroyed.

Defendant whose ditch was destroyed by defendants' wrongful acts *held* entitled to damages measured by the cost of restoration of the property destroyed.

30. Waters and water courses 🔑264—Defendants destroying ditch and making impossible reconstruction of earthen ditch cannot exclude evidence of cost of restoration not limited to that of earthen ditch.

Defendants, having destroyed plaintiff's ditch, cannot object that evidence of cost of restoration should have been limited to restoration of ditch of character of the one destroyed, which was rendered impossible by defendants' acts; plaintiff being entitled to restoration in manner that would meet changed conditions.

31. Evidence 🔑450(3)—Deed to land and riparian rights held not ambiguous so as to permit parol evidence of parties' intention.

Deed of "all that portion of the southeast quarter of section 20 lying and being west of a line running along the east bank of Hat creek and following the water's edge," followed by statement of parties' intention to transfer all riparian rights by reason of ownership in said legal subdivision of land particularly described, *held* not uncertain or ambiguous of description as to what was intended to pass thereunder so as to render admissible parol evidence of parties' intentions.

32. Deeds 🔑111—Deed passes only what is described in grant.

Only that passes by deed to realty which is described in the grant.

33. Evidence 🔑448—Parol evidence is admissible to interpret deed only where intention of parties, through fraud, mistake, or uncertainty, is left in doubt.

Parol evidence is admissible to show intent of parties to deed, where, through fraud or mistake, or because of uncertainty of terms of deed, the intention of the parties is left in doubt.

34. Evidence 🔑385—Meaning not found in instrument cannot be given under guise of construction or explanation (Code Civ. Proc. § 1856).

In view of Code Civ. Proc. § 1856, a meaning cannot be given to an instrument under the guise of construction or explanation which is not to be found in the instrument itself.

35. Waters and water courses 🔑131—Appropriator may acquire prescriptive right to divert and use water on land that he does not own, and user may be by claimant or his lessee or tenant.

An appropriator of water may acquire prescriptive right to divert and use the same from a stream on land that he does not own, and this user may be either by the claimant or by one holding under him as lessee or tenant.

36. Waters and water courses 🔑144—Rental and sale of water is beneficial use, but quantity claimed by appropriator must have been actually applied to beneficial purpose and reasonably necessary.

Rental and sale of water is a beneficial use, but the quantity claimed must not only have been actually used, but must have been reasonably necessary and actually applied to beneficial purpose.

37. Waters and water courses 🔑144—No prescriptive right to appropriate water for use on lands of others can be acquired by user without application to beneficial purpose.

No prescriptive right to appropriate water for use on lands of another can be acquired without beneficial use, regardless of period of time user may have been continued.

38. Waters and water courses 🔑152(8)—Evidence of permissive use of seepage and waste waters from predecessor's ditch held to sustain finding that plaintiff was not entitled to use waters of ditch for irrigation.

Evidence as to permissive use by plaintiff of seepage and waste water from ditch of predecessor in title on lands then owned by plaintiff *held* to sustain finding that plaintiff was not entitled to use waters of such ditch to irrigate such lands.

39. Waters and water courses 🔑130—Permissive use of waste or seepage water gives user no permanent right to continuance of supply.

Permissive use of seepage and waste waters creates no right in ditch, and lands so irrigated acquired no right appurtenant to ditch, since no permanent right can be acquired to have waste water supply continued either by appropriation or prescription.

40. Appeal and error 🔑1010(1)—Findings of fact in water right suit, sustained by evidence, cannot be disturbed on appeal.

Findings of fact in water right suit, sustained by evidence, cannot be disturbed on appeal.

41. Waters and water courses 🔑152(8)—Finding that appropriator is entitled to stated quantity of water is unwarranted, in absence of evidence showing quantity of water actually used.

In the absence of evidence as to quantity of water actually used, finding of fact that appropriator is entitled to stated quantity of water for use on its lands cannot be sustained.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Louis P. Joerger against the Pacific Gas & Electric Company, the Mt. Shasta Power Corporation, and others. The action was dismissed as to the defendant first named, and, from the judgment rendered, both plaintiff and the remaining defendants have appealed. Reversed in part, and in part remanded.

Jesse W. Carter, of Redding, and Annette Abbott Adams, of San Francisco, for plaintiff.

Thos. J. Straub, of San Francisco, and Chenoweth & Leininger and Carr & Kennedy, all of Redding, for defendants.

TYLER, Justice pro tem. Action to quiet title to certain lands and water rights and for damages for interference therewith. The transcript is voluminous, consisting of many thousands of pages. The questions presented are numerous, the briefs and supplements thereto being made up of over 3,000 pages. A complete recital of the pleadings and the facts would extend our opinion to undue proportions. We will therefore state only those which, in our opinion, are necessary to a full understanding and proper disposition of the questions here presented. The issues are framed upon an amended and supplemental complaint containing four separate counts or causes of action, and an amended answer of defendants Mt. Shasta Power Corporation, hereinafter referred to as the power company, and the Red River Lumber Company, hereinafter referred to as the lumber company.

The first three causes of action are of equitable cognizance, involving the quieting of title to lands and certain water rights owned by the plaintiff, and the fourth relates to damages alleged to have been suffered by reason of numerous torts or trespasses upon, and interference by defendants with, such lands and water rights. The case was tried before the court and a jury. The issues raised by the first three counts were considered equitable, and were decided by the trial judge, and the issue as to damages raised by the fourth count was submitted to, and decided by, the jury. The Joerger ranch is owned by plaintiff, and is a consolidation of what was at one time four different ranches. These ranches were known as the "Tucker Place," the "Grant Place," the "Smith Place" or "Smith-Braden" or "Smith-Schnittger Place," and the "Braden Place," and they were acquired by plaintiff during the years 1917 and 1920, the entire acreage consisting of some 1,680 acres. The lands are situated in Shasta county, and plaintiff has been engaged in farming portions thereof since the year 1917. A stream, known as Hat creek, flows through a portion of plaintiff's land in a northwesterly direction, and Pit river flows along the northeasterly boundary thereof, and the two streams unite a short distance beyond the northwestern boundary of said lands. At the time plaintiff acquired this property, and for many years prior thereto, portions of all of these ranches, approximating some 530 acres, so it is alleged, had been irrigated with water from Hat creek, conveyed onto the land by means of two ditches. One of these ditches diverted water from the west side of Hat creek, and conveyed it in a northerly direction, and was known as the "Tucker-Fitzpatrick Ditch" or "Tucker-Joerger Ditch." The other diverted water from the east side of said creek, and conveyed the same in a like direction, and was known as the "John Smith Ditch." Plaintiff's entire tract is somewhat irregular, and a large portion of the cultivated area consists of hills, knolls, swales, and depressions, which have been cleared and cultivated without any attempt being made to level the land for scientific irrigation, its character rendering this impossible. The system employed by plaintiff and his predecessors in interest to irrigate the cultivated portion is known as the flood system. In the operation of this system, large quantities of water are required in order to cover the irregular surface of the land, which quantities plaintiff claims to have acquired by user. The defendant Mt. Shasta Power Corporation is a subsidiary corporation to the Pacific Gas & Electric Company. These corporations are public utilities, engaged in the manufacture and distribution of electricity for public use. The lumber company is a private corporation, to which the power company transferred its plant upon completion, but continued its operation under some agreement with the lumber company. These companies dispute, in part, plaintiff's claim to the waters.

The first count of the complaint, after alleging ownership in plaintiff and his predecessors in interest of the land in question and of the Tucker-Fitzpatrick ditch for over 30 years, recites that Hat creek is, and from time immemorial has been, a natural stream, and is one of the largest tributaries of Pit river, into which it flows; that plaintiff and his predecessors in interest have by right diverted from Hat creek 1,000 inches of water, measured under a 6-inch pressure, for irrigation, watering stock, and domestic purposes, and that said water is appurtenant to a portion of plaintiff's lands; that the power company threatens to divert all the water of Hat creek. The second cause of action alleges ownership of the John Smith ditch and the right to divert from Hat creek through said ditch 1,600 inches of water, under a 6-inch pressure, for like purposes as stated in the first cause of action; that such right is likewise appurtenant to plaintiff's land, and threatened diversion by defendants is again alleged. The third cause of action alleges ownership in plaintiff of the Joerger ranch, and recites the whole is riparian to Hat creek, and that plaintiff is entitled to 2,600 inches of water as necessary for irrigation, stock, and domestic purposes. It is then further alleged that plaintiff and his predecessors in interest have at great expense cultivated and irrigated large areas of the ranch, and constructed ditches and other works so as to produce hay, feed, pasturage, vegetables, and other crops, and that in doing so they diverted, for more than 20 years under a claim of right, 2,600 inches of water under a six-inch pressure, and that such amount was and still is necessary to irrigate plaintiff's riparian lands, and plaintiff is entitled to such flow. Further allegations in this count recite that, since the commencement of this action, defendants have constructed a power plant on lands owned by one of them, situated on Hat creek, immediately above the boundary line of plaintiff's ranch, and by means of a dam, flume, and pipe line have diverted substantially all of the waters of Hat creek, and run the same through the power house for the generation of electricity; that during the course of construction of the dam, flume, and other works, and since the same were constructed, defendants have caused large quantities of débris, dirt, and other substances to pollute the waters of Hat creek; that they have stored the water and turned the same loose with great violence, washing trees and débris down on plaintiff's lands, and have shut off the water of said creek and thereby destroyed natural barriers between fields, permitting stock to pass back and forth without let or hindrance. The fourth cause of action incorporates by reference certain paragraphs of the third count, and recites the ownership in plaintiff and his predecessors in interest of the Tucker-Fitzpatrick and John Smith ditches, and the acquisition and right of plaintiff to divert 2,600 inches of water through the same; that defendants have caused earth, rock, and débris to fill up the ditches and the intakes, and interrupt the flow of water therein, and have caused dirt and filth to enter the ditches, thereby polluting the waters. Defendants are further charged with having cut the banks of the ditches and diverted the waters, and with having installed a pipe line under one of the ditches, making it impossible for plaintiff to go upon and over the same for the purpose of cleaning and repairing it. It is also charged that defendants have constructed a flume around the mountain side above plaintiff's ditch; that said mountain side is very steep, and, when water is turned into the flume, the seepage therefrom will cause slides, and cover up and destroy plaintiff's ditch, and cut off his water supply. The removal of earth and rock from the hillside on which defendant's power plant is constructed and the dumping of the same on plaintiff's land and in Hat creek is also complained of. Further allegations are to the effect that, since the commencement of the action, and during the years 1921 and 1922, defendants have diverted the water of Hat creek and diminished the flow thereof, in consequence of which plaintiff's crops have been destroyed. And finally it is charged that defendants have caused the waters to become so polluted that they are unfit for watering stock, in consequence of which plaintiff has been compelled to discontinue his dairy and go out of business. Plaintiff prays that his title to the lands and his right to 2,600 inches be quieted, and that an injunction issue restraining defendants from interfering with his vested rights, and that he be awarded $140,000 damages. To this complaint each of the defendants, the Pacific Gas & Electric Company and the power and lumber companies, filed and presented separate demurrers. The gas company was dismissed from the action. The demurrers of the other defendants were directed mainly to the misjoinder of parties and causes of action. The demurrers were overruled.

Defendants thereupon filed separate answers. They deny and allege as follows: As to the first cause of action they deny complete ownership in plaintiff of the Tucker-Fitzpatrick ditch, its capacity, or that plaintiff has irrigated the amount of land he claims; allege its capacity and the right of defendants to a portion of the waters in both ditches to irrigate their lands; deny that plaintiff has diverted 1,600 inches of water through the John Smith ditch, or that he requires such amount; deny that such ditch is appurtenant to the Tucker lands, or that it has the capacity alleged by plaintiff; deny that the Braden place is riparian to Hat creek, and allege the lumber company to be the owner of the bed and banks of said creek as the same flows through certain lands; deny that all the lands described in the second and third causes of action are riparian to said creek, and set forth the portions that are riparian. As to the third cause of action they allege that not more than 230 acres of plaintiff's ranch have been irrigated, and deny that plaintiff has diverted 2,600 inches of water; allege diversion of water by defendants, and set forth the construction of the plant by the power company and its lease to the lumber company; deny the acts of damage complained of. As to the fourth cause of action, they deny the resulting damage or that any will occur in the future; deny that the flow of water is impeded or polluted, and allege that a reasonable riparian use of the same is being made by defendants.

By way of separate defense they allege ownership in the lumber company of certain riparian lands and ownership of all the waters in Hat creek, except the amount to which plaintiff is entitled; allege the diversion of the water onto the riparian land, and that it is conducted through a flume to the power house and returned to Hat creek on the riparian lands; allege that the electricity generated is distributed to the use of the public; allege that 13.4 cubic feet have been permitted to flow in the Tucker ditch and 14.4 in the John Smith ditch; allege the diversion of excessive amounts of water by plaintiff, and that such excessive amounts have deprived defendants of the use thereof, and caused them irreparable injury. As a second defense they set forth ownership of the bed and banks of Hat creek from the northern boundary of plaintiff's land to the confluence of Hat creek with Pit river, and the ownership of certain parts of the bed and banks of Pit river, and they set forth the details of the construction of pit No. 3 power development; allege that all the waters naturally flowing in Pit river and its tributaries, including Hat creek, are reasonably needed for the beneficial purpose of the generation of electricity on said riparian lands involved in pit No. 3. By a third separate defense the power company sets up the plea of the statute of limitations. The prayer asks that the lumber company be decreed to be the owner of the riparian lands in sections 20 and 29. and, as such owner, that it has the right to use all the waters of Hat creek for the generation of electricity, subject to the right of plaintiff to take a reasonable amount, not to exceed 93 inches, during the irrigation season, and 2 miner's inches during the nonirrigation season, and for an injunction against plaintiff.

[1] At the close of the trial, the court made certain findings which, with the conclusions of law, cover many pages of the record. Plaintiff was awarded certain rights in the waters involved and damages in the sum of $40,000. Defendants were awarded an interest in certain of the lands and certain riparian rights. Both plaintiff and defendants have appealed from certain portions of the judgment. In order to avoid repetition, the various assignments of error will be stated where dealt with. The first claim made by defendants is that the trial court committed error in overruling their demurrers to the amended and supplemental complaint, as amended, for the reason that misjoinder of causes of action and of parties defendant appear on the face of that pleading. We have been cited to numerous cases by counsel for both parties upon this subject. We do not consider an extensive review of those authorities to be necessary. One of the objects of the reformed or code procedure is to simplify the pleadings and conduct of actions, and to permit the settlement of all matters of controversy between parties in one action, so far as may be practicable. The principal objection of defendants to the pleading is that some of the causes of action united in the fourth count are against the power company alone, while others are against both defendants jointly. It has been held in this state that, notwithstanding the language of section 427 of the Code of Civil Procedure, if one of the causes of action affects all of the parties, it is no objection that other causes of action affect only some of them, where all the parties are concerned in the main purpose of the litigation. In such case it is not material that they are all affected alike or in the same manner or degree, for the reason the relief awarded, if any, may be properly adjusted between them. Hepler v. Wright, 35 Cal. App. 567, 170 P. 667. Of course, causes of complaint differing in their nature, and having no connection with each other, cannot be united. The object of this exception is to prevent the confusion and embarrassment which would necessarily result from the union of diverse and incongruous matters, but the exception has no application to a case embracing a variety of circumstances, so connected as to form one transaction, even though the parties are not equally affected. If equality or uniformity were required a large part of the reformed or code procedure relating to this subject would be swept away. To permit a joinder where possible makes manifestly for the expeditious disposition of litigation without working hardship to any party defendant, and for this reason statutes relating to joinder should be liberally construed, unless expressly forbidden, to the end that a multiplicity of suits may be prevented. It is well settled that judgment may be given against such of several defendants jointly charged as are shown to be liable and in favor of the others who are not.

[2, 3] It is equally well settled that, when a case has been tried and judgment rendered upon the merits, in order to warrant a reversal for misjoinder, it must appear that some substantial rights of the demurrant have been affected, some prejudicial error suffered by him, or he has no room for complaint. Alexander v. Central, etc., Co., 104 Cal. 537, 38 P. 410; Foerst v. Kelso, 131 Cal. 376, 378, 63 P. 681; Allen v. Globe Grain & Milling Co., 156 Cal. 286, 104 P. 305; 24 Cal. Jur. p. 880; section 4½ of article 6 of the Constitution has been applied to such a situation; Trask v. Garza, 51 Cal. App. 739–743, 197 P. 807. See, also, Hirshfelds v. Weill, 121 Cal. 13, 53 P. 402. Then again defendants have not appealed from the entire judgment. They received substantial benefits thereunder, which have become final. A waiver of the objection of misjoinder ought to be applied against them. Defendant companies are closely interrelated in the transaction upon which the action is based. They were represented by the same attorneys below, and are so represented here. Nothing appears from the record which indicates that either defendant has been injured or prejudiced by reason of any misjoinder, even assuming such to exist. Under such circumstances they should not here be heard to complain. Harker v. Southern California Edison Co., 83 Cal. App. 204, 256 P. 848.

[4] The same may be said of the further objection that failure to segregate damages between the defendants constituted error. In this connection it appears from the record that it was agreed between the parties that the questions of damages should not be determined by the trial court, but should be left to the jury. When the form of verdict was considered by the court in the presence of counsel for all parties, some question arose with reference to it, but it was finally agreed that the one adopted by the court should be given to the jury. Had defendants desired a different form, they should have asked for it. Assuming that they did not expressly agree to the form adopted, they could not

stand idly by, and, after the rendition of the verdict, then for the first time on appeal claim that, as they were not joint tort-feasors as to certain of the acts complained of, the damages should therefore have been segregated. At the time of the announcement of the form of verdict, defendants might have asked that it be made certain. Not having done so, they are concluded by their omission. Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Harker v. Southern California Edison Co., supra; First National Bank of Los Angeles v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64.

[5, 6] Defendants next complain that the amount of water awarded to plaintiff for the various purposes claimed is excessive, and not supported by the evidence. In this connection it is contended that the allowance of 2½ miner's inches per acre to plaintiff for the irrigation season, and 1¼ miner's inches per acre during the nonirrigating season for the preservation of the ditch and other purposes, is excessive and wasteful as a matter of law, and further that the findings in this particular are not supported by the evidence. It is further claimed that the finding as to the beneficial use made by plaintiff of the waters and the acreage for which he is entitled to take water for irrigation purposes is materially less than that found by the court, and the amount allowed to plaintiff for the generation of power in the operation of his dairy and other purposes is excessive, and the method employed wasteful. In this state there is no statute which definitely regulates the duty or amount of water reasonably necessary for irrigation. This being so, the question becomes one of fact for the court, in a given case, to determine upon the evidence presented to it. The question of what quantum of water is reasonably required for irrigation is necessarily a complicated one, depending, as it does, upon many different conditions. The character of the soil, the area sought to be irrigated, the climatic conditions, the location, quality, and altitude of the lands, the kinds of crops to be raised, and the length of the irrigation season, must all be taken into consideration and weighed, as well with such other conditions as may be peculiar to each particular case. Pabst v. Finmand, 190 Cal. 124, 211 P. 11. Under such circumstances it is apparent there can be no exact uniform rule for computing the duty or reasonable quantity of water for irrigation to be applied in all cases alike. Witherill v. Brehm, 74 Cal. App. 286, 240 P. 529; California Pastoral Co. v. Madera Irr. Co., 167 Cal. 78, 138 P. 718.

[7-10] It is, of course, the policy of the state to require the highest and greatest public duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes. Our Civil Code expressly so provides. Civ. Code, § 1411. There can be no question, therefore, that an acquired right in waters is limited to the amount that is reasonably necessary for the beneficial purpose for which it is diverted, and no title can be acquired to that part of a diversion which is excessive of such needs. In so far as the diversion exceeds such reasonably necessary amount, it is contrary to the policy of the law, and is a taking without right, and confers no title, no matter for how long continued. Big Rock Water Co. v. Valyermo Ranch Co., 78 Cal. App. 266, 248 P. 264. Defendants assert that an examination of all the California cases will reveal the fact that no decree has ever been upheld awarding more than one miner's inch per acre. This may be true, and yet such circumstance is not controlling, for this court cannot fix a limit beyond which a trial court may or may not go, or say, as a matter of law, that the amount allowed is excessive, irrespective of the evidence. As above stated, the amount of water necessary for beneficial use is a question of fact in each particular case. 1 Wiel on Water Rights, 523. The question is not to be determined by rule, but rather by the evidence presented to the court or jury. In passing, it may be said that, in the ascertainment of this fact, long-continued use of a given quantity of water by appropriation may raise a presumption of necessary and beneficial use, for it is not reasonable to suppose that one would destroy or impair the value of his land by the use of an excessive amount. California Pastoral Co. v. Madera Irr. Co., supra; Campbell v. Ingram, 37 Cal. App. 728, 174 P. 366; Stinson Canal Co. v. Lemoore Canal & Irr. Co., 45 Cal. App. 242, 188 P. 77. Nor is there merit in the claim that the method employed by plaintiff in diverting the water is unauthorized. While an appropriator can claim only the amount which is necessary to properly supply his needs, and can permit no water to go to waste, he is not bound, as here claimed, to adopt the best method for utilizing the water or take extraordinary precautions to prevent waste. He is entitled to make a reasonable use of the water according to the custom of the locality, and, as long as he does so, other persons cannot complain of his acts. The amount of water required to irrigate his lands should, therefore, be determined by reference to the system used, although it may result in some waste which might be avoided by the adoption of another or more elaborate and extensive distribution system. Farnham on Waters, § 675; Wiel on Water Rights (3d Ed.) § 481; Barrows v. Fox, 98 Cal. 63, 32 P. 811.

[11-13] The lands of plaintiff, as above pointed out, constitute a contiguous area along the knolls and sloping hillsides adjacent to Hat creek. The ground is hilly and porous, marked by numerous depressions, and is irrigated by turning the water upon the ground and permitting it to run over the slopes. This

is the character of system commonly used in the vicinity. There is no authority which requires an appropriator of water to change his system of irrigation so that others may perhaps be benefited thereby, assuming that the method may produce some waste. Barrows v. Fox, supra. The findings of the trial court as to the allowance of water and the beneficial use that plaintiff has made thereof for various purposes, and the area of land irrigated by him, except as hereinafter stated. find full support in the evidence. Many witnesses, both scientific and lay, testified concerning plaintiff's claims in this respect, and their testimony fully supports the findings of the trial court upon these subjects. We do not feel that it is incumbent upon us to go into a detailed analysis of the voluminous evidence in this connection, which consists of many hundred pages. Defendants call our attention to the fact that many of plaintiff's witnesses are farmers, and that their testimony is at variance with that of defendants' experts. Plaintiff, too, produced experts in support of his claims, but the trial court was not bound to accept the testimony of any of these witnesses to the exclusion of the farmers who were familiar with the character of the land and its needs. Their testimony was also entitled to be considered. It has been said that this character of testimony is of a higher quality than the mere opinion of an expert; that it is the difference between practice and theory, between experience and observation or examination. Stinson v. Lemoore, etc., supra. Moreover, questions of the weight of evidence and credibility of witnesses are for the trial court, and its conclusion will not be disturbed, where it has the support of substantial evidence.

[14-17] Equally without merit is the further objection that the allowance of the number of inches in the John Smith ditch exceeds the amount claimed by one of plaintiff's predecessors in her notice of appropriation. There is evidence to show the amount of water actually used for irrigation on plaintiff's lands for more than the prescriptive period, before the commencement of the action. An enlargement of a water right may be made in the same manner as a new appropriation. Defendants next complain that the claim for damages for the pollution of the water is not supported by the evidence. What we have said with reference to the sufficiency of the evidence to support the findings concerning the quantity and beneficial use of the waters to which plaintiff was entitled applies with equal force to this contention. Various witnesses testified as to the pollution and the resulting damage. It was shown that, by reason of defendants' activities, the water became alive with bugs and had green algæ growing therein, causing stagnation, in consequence of which it became unfit for domestic or dairy purposes, which caused plaintiff's premises to decrease $75,000 in value, and no attempt was made by defendants to contradict the amount of depreciation. Defendants' next contention is that, even assuming the quality of plaintiff's domestic and dairy water supply to have been depreciated by reason of their acts, nevertheless, as they are making a proper riparian use of the waters of Hat creek, and their rights are being exercised in a lawful and reasonable manner, any loss resulting to plaintiff is, under such circumstances, without redress. In other words, they contend that the generation of electricity is a lawful riparian use; that, as their riparian power is being created in a reasonable manner, any slight impairment of the quality of the water supply resulting therefrom must be borne by the lower riparian owners without complaint or redress, it being damnum absque injuria. This doctrine may properly be applied where the injury works slight inconveniences, or occasional annoyances. It has no application where the injury is appreciable. The evidence relied upon by plaintiff shows that the damage suffered by him was not slight, but on the contrary, was real and extensive, greatly exceeding the amount of damages recovered by him.

[18-20] The law is well settled that any use of a stream which materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substances that so far affect the water as to impair its value for the ordinary purposes of life, or anything that renders the water less wholesome than when in its ordinary state, will constitute a nuisance, which courts of equity will enjoin, and for which a lower riparian owner, injured thereby, is entitled to redress. Trevett v. Prison Ass'n, 98 Va. 332, 36 S. E. 373, 50 L. R. A. 564, 81 Am. St. Rep. 727; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 P. 557. Conceding, therefore, defendants' generation of power to be a riparian use, that fact does not entitle them to pollute the water to the injury of others entitled to it. Farnum on Waters, § 495, p. 1645; Mentone Irr. Co. v. Redlands L. & P. Co., 155 Cal. 323, 100 P. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222; 40 Cyc. pp. 593, 594; Fisher v. Feige, 137 Cal. 39, 69 P. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 P. 557. It is a matter of common knowledge that pure and wholesome water for domestic uses, and in farming operations, is a valuable asset, and its presence or absence materially affects the value of farm property, and such rights cannot be destroyed by a riparian owner in a stream to such an extent as to render the water unfit for use. Yolande Coal Co. v. Pierce, 12 Ala. App. 431, 68 So. 563. Then again, plaintiff's rights as an appropriator to the waters in the ditches were acquired when the lands at the point of diversion were part of the pub-

lic domain. Under these circumstances, plaintiff's right to a continued flow of the water in the ditches in its original purity is prior and superior to the rights of defendants as riparian owners. One of the essential elements of a valid appropriation is that of priority over others. Under this doctrine, he who is first in time is first in right, and, so long as he continues to apply the water to a beneficial use, subsequent appropriators may not deprive him of the rights his appropriation gives him, by diminishing the quantity or deteriorating the quality of the water.

[21] So far as the rights of the prior appropriator are concerned, any use which defiles or corrupts the water so as to essentially impair its priority and usefulness for the purpose for which the water was appropriated by the prior appropriator is an invasion of his private rights, for which he is entitled to a remedy both at law and in equity. 2 Kinney on Irrigation (2d Ed.) pp. 2069, 2070; 1 Wiel on Water Rights, § 524; Arizona Copper Co. v. Gillespie, 230 U. S. 46, 33 S. Ct. 1004, 57 L. Ed. 1384; Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769; Phœnix Water Co. v. Fletcher, 23 Cal. 482; Hill v. Smith, 27 Cal. 476; Antioch v. Williams Irr. Dist., 188 Cal. 451, 205 P. 688.

[22, 23] Defendants complain of the admission of the testimony of one Dr. White, a physician and health officer of Shasta county, as to the fitness for domestic use of plaintiff's water supply; it being claimed that he was not a bacteriologist and had made no analysis of the water, for which reasons he was not qualified to testify upon the subject. There is no merit in this objection. As county health officer, he was certainly qualified to testify as to his opinion concerning the condition of the water and its fitness for domestic use. It does not require a bacteriologist to determine this question or that water is muddy, full of algæ and bugs, and that its taste is unpalatable due to such causes. Nor is there any merit in the claim that the court erred in admitting the testimony of certain witnesses for plaintiff to the effect that all the waters in the ditches were used, and that they were necessary for the irrigation of plaintiff's lands. The testimony was confined to the knowledge of the witnesses that all the waters used were necessary to produce maximum crops. They made no attempt to testify concerning the amount of water used by actual measurement. Their testimony was based upon their experience or judgment as to the amount of water necessary to properly irrigate the land, and had nothing to do with, nor did it relate to the amount of water used by actual measurement, that fact being established by other evidence. The testimony was admissible for the purpose for which it was received. Pabst v. Finmand, 190 Cal. 124, 211 P. 11.

[24] Complaint is made of certain instructions given to the jury. Defendants are in no position to avail themselves of alleged errors in this respect. The instructions requested by plaintiff and defendants do not appear in the transcript herein, which contains only the instructions as given by the court. Upon an appeal prepared under the alternative method instructions offered at the trial and refused by the judge, in order to be available to an appellant for use upon appeal, should be included in the reporter's transcript and settled by the judge. Since the transcript contains no copies of requested instructions by the parties, and does not reveal which of the instructions were given by the court on its own initiative, defendants cannot here complain of error in the instructions. Martin v. Pacific Gas & Electric Co., 195 Cal. 544, 234 P. 321; Shannon v. Calmus, 70 Cal. App. 652, 234 P. 107. For all that appears, they may have been presented by defendants themselves. However, we have examined all the instructions, and find no error contained therein.

[25-27] The ruling of the court in the admission and exclusion of certain evidence is next complained of. In this connection it is first contended that the trial court erred in admitting testimony as to plaintiff's damages to his crops for the years 1923 and 1924, for the reason that such damages were not within the issues; they having occurred subsequent to the filing of the complaint. The evidence was properly admitted. It was offered and received in support of plaintiff's claim that damage to his crops for the period involved was in consequence of the unlawful acts of defendants committed prior to the filing of the amended and supplemental complaint. Under such circumstances plaintiff was entitled to recover for the damage resulting after the commencement of the action. Civ. Code, § 3283; Hicks v. Drew, 117 Cal. 305, 49 P. 189; Bryson v. McCone, 121 Cal. 153, 53 P. 637; Berry v. Bakersfield, 177 Cal. 206, 170 P. 415. Nor did the court err, as claimed, in excluding evidence to the effect that the pollution in the Tucker-Fitzpatrick ditch could be eliminated by the installation of a filter at a reasonable expense. It is no doubt the rule that, where one suffers injury by the carelessness of another, the one so suffering must go to some trouble to avoid or lessen the damage, if a temporary expedient or slight expense will do so. This rule, however, does not compel a person who, as here, is suffering from a continuing nuisance, to take active measures which involve considerable expense, and which may or may not be practical, to prevent further injury in order to possibly minimize the damage for which the wrongdoer may be liable. 20 R. C. L. p. 494; Suffolk Gold M. & M. Co. v. San Miguel, 9 Colo. App. 407, 48 P. 828; Pelham Phosphate Co. v. Daniels, 21 Ga. App. 547, 94 S. E. 847; Worthen, etc., v. White Spring Paper Co., 74 N. J. Eq.

647, 70 A. 468; Johnston v. City of Galva, 316 Ill. 598, 147 N. E. 453, 38 A. L. R. 1384. It appeared from the proffered testimony that the installation of the filter could not be accomplished by a reasonable outlay. Nor was there any attempted showing that it would be practicable, considering the quantity of water claimed by plaintiff. The conditions here existing, including the cost of the filter render the rule invoked by defendants inapplicable. Chambers v. Belmore Land, etc., Co., 33 Cal. App. 78, 164 P. 404.

[28-30] Defendants next complain of the admission of evidence as to the cost of a concrete flume at the head of the John Smith ditch, claimed by plaintiff to be necessary by reason of defendants' acts in obstructing the intake of the ditch. The diversion weir in Hat creek is upstream from the ditch, and prior to the diversion by the power company of the water through its plant, such company constructed a wooden flume from the face of the dam into the ditch, and the water therefrom was carried though this flume after the construction of Hat No. 2 power plant. It appeared in evidence that this flume was leaking, and would soon decay, and it was necessary to replace this wooden flume in order to have the diversion works of the ditch in as good a condition as they were prior to the operations of the power plant. Plaintiff produced an engineer who testified that a permanent flume was necessary, and estimated the cost thereof, of a size sufficient to carry 46 second feet of water, the amount claimed to have been formerly diverted. Defendants' objection to this testimony is that the cost of a structure sufficient to carry the amount of water beneficially used by plaintiff as found by the court constitutes plaintiff's measure of damages, and not the cost of replacement of a ditch of the capacity of the one that existed before its destruction. The testimony was admissible at the time it was offered, for there was evidence to show that plaintiff had enjoyed waters to the full capacity of the former ditch. Defendants having destroyed plaintiff's ditch, he was entitled to have it replaced by one of the capacity destroyed. Nor does the fact that the court ultimately found plaintiff to be entitled to a less flow than he claimed alter or change the situation. It does not lie with defendants to say what use plaintiff might or might not make of a ditch of the capacity of the one destroyed, nor are we in any position, to declare that he had a limited use for the same only. The measure of damages in cases of this character is the cost of restoration of the property destroyed. 8 Cal. Jur. 817. Nor is there any merit in the further claim that evidence of cost of restoration should have been confined and limited to that of the character of the one destroyed. The reconstruction of an earthen ditch was made impossible by defendants' acts, and plaintiff was entitled to one that would meet the changed conditions. Knoche v. Pratt, 187 S. W. 578.[1] Moreover, defendants produced no evidence upon the cost of replacement of a ditch of any dimensions.

Defendants further complain of the admission of evidence regarding cost of raising the sides of the concrete section of the Smith ditch as constructed by defendants, and the necessity for, and the cost of constructing, a concrete section in the Tucker ditch, which would carry the amount of water claimed by plaintiff. What we have said with reference to the Smith ditch disposes of this objection. There was evidence to show that the maintenance of this ditch in its original condition could no longer be maintained by reason of defendants' acts, and that a permanent structure was required to meet the changed conditions in order that plaintiff might be placed in his former condition.

[31] We will now consider the portions of the judgment from which plaintiff has taken an appeal. He first contends that the trial court erred in construing a certain deed, which construction, it is claimed, deprived him of certain rights to which he is entitled. A brief statement of facts is necessary for an understanding of the question involved in this objection. On October 21, 1907, Lincoln Braden was the owner of the east half of the southeast quarter, the southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter of section 20, township 36 north, range 4 east, M. D. B. & M., situated in Shasta county. Hat creek, in the state of nature, flowed through a portion of this land in a northerly direction. Where Hat creek enters the southern boundary of section 20, the entire stream is in the southeast quarter of the southwest quarter of said section, and it continues in its natural course through the said southeast quarter of this southwest quarter until near the northern boundary of said legal subdivision, when the creek makes an abrupt bend, and a portion of the channel thereof is situated in the southwest quarter of the southeast quarter of said section. On the date last mentioned Braden and his wife conveyed to one Jesse E. Frick "all that portion of the southeast quarter of section 20 * * * lying and being west of a line running along the east bank of Hat creek and following the water's edge." The deed further recites that the parties of the first part intend to and do convey all land lying west of the east bank of Hat creek in said legal subdivision of said land hereinabove referred to; the easterly boundary of the land hereby conveyed is intended to be a meandering line following the east bank of Hat creek and following the water's edge at ordinary stages of the water; and the parties of the first part hereby intend to convey and transfer all the riparian rights which they have or possess by reason of ownership in

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[1] 194 Mo. App. 300.

said legal subdivision of land hereinabove particularly described. The power company subsequently acquired this land as conveyed to Frick, and, at the time of the trial of this case, defendant lumber company was the owner thereof. On July 7, 1920, plaintiff herein purchased from Ella P. Braden, the successor in interest of Lincoln Braden, the east half of the southeast quarter, the southwest quarter of the southeast quarter, and all that portion of the southeast quarter of the southwest quarter of section 20, lying east of Hat creek, together with all water rights appurtenant thereto. It was plaintiff's contention at the trial that the deed from Braden to Frick conveyed only all that portion of the southeast quarter of the southwest quarter of section 20, lying west of a line running along the east bank of Hat creek and following the water's edge, together with all the riparian rights pertaining to this subdivision, and that Braden retained the riparian right which was a part of, and attached to, the southwest quarter of the southeast quarter of section 20, by virtue of the fact that Hat creek naturally flowed through, over and across said last subdivision, and plaintiff subsequently acquired this land under his deed from Ella P. Braden. It was defendants' contention, and the trial court found, in construing the deed from Braden and his wife to Frick, that the grantors intended to and did convey a greater estate than that described in the deed. Accordingly it interpreted the instrument in this particular to include all that portion of the southeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section 20 to and including the meandering line following the east bank of Hat creek, and following the water's edge of said stream at ordinary stages of the water, together with all riparian rights in Hat creek appertaining to said southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of said section. In reaching this conclusion, the court proceeded upon the assumption that the description in the deed was ambiguous and uncertain, and it permitted the attorney who drew the same to testify, over objection, what was intended to pass thereunder. His testimony was to the effect that it was Braden's intention to convey to Frick all the riparian rights in and to the waters of Hat creek which he possessed in and to the southwest quarter of the southeast quarter of section 20. In so doing the court committed error. There is no uncertainty whatever in the description of the property conveyed under this deed. In plain and unambiguous language the land is described as all that portion of the southeast quarter of the southwest quarter of section 20, lying and being west of a line running along the east bank of Hat creek, and following the water's edge *in said legal subdivision.* No reference whatsoever is made to any land embraced within the southwest quarter of the southeast quarter of section 20, or to the riparian rights in and to Hat creek which are a part and parcel of said legal subdivision. Nor is there anything contained in the subsequent language employed which enlarges the grant or which in any manner renders the description uncertain, for it is there recited that the lands and riparian rights conveyed relate to the subdivision "herein above particularly described."

[32-34] Under no possible construction of the language employed in the instrument itself could it be held to embrace all of the southwest quarter of the southeast quarter of section 20. Even if it be assumed that the deed was sufficient to convey the land in the southwest quarter of the southeast quarter lying west of a meandering line along the east bank of Hat creek and following the water's edge, it would not thereby convey the riparian rights to the remainder of the lands in the southwest quarter of the southeast quarter of section 20 adjoining the creek. No principle of law is more well established than that nothing passes by deed except what is described in the grant. Where through fraud or mistake, or in the event that the terms of an instrument are sufficiently uncertain to leave the intention of the parties in doubt, parol evidence bearing upon the question is admissible. Here no fraud or mistake is charged, nor, as above stated, is there any ambiguity or uncertainty involved. An attorney under such circumstances who prepared the instrument cannot testify as to what was intended by the parties. 10 Cal. Jur. § 199, p. 930. Whatever his concept of a written agreement may be, it is inadmissible to overthrow plain and unambiguous language. Fleming v. Law, 163 Cal. 227, 124 P. 1018. A meaning cannot be given to an instrument under the guise of construction or explanation which is not to be found in the instrument itself. Payne v. Commercial Nat. Bank, 177 Cal. 68, 169 P. 1007, L. R. A. 1918C, 328. Nor can extrinsic evidence, in the absence of fraud or mistake, be received of the intention of the parties. Nicholson v. Tarpey, 89 Cal. 617, 26 P. 1101. Their rights must be ascertained from its terms. Code Civ. Proc. § 1856. The record shows that plaintiff and his predecessors in interest have been in the exclusive possession of all the land embraced within the southwest quarter of the southeast quarter of section 20, and have paid all the taxes levied and assessed against said land subsequent to the execution of the deed under which defendants claim. No testimony was introduced to show that either Braden or Joerger recognized the right of Frick or his successors in interest to exercise ownership or possession over the southwest quarter of the southeast quarter of section 20 over which Hat creek flows. From what we have said upon this subject it follows that the find-

ing of the trial court that the lumber company is the owner of all riparian rights in and to the waters of Hat creek in the southwest quarter of the southeast quarter of section 20 is not supported by the evidence. Under this finding plaintiff is deprived of the right to use any of the waters of Hat creek where it flowed over and across the southwest quarter of the southeast quarter of section 20, a right that plaintiff or his predecessors have never parted with.

It is next contended that the trial court erred in deciding that the plaintiff is not entitled to divert water through the John Smith ditch to irrigate that portion of the Tucker place lying east of Hat creek. In this connection it is urged that the evidence shows that Smith and Braden diverted a certain flow of water through the John Smith ditch for the purpose of supplying the Tucker land; that a prescriptive right was thereby created as against the lumber company to divert a certain quantity of water for such purpose; and that, when plaintiff succeeded to the rights of Smith, Braden, and Grant, by virtue of his purchase from them of their lands and of all their interest in the said ditch, he had a right to continue to convey a sufficient quantity of water through the ditch for the irrigation of the Tucker lands east of Hat creek. Defendants, on the other hand, contend that the evidence shows that the only water used on such lands was waste and seepage water, to which plaintiff could acquire no right. Plaintiff concedes, that, when his predecessors in interest were irrigating their lands, a certain amount of seepage and waste water drained off the same onto the Tucker lands below, and that this water was used to at least partially irrigate a portion of such lands. He claims, however, that, when his predecessors in interest were not irrigating their lands, a sufficient amount was diverted from the ditch onto the Tucker lands to properly irrigate the same under an arrangement with the owner of such lands that he would suffer the seepage and waste water from the ditch to flow at all times over and upon his lands without complaint, a situation he had been attempting to prevent; that, when plaintiff purchased the ditch, this arrangement was continued for such a period that it ripened into a title by prescription against the lands of the power company across which the water was conveyed.

[35-40] There can be no question that an appropriator of water may acquire a prescriptive right to divert and use the same from a stream on land that he does not own, and this user may be either by the claimant or by one holding under him, as a lessee or tenant. Rental and sale of water is a beneficial use. 25 Cal. Jur. p. 1159, § 173. The quantity claimed, however, must not only have been actually used, but must have been reasonably necessary and actually applied to a beneficial purpose. Without such beneficial use, no prescriptive right can be acquired, regardless of the period of time such user may have been continued. Turner v. East Side Canal & Irr. Co., 169 Cal. 652, 147 P. 579; 25 Cal. Jur. p. 1160, § 174. Upon the question as to whether or not the Tucker lands were supplied in part directly from the ditch, or whether the same were wholly irrigated by the seepage or waste waters flowing therefrom, the record is voluminous and the evidence conflicting. There is testimony, however, to show that no water was used on the land east of Hat creek except seepage and waste water prior to the time of plaintiff's purchase. There is also testimony which indicates that there was never any intent on the part of the owners to make any additional diversion of water to irrigate the lands in question or that they required irrigation, considering the seepage from the ditch. The permissive use of the seepage and waste waters, of course, created no right in the ditch to the owner of the Tucker lands, and such lands acquired no right appurtenant to the ditch, as no permanent right can be acquired to have a waste water supply continued, either by appropriation or prescription. Hunceker v. Lutz, 65 Cal. App. 649, 224 P. 1001; Kinney on Waters (2d Ed.) 661; Weil on Water Rights, § 57. There being evidence in the record to sustain the finding of the trial court upon this subject, we have no power to disturb it.

[41] And, finally, plaintiff contends that the court erred in awarding the power company 360 miner's inches of water through the Tucker-Fitzpatrick ditch for the use of its lands, as there is no evidence in the record to show the quantity of water so actually used. Counsel for defendants concede that plaintiff is correct in this contention.

From what we have said it follows that the portion of the judgment in favor of plaintiff is affirmed, as is also the portion which denies to plaintiff any water for the use of the Tucker lands lying east of Hat creek. The portion declaring defendant lumber company to be the owner of all riparian rights in any of the waters of Hat creek in the southwest quarter of the southeast quarter of section 20, township 36 north, range 4 east, M. D. B. & M., is reversed, as is also the portion declaring the power company to be entitled to 360 miner's inches of water measured under a 6-inch pressure through the Tucker-Fitzpatrick ditch.

We concur: WASTE, C. J.; FINCH, Justice pro tem.; LANGDON, J.; RICHARDS, J.; CURTIS, J.; SHENK, J.

PRESTON, J., being disqualified, does not participate in the foregoing.

On Rehearing.

PER CURIAM. Rehearing denied. Defendants and certain amici curiæ, in support of their petitions for a rehearing, have asserted that the allowance of 2½ miners' inches per acre duty of water for irrigation is incredible and palpably improbable. There is no merit in the claim. The lands in question, as pointed out in the opinion, are hilly and porous, and present a very unusual and extreme condition from a water requirement standpoint. All of the witnesses who were engaged in farming the lands in question testified as to the amount of water required to properly mature the crops, and their testimony fully supports the finding upon this subject, as does also the irrigation engineering experts produced by plaintiff. The testimony of one of the experts shows that from 3½ to 4 miners' inches per acre are reasonably necessary to obtain best results. In addition thereto, it appears in evidence that the division of water rights of this state approved a net duty of water of 2 inches to the acre to some 3,000 acres of land on upper Hat creek as a net duty of water for irrigation of lands in that locality, and there is evidence to show that this allowance is insufficient to properly irrigate these lands. These lands are located in the immediate vicinity of the Joerger lands, and they require a less amount of water than the Joerger lands, owing to the fact that the latter are hilly and more porous, in consequence of which frequent applications of water are required to maintain proper moisture for the crops. The amount of water here allowed is exactly the same as that allowed by the division of water rights to the lands in upper Hat creek; the additional one-half inch being added by the court to cover the loss in transportation which the evidence shows occurs. Under all these circumstances we cannot say as a matter of law that the amount allowed in this particular case is excessive.

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98 Cal. App. 423

PEOPLE v. MONTGOMERY. (Cr. 1774.)

District Court of Appeal, Second District, Division 2, California. April 22, 1929.

1. Homicide 🔑250—Evidence held insufficient to sustain conviction of manslaughter.

Evidence, in prosecution for murder, *held* insufficient to sustain conviction of manslaughter.

2. Criminal law 🔑560—State's theory opposed to positive testimony of innocence is insufficient when so unsubstantial and nebulous as not to raise honest question.

Where theory advanced by state opposed to direct and positive testimony of innocence is so unsubstantial and nebulous as not to raise in fair and reasonable mind an honest question, it must be *held* insufficient to sustain conviction, since state is just as intensely interested in protecting innocent men as it is in convicting guilty.

3. Criminal law 🔑475—Objection to hypothetical question asked physician, as to whether bullet would be deflected from its course at point of entering body, held erroneously overruled.

Objection to hypothetical question asked physician, as to whether bullet striking body under certain conditions would be deflected from its course at point of entrance, *held* erroneously overruled, in that proof of such facts should have been made of actual course by those performing autopsy.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

J. W. Montgomery was convicted of manslaughter, and he appeals. Reversed.

L. A. West and B. Z. McKinney, both of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Waldemar Augustine, of San Francisco, for the People.

IRA F. THOMPSON, J. The defendant was indicted by the grand jury of Orange county. The indictment contained two counts, the first charging him with the murder of John D. Callicott and the second with the murder of Orlie R. Mahon. The jury acquitted defendant of the first count, but found him guilty of manslaughter under the second charge. The appeal is from the judgment and from an order denying a motion for a new trial.

[1] The appellant on November 15, 1928, was employed by the California Gun Club as keeper and caretaker of its grounds, ponds, and hunting blinds, and for the purpose of spreading grain in the ponds to attract aquatic game birds. It was also his duty to warn trespassers off the property, advising them that it was private, and not open to the public for hunting, and presumably to make this work the easier for him, the land was inclosed by fences except across a slough where tidewater ebbed and flowed, and it was surrounded by an embankment from ½ to 2½ feet in length. Between 1 and 2 o'clock p. m. on the day in question the appellant heard a commotion in the pond, which investigation disclosed was caused by a dog, unaccompanied, so far as appellant could see, by its owner, chasing and frightening the birds away. The appellant drove down the road in his automobile near to the place where the dog was creating the disturbance. His shouts to the animal proving unsuccessful, the appellant fired two shots from a 32-caliber rifle into the water from 10 to 15 feet behind the dog for the purpose of frightening him. Upon firing the second shot, the appellant saw two men rise up from behind an embankment about 150 yards distant from him. These men, who were the victims of the affair, began to shout at the appellant and to approach him. When about 75 yards away appellant says that he for the first time could hear and understand

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

their language. He says they were cursing and abusing him, using foul, abusive, and offensive epithets. Each of the decedents was carrying a 12-gauge pump shotgun. The appellant further testified that after the decedents approached him a bit closer he said to them: "Gentlemen, let's reason this thing There is no use of us getting into trouble." Probably no more concise statement can be made than that of the witness to the succeeding events. He said: "Well, when they got about I guess thirty or forty steps from me they turned west to get up on the dike and the big fellow (Callicott) got up on the dike and he says 'You G—— D—— cowardly s—— of ———, I am going to shoot you just like you shot my dog' and he whirled and shot at me and I jumped to the left and it missed and I fired at him and hit him. I didn't have time to take sight, and I threw a shell out and the other man was facing west with his gun down like this and when this biggest fellow dropped why he whirled around and as he whirled around why I shot and he shot. and you couldn't hardly tell the difference. I don't know whether he had shot or not." Mahon was hit and fell to the ground as Callicott had done. The appellant also testifies that Mahon did not succeed in getting the butt of his gun to his shoulder nor did the witness when he fired. After the shooting the appellant says that without disturbing the bodies he went to his home two or three miles distant, called up the sheriff's office, gave information of the tragedy, and said that he would be waiting for some one to come for him. Two officers proceeded to the scene accompanied by the appellant. There they found, according to one of the officers, the tracks of the decedents approaching the fatal spots as described in the testimony of appellant, the two bodies, and the two shotguns. There was an empty shell in each gun and there were no tracks approaching the bodies from the place where the appellant said he was standing.

It should be noted at this point that appellant was the only witness to this fatal affair. Concerning the shots he is corroborated by the testimony of three witnesses. A Mrs. Brokoff testified that she lived about half a mile from the California Gun Club; that she was experienced in the use of firearms, having used them for 15 or 16 years in Texas; that on the day in question and between the hours of 1 and 2 o'clock p. m. she heard from the direction of the mentioned club two rifle shots, "then in a period of a few minutes a shotgun shot and another rifle shot, and then the last two shots was a rifle shot and a shotgun shot which were right together, almost." Mr. and Mr. Spies, also residing about half a mile distant, testified. Mrs. Spies said that at the time mentioned she heard "four rapid shots, almost simultaneously." Mr. Spies said he heard from the direction of the club some shooting and then for "about five to ten minutes * * * everything was quiet, then I heard two rifle shots, they came, oh, maybe, two minutes apart, then after that there was a shotgun shot and a rifle shot close together, and right after that two more shots, but I couldn't say which was first or last, they came so close together, just like one shot, but I could distinguish the rifle shot from the shotgun shot." We also add that several character witnesses testified on behalf of the appellant.

We have recited the testimony in considerable detail because the appellant insists that the evidence is insufficient to support the verdict. It will be observed that all of the testimony so far set down indicates very forcefully that the appellant shot both of the decedents in self-defense—and such could have been the only theory by which the jury absolved the appellant of guilt as respects Callicott. The respondent urges that there is substantial testimony supporting the verdict. Counsel directs our attention to the testimony of Dr. Alice L. Thompson, who performed the autopsy. She says that the bullet which killed Mahon "passed in between the first and second ribs, shattered the second rib, then through the anterior border of the right lung, then through the left lung, at the root of the lung, piercing the pulmonary blood vessels, thence passed to the border of the left fifth rib and was deflected upward and hit the point of the left scapula and passed out of the body." To this statement of the witness should be added her answer to the effect that the point of entrance was on the right of the mid line of the body in front, and her statement on cross-examination that possibly the second rib would deflect the bullet. The Attorney General argues that this testimony, in connection with the fact that Mahon was right-handed in the handling of firearms, is sufficient to justify the jury in doubting the veracity of the appellant, and in adopting the theory that when the appellant had shot Callicott he turned and aimed at Mahon, who, fearing for his life, shot in self-defense. He also asserts that it is strange that two hunters would fail to hit the appellant when firing at him from a distance of 80 feet with 12-gauge shotguns. These are the only things which respondent urges to overcome the direct and positive testimony of the appellant and all that we can find in a perusal of the transcript, with the exception of the responses by the witness Dr. Wagner to the following questions:

"Q. Assuming then that a bullet is fired from a distance of 27 paces from a 32-caliber Winchester rifle, Remington rifle, with a bullet of the kind contained in People's Exhibit No. 2; that that bullet strikes a person at that distance of 27 paces between the first and second ribs about an inch and a half below the clavicle at the right of the front midline of the body striking the upper edge of the second rib and shattering the rib and passes entirely through the body striking a rib at the back side on the left side and then passes out of the body, would you be able to say whether that bullet in your opinion was deflected from its course at the point of entrance upon striking the bone at the second rib? A. I can express an opinion, yes, sir.

"Q. Assuming the state of facts just described to you, in your opinion was that bullet deflected from its course? A. It was not."

[2] Assuming for the moment that the objection interposed by the defense was properly overruled by the court, what do we make out of the testimony? The question ignores the position of the person shot. It fails to take into account either his horizontal or his perpendicular position. It ignores the comparative levels of the two men. It fails to disclose to the witness how much of the second rib was struck or how badly it was fractured, and yet the angle of flight upon the curve of the rib might have considerably altered the situation. It takes it for granted that the ribs or bones of all men are comparable in their power of resistance, although it is a matter of common knowledge that they vary materially. It assumes that all 32-caliber bullets have behind them the same powder load. It overlooks the velocity and direction of the wind, if any there was. There are so many elements lacking in the question that it could hardly have been intelligently answered except from one factor only, to wit, the actual course of the bullet through the body. If it be said that the testimony of the witness is of value from this standpoint, we must remember that he did not perform the autopsy, and as he answered upon the hypothetical question only he was giving a valueless opinion, and one which merely attempted to fortify the argument of the prosecution that the deceased must have been in a certain posture when he was shot, by the opinion of one whom the jury may well have believed to be more skilled than they in such matters. Again assuming that there was no deflection of the bullet upon striking the second rib and that it did in its natural and direct course pass through the body from right to left, there is still no necessary inconsistency between this fact and the testimony of appellant. It must be remembered that, from the fact that Callicott and Mahon were companions and had been apparently acting in concert, appellant was justified, after having killed Callicott under circumstances which impelled the jury to find that he shot in self-defense, in interpreting the slightest hostile move by Mahon as indicative of the latter's intention to exact the life of appellant. The appellant testified that when he shot Callicott, Mahon, who had been facing Callicott swung around with his gun to shoot, but did not get it above his waist line when he (the appellant) "guessed at the biggest part" and fired. He does say, however, that Mahon raised his gun first. It is apparent therefore that although decedent was right-handed he did not take formal aim before shooting and may, at the time, have been exposing more of his right than his left side. That Mahon did not take aim before he fired probably explains why he did not hit the appellant. Everything which is said to support the verdict is speculative and conjectural. If, as respondent says, the jury adopted the hypothesis that Mahon fired in self-defense, we are compelled to reply that while as a hypothesis or supposition it may well serve as a drill ground for mental gymnastics, yet when it rests upon the basis of imagination and is unsupported by substantial testimony it is not sufficient to convict a person of manslaughter. The state is just as intensely interested in protecting the innocent man as it is in convicting the guilty, and when the theory opposed to direct and positive testimony of innocence is so unsubstantial and nebulous as not to raise in a fair and reasonable mind an honest question, it must be said to be insufficient.

[3] We now pass to the claim of appellant that the court erred in overruling the objection to the hypothetical question asked of Dr. Wagner, which we have already quoted. The argument is made that the question did not cover the subject of expert testimony and that the proper foundation was not laid. In addition to what has already been said concerning this question, it should be noted that had the question been reversed and the witness asked to state the position of the decedent from the course of the bullet, it would have been held improper on the authority of People v. Durrant, 116 Cal. 217, 48 P. 85; People v. Milner, 122 Cal. 181, 54 P. 833; People v. Farley, 124 Cal. 594, 57 P. 571; and People v. Overacker, 15 Cal. App. 620, 115 P. 756. Here the effort is made to prove the position by proving an undeflected course. We do not see that the question is objectionable for the same reason as that assigned in the cases cited. But we think that proof of the fact should have been made of the actual course by the person or persons who performed the autopsy. Dr. Wagner stated in his effort to qualify himself as a witness that his experience had been gained in examining "many cases of gunshot wounds of a similar nature passing through bones, passing through ribs," and that it was a part of his "business to determine the course and whether deflected or whether they passed in straight lines." In other words, his experience had been gathered in the actual examination of the wounded bodies and not in computing velocity, density and resistance. The court was in error in overruling the objection.

Assignments of error are also predicated upon the giving and the refusing of instructions, but we think comment thereon is unnecessary. From all that appears, the jury was fully and fairly instructed.

Judgment and order reversed.

We concur: WORKS, P. J.; CRAIG, J.

98 Cal. App. 338

McCLINTICK et ux. v. FRAME et al.
(Civ. 6749.)

District Court of Appeal, First District, Division 1, California. April 17, 1929.

As Modified May 9, 1929.

1. **Vendor and purchaser 🔑59—Wife, signing agreement to purchase land, was party thereto, regardless of whether contract used masculine and singular terms (Code Civ. Proc. § 17).**

Under Code Civ. Proc. § 17, the masculine as used in an agreement includes the feminine, and the singular the plural; hence wife, having signed agreement for purchase of land, was a party thereto, regardless of terms used therein.

2. **Mortgages 🔑281—Wife, joining with husband in agreement to purchase land, was bound by implied obligation to assume incumbrances forming part of consideration.**

Wife, having joined with her husband in agreement to purchase land, was bound by implied obligation to assume incumbrances forming part of consideration, even though agreement contained no express assumption of such indebtedness.

3. **Mortgages 🔑282(1)—Either husband or wife, signing agreement to purchase land, could be compelled to pay indebtedness impliedly assumed (Civ. Code, §§ 1431, 1659, 1660).**

Under Civ. Code, §§ 1431, 1659, 1660, relating to presumption that promise made in the singular, but executed by several persons, is joint and several, either wife or husband, both of whom signed agreement for purchase of land, with implied assumption of indebtedness, can be compelled to pay the indebtedness.

4. **Novation 🔑7—Subsequent agreement to purchase land, not joined in by vendor's wife signing the original agreement, had no binding effect on her (Civ. Code, §§ 1530, 1532, 1698).**

Subsequent agreement for purchase of land, which was not joined in by wife of vendor executing original agreement, had no binding effect on her, since the claim that the original contract was modified amounted to a claim of novation, within Civ. Code, § 1530, so as to require, under section 1532, a consideration and substitution by another agreement in writing, or by an executed oral agreement in accordance with section 1698, joined in by all parties to original agreement.

5. **Novation 🔑11—Novation must be pleaded to claim benefits by reason thereof.**

In order to claim benefits by reason of a novation, it is necessary that novation be pleaded.

6. **Pleading 🔑312—Extent and character of modifications alleged and admitted in pleadings are limited by terms of instruments attached as exhibits.**

Where allegations of complaint relating to modification of agreement to purchase land merely pleaded a modification according to the effect of instruments themselves, by attaching them as exhibits to the complaint, the extent and character of modifications alleged and admitted in pleadings are therefore limited by terms of instruments themselves.

7. **Mortgages 🔑292(8)—Finding that purchaser's wife executed agreement to purchase land required conclusion that she was liable with husband for payment of indebtedness.**

Finding that wife of purchaser executed original agreement to purchase land with the implied assumption of indebtedness required a conclusion that she was liable with her husband for payment of indebtedness, in view of fact that subsequent agreement relating thereto did not release her from her obligation.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by G. W. McClintick and wife against W. P. Frame and others. From the judgment, plaintiffs appeal. Reversed and remanded with directions.

Siemon & Garber, of Bakersfield, for appellants.

Gallaher & Jertberg, of Fresno, for respondents.

CAMPBELL, Justice pro tem. This is an appeal on the judgment roll, the appeal being based upon the ground that the court drew an erroneous conclusion from the findings in respect to one particular part of the judgment; appellants asserting that the court erred in failing to hold Theodosia Frame primarily obligated, together with W. P. Frame and Herman F. Nicolai, for the payment of a certain indebtedness. Defendant Nicolai has not appealed, and the judgment is final as to him. The suit was brought to secure declaratory relief; plaintiffs seeking to have the obligations of the respective parties in reference to a certain indebtedness fixed and declared by judgment of the court.

Plaintiffs owned a tract of land upon which they executed a deed of trust to secure the payment of an indebtedness to the Hellman Commercial Trust & Savings Bank and a mortgage to secure another indebtedness to defendant Nicolai; the mortgage being subordinate to the deed of trust. Plaintiffs entered into an agreement to sell the land to defendants W. P. Frame and Theodosia Frame, his wife. The first paragraph of the agreement is as follows: "This agreement, made this 1st day of February, 1923, between G. W. McClintick and Catherine McClintick, his wife, the parties of the first part, and W. P. Frame and Theodosia Frame, his wife, parties of the second part"—and was signed by both W. P. Frame and Theodosia Frame. The body of the agreement, however, uniformly designates the McClinticks as "parties," while it uniformly designates the vendee as "second party," or "the party of the second part." Respondents argue that wherever a verb in the contract is the predicate of the first parties the verb is plural; wherever a verb is the predicate of the second party the verb is singular; wherever in the contract appears a pronoun the antecedent of which is the first parties, the pronoun is common gender and plural; wherever in the contract appears a pronoun whose antecedent is the second party, that pronoun is masculine and singular; and therefore it may be properly inferred that Theodosia Frame was not considered as an actual party to the contract.

[1, 2] While the agreement uses the singular and masculine form of expression in subsequent clauses, the masculine includes the feminine and the singular includes the plural (Code Civ. Proc. § 17), and, Theodosia Frame having signed the agreement, this made her a party thereto, regardless of the terms used. In Eldridge v. Mowry, 24 Cal. App. 183, 188, 140 P. 978, 981, the court says: "But a party is presumed to have assented to all the terms of a written contract, when he signs it; and the place of the signature is immaterial, except in cases where an instrument is required by law to be subscribed." Furthermore, it is alleged in the complaint that "the defendants Frame made and entered into that certain agreement [February 1, 1923, agreement] in writing," which allegation is admitted in the answer of defendants W. P. Frame and Theodosia Frame, and the court so found. Theodosia Frame, having joined in the agreement with her husband, W. P. Frame, by the terms of which the assumption of the incumbrances formed a part of the consideration, and being one of the purchasers, was bound to pay the purchase price, as well as her husband, and such obligation is implied, on her executing the agreement, even though the agreement had contained no express assumption of such indebtedness. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901; White v. Schader, 185 Cal. 606, 611, 198 P. 19, 21 A. L. R. 499.

In the agreement of February 1st the plaintiffs agree to sell the land in the agreement described to the second party for $28,000, and agree to accept two parcels of property at fixed prices as part payment on the purchase price. The agreement further provides that the second party shall assume a certain mortgage of $8,000 in favor of the Hellman Commercial Trust & Savings Bank; that the second party is to harvest all crops produced on the property and deliver same to first parties, who shall receive 60 per cent. of the gross proceeds from such crops; that said 60 per cent. shall be applied first in payment of interest on the $8,000 mortgage, second in payment on the unpaid balance due first parties, and the balance on the principal; that the first parties reserve the right at any time during the term of the contract to obtain a loan not to exceed $10,000; and that, if the loan can be obtained, the second party is to sign with first parties, which loan, if obtained, the second party agrees to assume and pay according to the terms of such loan, with the understanding that the amount obtained over and above the present mortgage shall be applied as a credit and payment on the unpaid balance due the first parties. While the vendees are, excepting in the first paragraph of the agreement, referred to in the singular number as second party, the complaint alleges, the answer admits, and the court found the agreement and foregoing conditions thereof to have been made and agreed to by both W. P. and Theodosia Frame.

The subsequent agreement of April 1, 1924, is in the form of a letter written by G. W. McClintick to First National Bank of Delano, with the acceptance and approval of W. P. Frame appended thereto, and recites that the deed to the property is to be executed to W. P. Frame and Theodosia Frame, his wife, as joint tenants, and is in settlement of McClintick's agreement with W. P. Frame. The obvious purpose of the arrangement was to complete the sale provided for under the February agreement, by providing for the payment of the unpaid balance of the purchase price in a somewhat different way. All that appears is that W. P. Frame and G. W. McClintick agreed to wipe out the balance of the unpaid purchase price, by Frame assuming and agreeing to pay and receive credit for the Nicolai indebtedness of $2,500; by Frame giving McClintick two notes aggregating $852, and by Frame assuming and agreeing to pay two bills aggregating $570; or, in other words, Frame agreeing to pay McClintick indirectly $3,922 in full satisfaction of the unpaid balance of the purchase price, and McClintick agreeing to pay the current interest, amounting to $350, on the Hellman bank indebtedness, and Frame to assume payment of the first mortgage of $10,000 and the second mortgage of $2,500.

The terms of the April agreement are all in the nature of modifications of the February agreement. Another feature of the April agreement is that it is made in settlement of McClintick's contract with W. P. Frame, and McClintick agrees to convey the land to W. P. and Theodosia Frame as joint tenants, subject to the incumbrance of $10,000 and $2,500, and Frame must assume payment of both of these mortgages. The McClinticks were husband and wife, as were also the Frames; the property dealt with in each case was community property, and neither Mrs. McClintick nor Mrs. Frame, who signed the February agreement, were parties to or signed this latter agreement of April 1st. As Mrs. Frame was obligated under the

February agreement to pay the obligation to the Hellman Commercial Trust & Savings Bank, does the April agreement release her from such obligation? The court in effect answered this question in the affirmative, with the result that Nicolai and W. P. Frame are held primarily responsible to the McClinticks for the payment of the Hellman Commercial Trust & Savings Bank indebtedness, but Mrs. Frame is not.

[3] Under the February agreement the obligations of W. P. and Theodosia Frame are joint and several (Civ. Code, §§ 1659, 1660), and either or both of them could have been compelled to pay the indebtedness. The obligation was for the benefit and was made in favor of Catherine McClintick, as well as of her husband, and she did not join in the April agreement. Theodosia Frame was one of the purchasers under the former agreement, and under its terms assumed with her husband, in the absence of express limitation, the payment of the incumbrances which formed a part of the consideration of the conveyance. White v. Schader, supra. "A promise, made in the singular, but executed by several persons, is presumed to be joint and several." Civ. Code, § 1660. "An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several. * * * This presumption, in the case of a right, can be overcome only by express words to the contrary." Civ. Code, § 1431.

[4, 5] Respondents urge that the original contract was modified by the subsequent April agreement, and that new terms in the April agreement take the place of the terms in the February agreement, and therefore the old contract stands, with substitution of the new terms for the old terms that were by the new contract modified. Such claim amounts to a substitution of the individual obligation of W. P. Frame for the joint and several obligations of W. P. and Theodosia Frame, and amounts to a claim of novation. Civ. Code, § 1530. A novation contract is subject to all the rules concerning contracts in general. Civ. Code, § 1532. It would require a consideration from Theodosia Frame to support it, and, as the February agreement is in writing, a substitution could only be made by another agreement in writing or by an executed oral agreement. Civ. Code, § 1698. It would have to be joined in by all the parties to the original agreement. Cal. Canning Peach Growers v. Downey, 76 Cal. App. 1, 243 P. 679. The April agreement, not being joined in by Catherine McClintick, can have no binding effect upon her. Furthermore, it may be said that a novation has not been pleaded, which it must be if benefits by reason thereof are claimed. McGinn v. Wiley, 24 Cal. App. 303, 312, 141 P. 49.

[6] It is further urged by respondents that Catherine McClintick, by joining in the allegation of the complaint that "on or about April 1, 1924, the plaintiff G. W. McClintick and the defendant W. P. Frame made and entered into that certain written modification of the above-mentioned agreement referred to as Exhibit A, a copy of which modification is hereto annexed and marked Exhibit B," and defendant Theodosia Frame, by joining in the admission in the answer, adopted and ratified the action of G. W. McClintick and W. P. Frame in thus modifying the agreement, and that the admission of the allegation of the complaint pleading performance of the April agreement was another confirmation of the act of the two husbands in modifying the original agreement. The allegations which it is claimed are admitted, however, merely plead a modification according to the effect of the instruments themselves by attaching them as exhibits to the complaint. The extent and character of the modifications alleged and admitted in the pleadings are therefore limited by the terms of the instruments. Nowhere in the April agreement is the provision of the February agreement requiring Theodosia Frame to pay the indebtedness to the Hellman Commercial Trust & Savings Bank in any manner modified, changed, or even mentioned. If we should concede respondents' argument to be sound, and that the two contracts merged and are to be read together, and that the conditions in the new contract, where inconsistent with the conditions in the old contract, replace the old conditions, we have a joint and several obligation of W. P. and Theodosia Frame to assume and pay the Hellman Commercial Trust & Savings Bank indebtedness, as well as a supplementary agreement of W. P. Frame individually to pay it.

The court found in accordance with the allegation that W. P. Frame and Theodosia Frame executed the February agreement, but made no finding as to whether she was released or discharged from her obligations thereunder—this evidently for the reason that such release or discharge is not pleaded as is required in order to claim release or discharge thereby. McGinn v. Wiley, supra. The court simply omits the name Theodosia Frame from its conclusions of law, when declaring that W. P. Frame and Herman Nicolai are primarily obligated for the payment of the Hellman Commercial Trust & Savings Bank indebtedness, and from the provisions of the judgment which make W. P. Frame and Herman Nicolai primarily responsible.

[7] The court having found that Theodosia Frame executed the February agreement, and, the subsequent April agreement not having released her from her obligation, the conclusion of law from such finding must follow that she is liable with her husband, W.

P. Frame, and Herman Nicolai, for the payment of the Hellman Commercial Trust & Savings Bank indebtedness.

The judgment is reversed and the cause remanded with directions to the trial court to enter judgment in accordance herewith.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 365

ROBINSON v. SOUTHLAND PRODUCE CO. et al. (Civ. 6504.)

District Court of Appeal, Second District, Division 2, California. April 18, 1929.

1. Appeal and error ⚷113(4)—Order vacating previous order of dismissal is appealable (Code Civ. Proc. § 963, subd. 2).

Under Code Civ. Proc. § 963, subd. 2, an order vacating a previous order dismissing action is appealable; being a special order after judgment.

2. Appeal and error ⚷103—Order granting leave to amend complaint is not appealable.

An order granting leave to amend complaint is not an appealable order.

Action by Mrs. Pearl E. Robinson against the Southland Produce Company and Nick Estrin and Phillip Garbus, doing business under the firm name and style of Liberty Produce Company, and another. From orders setting aside a previous order of dismissal, and granting a motion for leave to file an amended complaint, the last two named defendants appeal. On motion to dismiss appeal. Motion to dismiss granted in part, and in part denied.

Wm. J. Claassen, of Los Angeles, and H. C. Miller, of Birmingham, Ala., for appellants.

M. O. Graves, of Los Angeles, for respondent.

CRAIG, J. Respondent originally commenced an action for damages against the defendants Southland Produce Company, a corporation, and Liberty Produce Company, a corporation. Answer was filed by Nick Estrin and Phillip Garbus, doing business under the name of "Liberty Produce Company, a copartnership," and denied that that company was a corporation. The Southland Produce Company did not appear. Upon the day of trial, counsel for the plaintiff announced that he had received information that the truck which she alleged had caused her personal injuries had been transferred by the Southland Produce Company to the Liberty Produce Company, and that the latter was a copartnership composed of the two individuals above named. The plaintiff thereupon moved to dismiss the action as to the Southland Company, which was granted, and she then moved for leave to file an amended complaint in accordance with the facts. This latter motion was denied, and, on motion of the remaining defendant, the case was dismissed; the trial court entering an order which recited: "Defendants move to dismiss the case, which motion is by the court granted." Thereafter the plaintiff moved to set aside the order of dismissal, assigning as grounds therefor that it was made through inadvertence; that it showed no grounds for dismissal; that the defendants were estopped by the pleadings from moving to dismiss; and that said order was without and in excess of the jurisdiction of the court. At the time this motion was presented, the plaintiff also moved for leave to file an amended complaint. Each of these latter motions was granted, and an amended complaint was filed and served in open court, naming all of the parties as defendants, including the Southland Produce Company, a corporation, and appellants individually as doing business under the fictitious name of Liberty Produce Company, a copartnership. Notice of appeal was served upon counsel for the plaintiff, and filed, entitled, "Mrs. Pearl E. Robinson, Plaintiff, vs. Southland Produce Company, a Corp., and Liberty Produce Company, a Copartnership," reciting that: "The defendants, Nick Estrin and Phillip Garbus, hereby appeal * * * from that certain order made and entered on the 12th day of December, 1928, wherein the above captioned court vacated its previous order of dismissal in said cause and from the order of the court * * * wherein plaintiff was granted permission to file its amended complaint making appellants parties defendants."

[1, 2] Respondent moves this court to dismiss the appeal, and assigns as grounds therefor that neither of said orders is appealable. The order vacating the order dismissing the action is an appealable order. Code Civ. Proc., § 963, subd. 2; James v. Center, 53 Cal. 31. It is a special order made after judgment.

The order granting leave to amend is not appealable, and the motion to dismiss the appeal therefrom is granted. The motion to dismiss the appeal from the order vacating the dismissal is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

98 Cal. App. 245

LEPPER et al. v. RATTERREE.

CLARK v. SAME.

(Civ. 3749, 3750.)

District Court of Appeal, Third District, California. April 12, 1929.

1. Vendor and purchaser 🔑31—Action to rescind land purchase contract may be based on mistake of plaintiff only (Civ. Code, § 1577).

Under Civ. Code, § 1577, it is not necessary, in an action to rescind contract for purchase of real estate on the grounds of mistake, that the mistake must be mutual, since such action may be based on mistake only on part of party prosecuting action.

2. Vendor and purchaser 🔑97, 100, 116, 119—Rescission of contract cannot be ordered, unless plaintiff has been diligent and is capable of restoring defendant's status quo.

Rescission of contract for purchase of realty cannot be had, in view of Civ. Code, § 3407, unless party rescinding has been diligent, and is capable of making restitution, so that opposite party is restored substantially to same position as though contract had not been made.

3. Vendor and purchaser 🔑44—Evidence of purchaser's mistake must be clear and convincing to warrant relief.

In order to relieve purchaser of real estate from mistake, evidence must be clear and convincing, showing mistake to entire satisfaction of court.

4. Vendor and purchaser 🔑31—Purchaser under written contract is charged with knowledge of its provisions of which he neglected to inform himself.

Purchaser of realty under contract in writing, who signs it, is charged with knowledge of all of its provisions, where he had means of such knowledge and carelessly and negligently omitted to inform himself.

5. Vendor and purchaser 🔑44—Evidence that purchaser continued payments without discovering alleged mistake in designation of lots by plat numbers held to warrant decree against rescission.

Evidence that purchaser of realty continued making payments for year, without looking at copies of contract, *held* to sustain finding that he was not entitled to rescind contract for mistake in designation of lots by numbers on plat.

Appeals from Superior Court, Los Angeles County; William C. Doran, Judge.

Separate actions, consolidated for trial, by L. E. Lepper and another, and by Lera Clark, against Ira C. Ratterree, doing business under the the fictitious name of the Ratterree Investment Company, in which defendant filed a cross-complaint in each action. Judgment for defendant, and plaintiffs appeal. Judgments affirmed.

Hoye & Boehler, of Los Angeles, for appellants.

Frank G. Falloon, of Los Angeles, for respondent.

PLUMMER, J. The above cases relate to the entering into contracts for the purchase of two lots, situate in Ratterree's Washington Boulevard tract No. 6256, city of Los Angeles. The cases were consolidated for trial, were tried upon the same testimony, and are presented to us for consideration upon one transcript. The facts relating to each case are identical. The defendant filed a cross-complaint in both actions, and in both actions had judgment. The plaintiffs in each case appeal.

The record shows: That on and prior to October 15, 1923, the defendant was and had been engaged in the business of selling lots in different parts of Los Angeles county, and for that purpose had agents and salesmen engaged in interesting and finding prospective purchasers for such lots. That on or about said date the plaintiff Emily Lepper and the plaintiff Lera Clark went upon the said Ratterree tract and viewed two lots, which the plaintiffs testified were lots 235 and 236 of said tract. The premises were a part of what is known as Washington Boulevard tract, lying along and on the north side of Washington boulevard in the city of Los Angeles. That the said plaintiffs, at the time of viewing the lots in question, were accompanied by a salesman of the defendant company. That at the time of the inspection of said lots a small plat of said tract was handed to one of the plaintiffs, but was not examined by them. That at the time of the inspection of said lots no mention was made of the number of said lots, nor was any particular attention paid to the small plat thereof which was handed to one of the plaintiffs by the defendant's salesman. The original plat handed to one of the plaintiffs was introduced in evidence, and is made a part of the record in this case. An inspection of the plat shows that the numbers of the lots thereon are in very small figures and not very easily read, though by turning the plat to one side it does appear that the word "sold" is written or printed on the lots numbered 235 and 236.

A few days after the personal inspection of the lots, a contract of purchase was entered into by L. E. Lepper and Emily Lepper for the purchase of one of the lots, and by Lera Clark for the purchase of the other of said lots. The contract entered into by the plaintiffs L. E. Lepper and Emily Lepper described the lot as No. 235 in said tract, and the contract entered into by Lera Clark described the lot as No. 226 of said tract. The lots described in the respective contracts were situate in a different block, and were lots different from those inspected by the respective plaintiffs, according to their testimony. The contracts in both cases called for the payment of a purchase price of $1,800 per lot. About one year later, according to the record and the allegations of the complaints, the discovery was made that by mistake the plaintiffs in this action had contracted to purchase lots 225 and 226, instead of lots 235 and 236. Upon such discovery the plaintiffs sought to have the alleged mistake corrected, and, upon the refusal of the defendant to make any adjustment, this action was begun.

The complaint, after what is called a preliminary statement therein, relative to the inspection of lots 235 and 236, the execution of the contract under mistake, and that at the time the contract was signed the agent of the defendant represented and stated to the plaintiffs that the contracts covered the two lots that had been viewed by the plaintiffs, sets forth two causes of action. The first cause of action alleges that the plaintiffs relied upon the representation of the agent to the effect that the description in the contract was correct, and described the lots which plaintiffs had viewed and inspected and agreed to buy, and that upon such acts and conduct the plaintiffs were induced to sign the respective contracts, and without which said contracts would not have been signed. It is further alleged that the agent and representative of the defendant knew that such statements were false and fraudulent, and were made with the intent to deceive and defraud the plaintiffs.

The second cause of action alleges that the plaintiffs, relying upon the acts, conduct, and statement made by the agent of the defendant, to the effect that the contracts they were signing covered and properly described the lot they had viewed and inspected, and had intended and agreed to buy, signed the contract; that plaintiffs are informed and believe that defendant well knew plaintiffs were signing said contract under a mistake and misunderstanding as to the property described. The complaint also alleges that defendant knew, at the time of signing said contract, that plaintiffs were so mistaken, or that defendant was likewise mistaken in that regard, and that as a result of the foregoing, and because of said mistake and misunderstanding, plaintiffs paid to the defendant the sums of money set forth in the complaint. The complaints in both actions set forth what was done toward securing a rescission of the contracts, asks for a rescission of the contracts and for the return of the money paid on account of the contracts herein referred to. The complaints in both actions are practically identical, save as to the number of the lot described, and we have set forth the pleadings as though but one complaint were involved.

The answer of the defendant in both complaints denies any fraudulent misrepresentations; denies any false representations; also denies that the defendant knew that the plaintiffs were acting under any mistake; denies that the plaintiffs relied upon the representations of any agent of the defendant; denies that the plaintiffs would not have executed the contracts, if they had not been acting under mistake or misrepresentations on the part of the defendant. The answer of the defendant, in paragraph V, in answer to paragraph VIII of the plaintiffs' complaint, which contains, in substance, a statement of the facts covering the transaction, denies as follows:

"Referring to paragraph VIII, denies that through want or lack of diligence or care on the part of plaintiffs that they did not discover the alleged facts set forth in said complaint, prior to December 1, 1924, and denies that they did not know their rights prior to March 26, 1925, and alleges that plaintiffs have had full knowledge and notice of all facts and all their rights in the premises, and of all those things which they allege they have no knowledge or notice of, on, after and ever since October 15, 1923."

The answer of the defendant further denies that the plaintiffs believed or supposed the description contained in said contracts was a description of other property, or any property which plaintiffs had intended or agreed to buy, different from that described in said contracts. The answer of the defendant denies that the defendant knew plaintiffs signed said contract under any mistake or misunderstanding as to the context thereof. For a third defense, the defendant, in its answer, alleges that the plaintiffs have been guilty of laches and unreasonable delay in bringing this action, and that, if plaintiffs ever did have any cause of action, they have lost their cause by sleeping on their rights for so long a time as to bar any relief in equity.

The court found that on or about the 15th of October, 1923, the plaintiffs, of their own free will, went upon a tract of land described as tract No. 6256, etc., also known as Ratterree Washington Boulevard tract, and there viewed and inspected said tract; that, at the time the plaintiffs went upon said tract, defendant, by one of its agents and salesmen, handed to plaintiffs a circular, on the front page of which was correctly reproduced a map showing said tract in its entirety; that said map clearly and plainly showed each and every lot of said tract, by its correct number, and clearly and plainly showed the dimensions of every lot in said tract, and the dimensions of every road, street and alley of said tract; that the said pamphlet, at the time the same was handed to the plaintiffs, not only showed all the said lots and numbers and all said dimensions, but also had clearly printed on a number of the lots so shown, in large, bold letters, the word "sold"; that the word "sold" appeared upon lots 235 and 236.

We may here repeat what we have heretofore said about the word "sold" and the numbers of the lots. An inspection of the miniature plat contained in the transcript shows that the numbers are very small, and that the word "sold" is so printed that it is necessary to turn the plat to one side before it can be read. The court further found that no relation of trust and confidence existed between the plaintiffs and the defendants, and then found that "plaintiffs had no right to rely upon any representation made by defendant or any of its agents or salesmen at that time, with reference to the description of any lot viewed or inspected by plaintiffs; that there was then and there open to plaintiffs the means of full knowledge and information as to the description and location of lots 235 and 236, and also of lots 225 and 226"; that, if plaintiffs failed to fully inform themselves as to the location and description of said lots, said failure was due to their own negligence and carelessness; that plaintiffs, both of whom viewed said lots and saw said pamphlet prior to signing of any documents in connection therewith, are highly educated and intelligent, etc.

The court further found "that plaintiffs had no right to rely upon any representations of said defendant, or any of its agents or salesmen, to the effect that the description in the contract signed by plaintiffs was a correct description, and that plaintiffs were not induced to sign the contracts by any false and fraudulent, or false or fraudulent representations of the defendant, or any of its agents or salesmen." The court further found that the defendant did not know that the plaintiffs were acting under any mistake.

The court nowhere found that the allegations of the complaints—that the plaintiffs were acting under mistake, that they went upon lots 235 and 236 of the tract in question, and that the plaintiffs thought they were buying the lots inspected by them—were true. It may be here stated that the complaints and the answers contained allegations and denials as to the selling price of the respective lots, but, as the value of the lots are not material, no further mention need be made thereof. The pleadings are also absolutely silent as to any changed conditions of the respective parties, and no facts are set forth or pleaded in relation thereto which would show that either of the parties would be disadvantaged by reason of the equitable interposition of the court herein, in adjudging and decreeing rescission of the contracts and the return of the money paid on account thereof.

While no portion of the testimony is printed as an appendix to appellants' brief in this action, the following summary set forth by appellants in their argument is a fair statement of the evidence relied upon in this cause:

Mrs. Lera Clark testified in substance as follows: The printed circular, showing a plat of real estate, was handed to her by one of defendant's salesmen while she and Mrs. Lepper were viewing the lots. This witness and Mrs. Lepper had gone to the tract to look at the lots, and there met one of defendant's salesmen. They were shown two lots. The lots were about the fifth and sixth lots back of the first alleyway, which was back of the first lots facing on Washington boulevard; told the agent she would not be interested in anything very far from Washington boulevard. The plat marked Plaintiffs' Exhibit I was the only plat shown the witness. The witness did not know the number of the lot. The agent said there were only two lots left in the tract. This salesman, accompanied by another salesman, came to the house to talk with Mr. Clark, who said that, if the lots were right off Washington, they would be satisfactory. "I think they had referred to this map they had given me." They talked about the lot being so near Washington, so near the business section, but far enough away, so that it would be a good lot on which to build a flat. They said that Washington boulevard would soon be finished. They didn't talk much about the plat; just about the lot. It is the same lot, the lot we were shown. It is the fifth lot from the corner. A year later the mistake was discovered, when a Mr. Franklin came to talk about the lot, and on investigation learned the real location of the lot described in the contract. This lot was in the same relative location in the block farther away.

On cross-examination the witness testified that she did not look at the map at all; that she looked at the property; that they were not bothering with the map, because they were on the land; it was the location of the lot in which they were interested, and not in the plat; that the salesman did not point to the map; "the salesman told me to show that to my husband. The lot was not more than a city block from Washington." The witness thought that the streets were laid out at the time. The witness further testified that the salesman had a big roll in his hand, but did not open it; that she never thought of the number of the lot once when she signed the contract; that she did not notice the word "sold" on lots 235 and 236 until called to her attention in court by the presiding judge, and then, by turning the plat to one side, she could read the word "sold." The witness further testified concerning the contract as follows: "I don't know that I read that contract over particularly; it was the lot that I wanted, and I was perfectly willing to buy it."

Mrs. Lepper testified that she was with Mrs. Clark on the first trip to the tract and examined the lots; looked at the lots; "that the lots were a good city block from Washington boulevard." The witness could not indicate the location of the lots on the plat, because she did not understand enough about directions, and could not point out the numbers of the lots on the plat; did not know whether the alley back of Washington was named Cologne street or not; that the lots were one city block from Washington; that the agent said to her, "Do you want to see the map?" to which the witness replied, "No; I just want to see my lot."

On cross-examination the witness further testified: "I don't understand the map very well; that is what I told the salesman." The agent took me a good city block off Washington boulevard and said, "You are so near Washington you will be able to have a resale of these in a very short time." The witness, after looking at the plat, testified: "I should say here is Washington; then, as I remember, is the alley; then, our lots; then, another street; I don't know the name of it." On redirect examination the witness guessed that the lots were 50 or 60 feet from the alley.

L. R. Clark, a witness called by the plaintiffs, testified that the two salesmen came to his house; said they had two good lots left in the tract, and they were such a short distance from Washington boulevard it would be a good investment. "I thought it was a good investment because they were just starting to widen Washington boulevard. They had this little plat, and marked the two lots we were to get." An examination of the plat shows the marking to be on lot No. 236. "The salesman said they had only two lots to sell." This witness did not sign the contract and never saw it.

Dr. L. E. Lepper, one of the plaintiffs, testified as follows: After Mrs. Clark and Mrs. Lepper had seen the tract, he and the two salesmen drove out to the tract. The witness told the salesman he wanted to see the lots the ladies had been shown. The salesman took him to the tract and said: "This is the lot Mrs. Clark wants, and this is the one, right next to Mrs. Clark, that Mrs. Lepper wants; you are standing on the lot that Mrs. Lepper wants." The witness then testified that the lots were about the distance of an ordinary city block from Washington boulevard; that he did not know what the numbers were; that the agent said nothing about the numbers; that the agents had another plat with them; that it was a larger plat; the agent stated that the lots marked in red were all sold, but the two lots pointed out as the ones upon which they were standing and wanted to buy were not colored red; that at the time of the closing of the contract, later in the day, the witness said: "Well, I hope that these numbers that I am signing for represent the lots I have seen this morning." To which the salesman replied: "A reputable concern like Ratterree could not afford to misrepresent things."

On cross-examination the witness further testified: The map (Plaintiffs' Exhibit 1) was not shown to or seen by the witness for more than a year afterwards; that the only map he saw was the chart shown out at the tract the day he first went out there; that he recollected no lot numbers, only colors; that he was not interested in the chart, but in the property; that he did not read the contract before he signed it. On redirect examination this witness testified that he did not read the contract, because the salesman told him it was the ordinary conventional type of contracts used in sales on the tract, and he assumed it would be all right, inasmuch as he was dealing with a concern like the Ratterree Investment.

This summary is taken from appellants' brief, and, therefore, may be assumed to be as favorable a presentation of the plaintiffs' cause of action as warranted by the facts. No testimony was introduced by the defendant, save expert testimony, as to the value of the lots.

In connection with the foregoing summary of the testimony, we may state that we have read the complete transcript of the evidence, and do not find a single word therein to the effect that the salesman ever mentioned the number of the lots to the plaintiffs, or that any representation was made in relation thereto, save and except the words, "a reputable concern like Ratterree could not afford to misrepresent things," in reply to a question by Dr. Lepper. The testimony shows that Mrs. Clark read the contract, but did not pay any particular attention to it. The testimony does not show whether Mrs. Lepper did or did not read the contract which she signed, but there is not a word of testimony to show that either one of them relied upon a single statement made by any of the defendant's salesmen, nor is there anything in the record to show that Dr. Lepper relied upon anything that had been said to him by any of the defendant's salesmen.

An inspection of the plat, which was handed to the prospective purchasers when they first visited the tract, and which was introduced as an exhibit in this cause, discloses the following: The tract is bounded on the south by Washington boulevard. This boulevard, however, does not run directly east and west, but runs along the tract in a northeasterly and southwesterly course, so as to necessitate a diagonal location of the lots along the boulevard. The first tier of blocks between Washington boulevard and the alley immediately to the north, as shown by the plat, are in depth only the length of one lot. This alley is unnamed. The first street to the north of Washington boulevard is Cologne street. Lots 225 and 226, in the block north of Cologne street, are in the center of the block facing Olga avenue. Lots 235 and 236 are in the center of the block south of Cologne street, and likewise face on Olga avenue. The relative position of all four of the lots is the same, save and except that two lots are north of Cologne street and two lots are south of Cologne street.

The summary of the testimony shows that some of the witnesses testified the lots were a good block from Washington boulevard. Upon this testimony the court might very well conclude that the two lots were in the block north of Cologne street. The witness Mrs. Lepper knew nothing about the plat, nor did she know much about directions. The testimony shows that none of the witnesses paid much attention to the plat. Other testimony, which we have not set out herein, was to the effect that the tract was unimproved, save that the streets were marked out; that there were no buildings upon the property, and work had just been begun, widening Washington boulevard. Under such circumstances we think the trial court might very well conclude that the contracts which the parties signed spoke the truth. The alleged mistake in the numbers of the lots inserted in the contracts was not discovered until a year after the lots had been purchased.

[1, 2] While what are called findings of fact, set forth in the transcript, are mostly conclusions of law, and do not correctly state the law in all instances, and are deficient, in that there is no finding on the question of whether appellants did or did not sign the contracts under the mistaken idea that they were buying lots 235 and 236, instead of lots 225 and 226, we do not very well see how any other judgments could be rendered in these actions. We agree with the appellants that it was not necessary, in an action to rescind on the grounds of mistake, that the mistake must be mutual. While some jurisdictions hold that the mistake must be mutual, section 1577 of the Civil Code and the numerous decisions of the courts of this state show that an action to rescind may be based upon the mistake only of the party prosecuting the action. See National Bank of California v. Miner, 167 Cal. 532, 140 P. 27; Dunham v. McDonald, 34 Cal. App. 744–747, 168 P. 1063; Los Angeles Co. v. New Liverpool Co., 150 Cal. 21–27, 87 P. 1029. Rescission, of course, cannot be had, unless the party rescinding has been diligent and is capable of making restitution, so that the opposite party is restored substantially to the same position as though the contract had not been made. Goodrich v. Lathrop, 94 Cal. 56, 29 P. 329, 28 Am. St. Rep. 91. Section 3407 of the Civil Code specifies that "rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made." Upon this question the record is entirely silent.

[3-5] As we have said, the record shows no fraud, no misrepresentation, and therefore the cases cited upon the subject of fraud need not be considered. We think the following statement of the law, found in 6 Cal. Juris. 84, is applicable to the present case: In order to relieve a party from mistake "the evidence must be clear and convincing, showing the mistake to the entire satisfaction of the court, and not loose, equivocal, or contradictory, leaving the mistake open to doubt. If the evidence is sufficient to satisfy the court that the instrument does not express the intention of the parties, and that the plaintiff had been mistaken in supposing that it did, the fact of his having read the instrument will not prevent the court from finding that it was made under a mistake." And, further: "If a person enters into a contract with another, between whom and himself no relation of a special trust or confidence exists, and it is reduced to writing by such other person, and the means of knowledge of the terms of the writing are equally open to both, and he signs it without reading, he cannot avoid a liability created by the writing, even if its terms differ from the terms of the contract as agreed upon verbally. A person accepting a contract is charged with knowledge of all of its provisions, where he had the means of such knowledge, and of which he carelessly and negligently deprived himself. The fact that he is illiterate does not change the rule. The care of a prudent man in the transaction of his business demands an examination of the instrument before signing, either by himself or by some one for him in whom he had a right to place confidence."

While a number of cases have been cited by appellant where rescission has been granted on the grounds of a mistake as to the subject-matter of the purchase, such as relating to the acreage of real estate, the boundaries of land, and whether certain springs or water sources were not upon the land actually purchased, but were shown to the purchaser as being upon the land, the question goes back to whether the evidence clearly establishes the allegations of the mistake. The explanation given by the appellants as to their failure to discover the alleged mistake was a matter of fact to be passed upon by the trial court. During the year intervening between the purchase of the lots and the discovery of the alleged mistake, the respective parties had been making payments monthly. It is possible that the parties never looked at their contracts during that period of time. The evidence shows that they had copies in their possession, but the evidence in this respect shows an absolute want of diligence, care, and attention, similar to that relating to the execution of the contracts in the first instance.

In view of the lack of the important elements in the testimony which we have heretofore pointed out, we do not very well see how any trial court could find that the mistakes in these cases were established by clear and satisfactory proof. This is especially true, in view of the fact that written instruments are not to be lightly set aside or disregarded.

It is therefore ordered that the judgments in both cases be and the same are hereby affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

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98 Cal. App. 242

KENDALL et al. v. SAN PEDRO LUMBER COMPANY. (Civ. 3752.)

District Court of Appeal, Third District, California. April 12, 1929.

1. Evidence 🔑215(1), 265(3)—Declaration of trust and assignment, setting out list of creditors and amount due, constituted admission of indebtedness, and was sufficient to establish prima facie case.

Declaration of trust and assignment, setting out in schedule as a part of assignment a list of creditors with the amount due each creditor, constituted admission of indebtedness due respective creditors named therein, and was sufficient to establish a prima facie case.

2. Evidence 🔑251(1)—Debtor's admission of indebtedness is prima facie binding on trustees authorized to take charge of assets.

Admission of debtor by virtue of declaration of trust and assignment, setting out list of creditors and amount due each one, was prima facie binding on trustees authorized to take charge of all assets and distribute residue after payment of expenses and preferred claims among unpreferred creditors.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Charles E. Kendall and another, trustees of the business, assets, and effects of the Terminal Ways & Machinery Company, against the San Pedro Lumber Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

A. P. Michael Narlian, Joseph N. Beardsley, A. E. Moore, and H. K. Lockwood, all of Los Angeles, for appellants.

Ernest B. Coil, of Los Angeles, for respondent.

PLUMMER, J. The appellants instituted this action to obtain a declaratory judgment relative to the validity of a claim in the sum of $45,129.35, owned and possessed by the defendant against the Terminal Ways & Machinery Company, the assignor of the plaintiffs. The defendant had judgment, and from this judgment the plaintiffs appeal.

The record shows that the Terminal Ways & Machinery Company, a corporation organized and existing under the laws of the state of California, had become heavily involved financially and unable to meet its obligations, and on or about the 10th day of July, 1924, executed an assignment and declaration of trust in favor of the plaintiffs, wherein and whereby the plaintiffs were authorized to take charge of all the assets and property then and theretofore belonging to the Terminal Ways & Machinery Company, collect all moneys due the company, reduce the assets to cash and discharge all the expenses of executing the trust, pay all preferred claims, and then distribute the residue, pro rata, among the unpreferred creditors of said company. The declaration of trust and assignment sets out in Schedule D, as a part of said assignment, a list of the creditors of the said Terminal Ways & Machinery Company, and the amount due each creditor, the language of the instruments to which we have referred being as follows: "And it is further agreed by and between the trustor and each of said beneficiaries, respectively, that the sum specified in said Schedule D as due any beneficiary from the trustor represents the total indebtedness of the trustor to such beneficiary, as of the date of this instrument." In Schedule D, to which we have referred, it is set forth that the amount due one A. M. Goodhue is the sum of $45,129.35. This is the amount claimed by the respondent in this action as the assignee of A. M. Goodhue. The declaration of trust in relation to this item, among other things, contains the following language: "Provided, further, that the San Pedro Lumber Company, a corporation, hereby waives and releases all claims or obligations which it may have or hereafter acquire against the stockholders of said Terminal Ways & Machinery Company, by reason of an assignment of a certain purported claim of one A. M. Goodhue, or otherwise, and it is hereby expressly agreed that it will not seek to recover or hold said stockholders on a stockholder's liability, or otherwise, by reason of said claim of A. M. Goodhue, or any other claims which it may now have against said corporation."

The declaration of trust further provides "that the trustees may pass upon all claims of all beneficiaries subscribing hereto, and may disallow any claim, in whole or in part. Such disallowance shall be without prejudice to the right of claimant to a judicial determination of the validity of such claim," etc. The answer to the appellants' complaint sets out at length the declaration of trust and the assignment made by the Terminal Ways & Machinery Company, containing the statement which we have quoted as to the amount due the respective creditors listed in Schedule D, and the amount due each creditor, and also the assignment to which we have just made reference. Upon the trial of the action the plaintiffs introduced no testimony whatever. The defendant introduced the declaration of trust and the assignment, and then rested its case. The court found that the declaration of trust and assignment had been fully executed by the trustees, save and except as to the distribution of the assets; that Schedule D has been in no way changed or modified since the execution and delivery of the declaration of trust and assignment; that the amount shown in Schedule D opposite the names of the respective creditors as shown by the books of the trustor, exhibited the amounts due the respective claimants. The court also further found that the San Pedro Lumber Company, as the assignee of A. M. Goodhue, was entitled to the amount of its pro rata of the assets based upon a claim in the sum of $45,129.35. The court also further found that the assignment, declaration of trust, and Schedule D constituted a stated account of the amount due the respective creditors.

[1, 2] Upon this appeal it is strenuously argued that the instruments to which we have referred do not constitute a stated account, and therefore the judgment of the trial court should be reversed. For the purposes of this opinion it may be conceded that the appellants' contention is well taken that the court was in error in finding that the instruments to which we have referred constituted a stated account, but it does not follow that the judgment should be reversed. The instruments to which we have referred and from which we have taken excerpts constituted admissions of the Terminal Ways & Machinery Company, of the indebtedness due its respective creditors named in said instruments, and as to the respondent, of the assignment to it of the amount due A. M. Goodhue. This constitutes sufficient proof to establish a prima facie case. The admission of the debtor is prima facie binding upon the plaintiffs in this case, who, as to such admission, stand in the shoes of their assignor. If they had any proofs that the admission was incorrect, that there was any attempt to give a preference to the respondent in this case, that the records did not show the truth by reason of some collusion or other wrongful act, it was their duty to introduce evidence thereof. The appellants in this case introduced no testimony whatever relative to the correctness of the respondent's claim. As we read the record, both parties submitted the cause upon the declaration of trust and assignment, including Schedule D. This was sufficient proof, as we have said, to make a case in favor of the respondent, and, there being no contradictory testimony, the judgment in favor of the respondent that the records show a correct statement of the amount due the respondent must be upheld, even though it is granted that the court was in error in denominating Schedule D a stated account.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

98 Cal. App. 297

PUGH-MILLER DRILLING CO. v. MAIN OIL CO. et al. (Civ. 3759.)

District Court of Appeal, Third District, California. April 15, 1929.

1. Bills and notes 🔑104—Contracts 🔑95(1)—Third parties' notes and agreement to pay rent to prevent repossession by seller under conditional sale contract held not executed under "duress."

Where seller under conditional sale contract had right to remove oil well drilling machinery, and third parties for whom buyers were drilling well executed notes and agreed to pay rent for account of buyers to prevent repossession of machinery by seller, notes and agreement were not made under duress, since standing upon one's legal rights for protection thereof is not duress.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Duress.]

2. Parties 🔑6(2)—Conditional seller, with whom third parties made agreement to pay bona fide indebtedness of conditional buyer, was real party in interest.

Where third parties agreed to make payments to seller in satisfaction of bona fide indebtedness of buyer under conditional sale contract, seller was real party in interest and entitled to bring action against third parties.

3. Bailment 🔑31(1)—Failure to make repairs after reasonable notice to letter must be shown as prerequisite to hirer's right to recover (Civ. Code, §§ 1955–1957).

Under Civ. Code, §§ 1955–1957, governing rights of hirer and letter in regard to repairs on bailed property, before hirer can recover from letter the amount expended for repairs, it must be shown that letter has failed to make such repairs after having been given reasonable notice to do so.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by the Pugh-Miller Drilling Company against the Main Oil Company of California and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Leslie H. Kranz, of Los Angeles, for appellants.

Burke, Camarillo & Herron, of Los Angeles, for respondent.

FINCH, P. J. The plaintiff was given judgment against all the defendants for the amount of two promissory notes for $1,500 and $750, respectively, executed by the Main Oil Company, and indorsed by the members of its board of directors, and also against the Main Oil Company alone for the further sum of $1,250 for the hire of an oil well drilling machine, being at the rate of $50 a day from March 27 to April 21, 1925. The defendants Main Oil Company, Leonards, Minor, and Allen have appealed from the judgment.

There is no conflict in the evidence relating to the execution and indorsement of the promissory notes or the use by the Main Oil Company of the drilling machine at the alleged rate per day. The defendants resisted payment of the plaintiff's demands on three grounds: (1) That the promissory notes were obtained by duress; (2) that H. L. Ball and C. C. Boatright, and not the plaintiff, were the real parties in interest; (3) that the corporation defendant was entitled to a credit of $3,983.51 for the cost of replacements made by it on the drilling machine.

The machinery in question was sold by the plaintiff to Ball and Boatright on a conditional sale or lease contract. Thereafter the purchasers entered into a contract to drill a well for the corporation defendant. They entered upon the work, and, after it had been in progress for some time, the plaintiff made demand upon Ball and Boatright for payments which had become due, and stated, in the presence of one of defendants, a director of the Main Oil Company, that, if payment was not made, the plaintiff would take possession of the machinery under the terms of the sale contract and remove it. In order to prevent the removal of the machinery, the defendants paid the plaintiff $1,000 "on the instruction of Ball and Boatright," gave the promissory notes in suit, and agreed to pay the plaintiff "a rental of $50 a day" for subsequent use of the machinery "for the account of Ball and Boatright."

[1] Appellants contend that the plaintiff demanded that the defendants agree to make payments for Ball and Boatright, under their contract to purchase, with the alternative of the removal of the machinery; that "a cessation of the work at that juncture would have been disastrous"; and that such conduct on the part of the plaintiff "amounted to duress." Mr. Pugh testified that he made a demand for payment on Ball and Boatright, but not on the defendants. Plaintiff had the right, under its contract with Ball and Boatright, to take possession of the machinery in the event of their default. "It is not legal duress to threaten or actually to take advantage of the usual remedy by suit for the enforcement of a debt or obligation. * * * Standing upon one's legal rights for the protection thereof cannot be recognized as coercion, intimidation or undue influence of any other person." 6 Cal. Jur. 67.

[2] There is no evidence whatever to support the appellants' second contention that the plaintiff is not the real party in interest. The uncontradicted evidence shows that the plaintiff agreed to sell the machinery to Ball and Boatright on the terms herein set forth, and that the payments which the defendants made and agreed to make to the plaintiff were in satisfaction of a bona fide indebtedness of Ball and Boatright to the plaintiff.

[3] The defendants introduced evidence to the effect that the plaintiff impliedly agreed to credit the Main Oil Company with its expenditures for necessary replacement of parts of the machinery. The plaintiff's witnesses testified to the contrary. The defendants also produced evidence tending to show that it is the custom in the oil fields for the owner of the machinery in such a case to pay for replacements. Pugh testified that the custom is that "the man who hires the rig always keeps it up." Leaving out of consideration the fact that the plaintiff did not lease the machinery to the Main Oil Company, but to Ball and Boatright, and they to the defendant company, and treating the whole arrangement as a hiring of the machinery by the oil company from the plaintiff, the following sections of the Civil Code are controlling:

"1955. One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use.

"1956. A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter.

"1957. If a letter failed to fulfill his obligations, as prescribed by section nineteen hundred and fifty-five, the hirer, after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default, and may recover such amount from him."

Under the provisions of these sections, before the hirer can recover from the letter the amount expended for repairs, it must be shown that the letter had failed to make such repairs, after having been given reasonable notice to do so. McFayden v. Town of Calistoga, 74 Cal. App. 378, 384, 240 P. 523. No such showing was made in this case.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

In re CHRISTIE.

CHRISTIE v. SHEAFER et al.

(Civ. 3732.)

District Court of Appeal, Third District, California. April 8, 1929.

1. Adoption 🔑3—Statutes relating to adoption must be strictly construed.

Statutes relating to adoption are in derogation of the common law, and must be strictly construed.

2. Adoption 🔑3—Courts construe every intendment of statutes relating to adoption in favor of claim of natural parent.

Courts will construe every intendment of statutes relating to adoption in favor of claim of natural parent, and strictly construe them when purpose or effect thereof is to deprive natural parent of possession of child; all doubts being resolved in parent's favor in an endeavor to preserve integrity of the family and to protect rights of the parents.

3. Adoption 🔑12—Where final decree of divorce was vacated at time of hearing motion to set aside decree of adoption, notice of adoption to father of child was required (Civ. Code, § 224).

Where final decree of divorce had been vacated at the time of hearing of motion to set aside decree of adoption of child of parties to divorce action, parties were left by virtue of vacation of final decree as if no final decree had been issued and stood before court as husband and wife directly within express purview of Civ. Code, § 224, providing that a legitimate child cannot be adopted without consent of its parents if living, though the wife possessed an interlocutory decree declaring her entitled to a final decree, so that husband was entitled to notice of adoption proceedings; his consent thereto being required.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Motion by Richard H. Christie in the matter of the adoption of Richard H. Christie, Jr., a minor, to set aside a decree of adoption against H. H. Sheafer and others. Motion denied, and petitioner appeals. Reversed.

See, also, 277 P. 872.

Lucian J. Clarke and Clarke & Wilson, all of Los Angeles, for appellant.

Lyle W. Rucker, of Los Angeles, for respondents.

McDANIEL, Justice pro tem. This appeal is from an order of the superior court of Los Angeles county, in department No. 27, denying a motion to set aside a decree of adoption. The motion was made under the provisions of section 473 of the Code of Civil Procedure. The facts may be summarized as follows, to wit: Richard H. Christie, Jr., is the son of appellant, Richard H. Christie, and his wife, Ruth A. Christie. He was born October 8, 1922. The petition for adoption of said minor child was filed by H. H. Sheafer and Clara Sheafer, his wife, who were the maternal grandparents. The petition shows that Ruth A. Christie, the mother of said child, secured an interlocutory judgment of divorce from her husband, Richard H. Christie, upon the grounds of extreme cruelty, on the 8th day of March, 1926, in department 7 of the superior court, in and for Los Angeles county. It is alleged that on March 9, 1927, a final judgment of divorce was entered in this matter in favor of Ruth A. Christie and against Richard H. Christie, and that the mother of said child consented in writing to the adoption of the said child by the petitioners. The remaining averments in the petition for adoption are apparently in due form. It was filed on the 10th day of March, 1927, the next day after the issuance of the said final decree of divorce. Thereafter, on said day, the matter was heard by the court, and all the proceedings seem to have been in due form, except it affirmatively appears from the record that the father of the minor was not given any notice of the hearing of said proceedings for adoption, was not present at the hearing, and did not in any manner, nor at all, give his consent thereto. The adoption proceedings were heard in department No. 27 of said court.

On the 23d day of March, 1927, the appellant, Richard H. Christie, filed a notice of motion to set aside and vacate the decree of adoption in said matter. He sets forth as grounds of motion that said decree was made against the said Richard H. Christie, through his mistake, inadvertence, surprise, and excusable neglect; that the court is and was without jurisdiction to act upon the petition for adoption, or to enter the decree therein; that the decree is contrary to, and in violation of, article I, § 13, of the Constitution of the state of California, in that it deprives said Richard H. Christie of his property without due process of law; that fraud and deceit were practiced upon the court to procure the said decree of adoption, in that, at said time, to wit, March 10, 1927, the above-entitled court, in department 29 thereof, had theretofore acquired and had jurisdiction over the awarding of the care, custody, and control of said minor child, and on the 28th day of February, 1927, had made its order so awarding the child to both parents in the divorce action between Ruth A. Christie and Richard H. Christie, the mother and father of said minor child, and this court (i. e., department 27 of said above-entitled court) was not informed of the effect or circumstances of said order of the judge of said department 29; that at the time of the said decree of adoption, to wit, March 10, 1927, there was no valid final decree or judgment of said divorce between the parties to said action; that the mother and father of said minor child were not divorced. Supporting the petition was the affidavit of Richard H. Christie, a copy of which was attached to the notice of motion, and reference was made, also, to the papers and records on file in said divorce action, same being No. D43768, superior court of Los Angeles county files. The petition also cited authorities relied upon. The affidavit of appellant shows all of the matters set forth in this petition, with a few added facts, namely, that, after the interlocutory decree was entered on the 8th day of March, 1926, on the 10th day of March, 1926, an amended interlocutory judgment in said action was entered in the records of said court, wherein the care, custody, and control of the minor son of the parties was awarded to the plaintiff in the divorce action, namely, Ruth A. Christie, but permitting the defendant, the affiant, to take the minor son from the home of the plaintiff, between the hours of 10 o'clock a. m. and 5 o'clock p. m. on Wednesday of each week, until the further order of the court; that thereafter, on or about the 21st day of December, 1926, the parties to said action entered into an agreement in writing, which agreement is filed in said divorce action, and of which a certified copy has been filed herein and made a part of the record on this appeal. The said agreement provides that, on the ex parte application of the affiant, or his attorney, at any time after the date of said agreement, the said interlocutory order may be modified so as to provide that the care, custody, and control of said minor child shall be equally divided between the plaintiff and affiant; that, pursuant to said agreement, on the 19th day of January, 1927, an amended interlocutory judgment was docketed and entered in said action, providing that the care, custody, and control of said minor child be equally divided between the parties, and that affiant and his father, Haldane H. Christie, be permitted to take the minor son from the home of plaintiff or from such other place as said minor child might be living, and keep the custody and control of him, not to exceed in the aggregate, six months in any one calendar year; that on the 20th day of January, 1927, an order was issued by the presiding judge of said court requiring the parties to appear in department 29, on the 28th day of February, 1927, at 10 o'clock a. m., to show cause, if any they had, why the minor son of plaintiff and affiant should not be placed in the hands of Mrs. H. H. Sheafer, plaintiff's mother, and she be given the ultimate custody and control of him, pending the further order of the court, and further, to show cause why the defendant (this affiant) should not be restrained from taking the child from the home of plaintiff's mother.

It is recited that in said department 29, on February 28, 1927, pursuant to said order, affiant and his father, plaintiff Ruth A. Christie, and her mother, Mrs. H. H. Sheafer, appeared and testified concerning matters then before the court, and that at the conclusion of the hearing the court directed affiant's attorney, Lucian J. Clarke, Esq., to prepare an amended interlocutory judgment of divorce and order, and submit it to Lyle W. Rucker, Esq., attorney for plaintiff, before submitting it to the judge of department 29 for his approval and signature. The affidavit further alleges that on March 18, 1927, another amended interlocutory judgment of divorce and order was entered in the records of the court; then it sets forth the steps taken in the adoption proceedings in department 27; states that affiant has examined the papers and documents and file of said adoption proceeding, and no mention was therein made of the pendency in said superior court, or in department 29 thereof, of any matter, question, or action, or order or judgment, relative to the care, custody, or control of affiant's minor son; and alleges that affiant had no knowledge nor notice, either written or oral, of the pendency of said adoption proceeding, or of the intention of plaintiff in said divorce action, or her mother or her husband, to petition this, or any court for the adoption of the child; further alleges that affiant has stated all the facts herein related, to his attorney, and is by him informed and verily believes that this court is and was without jurisdiction to hear and determine the matters contained in the petition for adoption, and make or enter said decree of adoption therein; states that, had affiant known of the filing of the petition, he would have appeared in said court at said time and objected and resisted the same to the utmost of his ability; that he has never consented nor agreed to the adoption, by any person, of said minor child, and asks that the decree of adoption be set aside. The foregoing facts either were not controverted or were established beyond question by the record.

Respondents contend that the trial court had plenary jurisdiction; that the proceedings were regular in all respects; that the decree of adoption was valid, and the judgment denying appellant's motion should be affirmed.

Matters of testimony not certified to this court nor shown in the record were argued, but cannot be given consideration because not properly presented by this appeal.

On the 12th day of April, 1927, in department 27 of said superior court, the motion to vacate and set aside the decree of adoption was denied. In the argument it is conceded that, at the time of the hearing on the motion, it was shown to the court that on March 19, 1927, upon application by appellant, heard in department 15 thereof, the final decree of divorce of March 9, 1927, was vacated and set aside by order duly entered, and thereafter the plaintiff Ruth A. Christie took an appeal now pending therefrom.

[1, 2] Statutes relating to adoption are in

derogation of the common law, and must be strictly construed. In re Newman (Cal. App.) 262 P. 1112. That case also holds that, since the statutes relating to adoption are in derogation of the common law, the rule of strict construction applies, especially when the purpose or effect thereof is to deprive a natural parent of the possession of his child, and the courts, being solicitous in preserving the integrity of the family and zealous to protect the rights of the parents, will construe every intendment thereof in favor of the claim of the natural parent, all doubts being resolved in his favor; and, if the statute is open to interpretation, it should be construed in favor of the natural parent (citing authorities).

[3] It affirmatively appears from the record herein and in the above-entitled divorce action, while the so-called final decree of divorce of March 9, 1927, was silent as to the matter of the care and custody of the minor child, there was actually in force a subsisting and valid order dated January 19, 1927, made ex parte, it is true, but continued in force expressly, February 28, 1927, after hearing in open court in the presence of all parties, which was made in accordance with the provisions of section 138 of the Civil Code of this state, during the pendency of the divorce proceedings. This court, when discussing In re De Leon, 70 Cal. App. 1, on page 14, 232 P. 738, 743, says: "While section 224 [Civil Code], provides generally that consent shall not be necessary to the adoption of children of the marriage from the parent against whom the decree is granted on the ground of cruelty, the section stops there. It does not assume to interfere with the orders of the court in divorce proceedings as to the custody of children." The preceding sentence is the court's quotation, in part, from the Matter of Cozza, 163 Cal. 514, 126 P. 161, Ann. Cas. 1914A, 214. The court then proceeds: "After further discussion of the case, the Supreme Court held that, even though the divorce had been granted to the husband on account of the extreme cruelty of the wife, the child having been awarded to her, notice of the proceeding to adopt the child in question was absolutely necessary, and the proceeding having been had without the giving of such notice and without her consent, the order of the trial court was reversed." The view shown in these excerpts is applicable to the instant case. If there are any doubts, however, that the trial court herein committed error in making the adoption award without requiring notice to be served upon the father, the appellant herein, and if it be deemed that at the time of the decree of adoption the court prima facie had jurisdiction to render judgment—it became apparent on the hearing of the motion to set aside the decree, without contradiction, that the final decree of divorce of March 8, 1927, had been vacated and annulled. We deem that the situation then shown left the parties, by virtue of that vacation of the final decree, as if no final decree had ever issued, and the parties stood before the court as husband and wife, and directly within the express purview of section 224 of the Civil Code. They were not divorced, although the wife possessed the interlocutory decree declaring her entitled to a final decree. The husband was entitled to notice, and his consent to the adoption was requisite and necessary. This view makes any analysis or discussion of other points argued by respective counsel needless. We regard the cases of Miller v. Higgins, 14 Cal. App. at page 156, 111 P. 403, In re De Leon, 70 Cal. App. 1, 232 P. 738, and In re Newman (Cal. App.) 262 P. 1112, in their reasoning and application of the principles of law which pertain to adoption, as decisive of the question of the necessity of notice upon appellant at the hearing for adoption in the trial court and all the material issues herein.

The order is reversed.

We concur: PLUMMER, Presiding Justice pro tem.; ROLFE L. THOMPSON, J.

98 Cal. App. 331

OLD RIVER FARMS CO. v. ROSCOE HAEGELIN CO. et al. (Civ. 6366.)★

District Court of Appeal, First District, Division 1, California. April 16, 1929.

Rehearing Denied May 16, 1929. Hearing Denied by Supreme Court June 13, 1929.

1. Associations 🔑16—Individual members of voluntary unincorporated association were liable as general partners for debt of association (Const. art. 12, §§ 1, 3, 4).

Individual members of voluntary unincorporated association were liable as general partners for claim against association, regardless of limitation of personal liability under Const. art. 12, § 3, as to stockholder of corporation or joint-stock association, since provision limiting liability when construed in connection with sections 1 and 4 refers only to stockholders of corporation or joint-stock association formed under the general laws.

2. Associations 🔑16—Members of voluntary unincorporated association were not relieved from liability on lease because president added words, "no personal liability," to signature thereto.

Fact that president of voluntary unincorporated association after signing lease added words, "no personal liability," did not have effect of relieving members of association from personal liability for rent accruing thereunder.

Appeal from Superior Court, City and County of San Francisco; C. P. Vicini, Judge.

Action by the Old River Farms Company against the Roscoe Haegelin Company and

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★Rehearing denied. Hearing denied by Supreme Court.

others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hearing denied by Supreme Court; SEAWELL and LANGDON, JJ., voting for a transfer.

Harry G. McKannay, of San Francisco, for appellants.

Randolph V. Whiting, of San Francisco, for respondent.

PARKER, Justice pro tem. This is an action to recover unpaid rent. The making of the lease and the nonpayment of the last installment of the rent thereunder are admitted. The lease was between plaintiff, a corporation, and Roscoe Haegelin Company, which is described in the lease as "a Trust Association organized and existing under the laws of the State of California." Plaintiff brought this action against Roscoe Haegelin Company as an unincorporated association and certain of the members thereof, whose association and membership in the said company is not denied. Judgment was rendered in favor of the plaintiff and against all of the named defendants, and all of said defendants have appealed.

There is no contention made here that the judgment as to the defendant Roscoe Haegelin Company is in any particular erroneous. The individual defendants against whom judgment was rendered, present this appeal on the claim that whatever may have been the liability of the defendant Roscoe Haegelin Company there was no liability on the members of said company individually. It is conceded that on the record before us the judgment against Roscoe Haegelin Company must be affirmed. We will then consider the appeal of the remaining defendants.

The complaint alleged that the Roscoe Haegelin Company was and now is a voluntary unincorporated association consisting of the defendants named and others unknown to plaintiff. The defendants herein by way of answer allege: "That Roscoe Haegelin Company is a voluntary unincorporated association doing business as a joint stock company under and by virtue of a written agreement of trust." Further the defendants, by way of additional answer, alleged: "That in and by said written agreement of lease plaintiff agreed in writing that said written agreement of lease created no personal liability as against the trustees of the said voluntary unincorporated association in favor of said lessor, the plaintiff herein." The trial court found: "That defendant Roscoe Haegelin Company now is and at all times mentioned herein was a voluntary unincorporated association, consisting of various individuals associated in business and transacting business under said common name." The court further found—and the finding is not disputed here—that at the time the indebtedness was incurred each of the individual defendants was a member of the said association, owning shares therein. In this connection it may be noted that the finding of the court discloses that some of the individual defendants were trustees of the association, while other defendants were not. The main argument advanced is as follows: "The defendant Roscoe Haegelin Company is a corporation as such term is defined in section 4 of article 12 of the Constitution of the state of California."

[1] Section 4 of article 12 of the Constitution of this state is as follows: "The term corporations, as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships."

Appellants then contend that the form of organization of Roscoe Haegelin Company is that of a joint-stock company. Putting their argument into formula, it is thus stated: Joint-stock companies under the Constitution are corporations; Roscoe Haegelin Company is a joint-stock company; therefore Roscoe Haegelin Company under the Constitution is a corporation. From this point the argument continues that, being a corporation, the liability of its members or shareholders is governed by the provisions of section 3 of article 12 of the Constitution, as follows: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proposition of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association." However, there is another section of the Constitution which has been apparently cast aside in building up this entire argument. Section 1 of article 12 reads: "Corporations shall be formed under general laws, but shall not be created by special act." Should we accept, then, appellants' construction of section 4, we would then read section 1 as follows: "Sec. 1. Corporations, including joint stock associations, may be formed under the general law and not otherwise."

Approaching section 3 of article 12 with this construction in mind, the conclusion compelled is that the reference to stockholders of a corporation or joint-stock association is intended to mean stockholders of a corporation or joint-stock association formed under the general law. When the framers of the Constitution in section 4 of article 12 used this language: "The term corporations, as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations," it seems clear that they meant thereby to create but one class of organization to be known as a corporation, and to embrace within that class joint-stock companies; in other words, that there could exist no joint-stock company having any of the privileges of a corporation unless said joint-stock company became a corporation by compliance with general laws as provided by section 1 of article 12.

In the case at bar it is conceded that the Roscoe Haegelin Company is not a corporation organized and existing under the general laws.

The case of Goodlett v. St. Elmo Investment Co., 94 Cal. 301, 29 P. 505, has many features in common with the instant case. In that case the points here discussed were not raised, for the reason that it seemed conceded by the court and all parties that there was an individual liability upon the shareholders if proper pleadings sought to enforce it.

We do not feel called upon to detail the articles of agreement under which the Roscoe Haegelin Company was organized, or under which it operated. Plaintiff characterizes the company as "an unincorporated association," and defendants call the company "a voluntary unincorporated association doing business as a joint stock company." From what we have already stated, it is a distinction without a difference.

In Stitzinger v. Truitt, 81 Cal. App. 505, 253 P. 972, it is said: "At common law joint-stock companies were regarded as commercial partnerships, and in the absence of express provisions, statutory or otherwise, the rights and liabilities of their members are to be determined by substantially the same rules. * * * Except in so far as such liability may be limited by statute, or by special agreement with those dealing with the association, the stockholders of a joint-stock company are personally liable for the debts and obligations of the company, precisely as general partners are liable for the debts of the firm, and liability to creditors is not changed by the fact that the form of the association was intended to give the association the attributes of a corporation"—citing 33 Cor. Jur. 889. "There is no claim or pretense here that the syndicate complied with any statute providing for a joint-stock company or for any kind of a special partnership. For this reason, then, the appellants would be liable as general copartners under the general rule. Also their liability is of the same nature whether they be regarded as general copartners or merely as members of an association doing business under an associate name."

See, also, Bullard v. Kinney, 10 Cal. 60; Goodlett v. St. Elmo Co., 94 Cal. 297, 29 P. 505; Webster v. San Joaquin, etc., Co., 32 Cal. App. 264, 162 P. 654; Leake v. City of Venice, 50 Cal. App. 462, 195 P. 440.

In the case at bar there is nothing to indicate compliance with the statute governing limited or special partnerships, and no claim is made that the Roscoe Haegelin Company is such a partnership.

From what has been said it follows, in the absence of any special agreement to the contrary, that the individual members of Roscoe Haegelin Company are liable as general partners in as far as the claim of plaintiff is concerned.

[2] As to appellants' further claim that plaintiff agreed in writing that the lease created no personal liability as against the trustees or members of said association in favor of plaintiff, this raises an issue of fact. The finding of the court is adverse to appellants on this issue, and there is nothing in the record before us to warrant this finding being disturbed. The contention of the appellants on this phase of the case is based upon the lease and its execution. In the body of the lease the Roscoe Haegelin Company is described as "a trust association organized and existing under the laws of the state of California." After the lease was prepared and executed by plaintiff it was sent to the president of the association, and his execution is as follows: Roscoe Haegelin Company. No personal liability. By Roscoe Haegelin, Pres."

It is claimed that the words "No personal liability" determined the matter there and then. This would not be controlling standing alone. In fact, appellants in their main contention admit that, if their claims regarding a joint-stock company were sound, there would still remain a proportionate personal liability. We do not feel that the claim merits further discussion. The trial court went fully into the circumstances surrounding the execution of the lease, and found that there was no waiver of personal liability, and, as indicated herein, we do not think that there is any peculiar magic in the phrase as inserted. The words are too general to have the effect claimed, and would not overcome the facts themselves and the law applicable thereto.

It must be noted that at no time did the Roscoe Haegelin Company or its members or the individuals comprising said association ever claim to be anything but a voluntary unincorporated association, working under a trust agreement. Even in the pleadings the company was so designated up to and after the actual trial when, by permission of court, the words, "as a joint stock company," were inserted to describe the company as "a voluntary unincorporated association doing business as a joint stock company under and by virtue of a written agreement of trust." In the articles of agreement we find no mention of or characterization of the company as a joint-stock company. There was filed in the office of the county clerk a "Notice of Individuals transacting business under the name of Roscoe Haegelin Company," wherein notice was given that certain individuals were transacting business as trustees under an agreement and declaration of trust under the firm name and style of Roscoe Haegelin Company. Application was made to the commissioner of corporations for a permit to issue and sell shares of stock, wherein the concern was described as "Roscoe Haegelin Company, an unincorporated association doing business under an agreement of declaration of trust." In no place nor at any time did appellants represent the company as a joint-stock company.

The law has anticipated that individuals may desire to embark in business ventures without risking their entire capital, and has provided for just such cases by ample statutory enactments and by direct constitutional provisions. Appellants, however, attempt to disregard all of these wise and salutary laws, and ask us to hold them as naught. This we decline to do.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 301

GILINSKY FRUIT CO. v. DAVIS, Presidential Agent. (Civ. 6475.) ★

District Court of Appeal, First District, Division 2, California. April 16, 1929.

Rehearing Denied May 16, 1929. Hearing Denied by Supreme Court June 13, 1929.

Railroads ⟹5½(25)—Presidential Agent, by filing demurrer and interposing answer to complaint, made general appearance, precluding directed verdict because of defective service (Transportation Act 1920; 49 USCA § 71 et seq).

Presidential Agent, having filed demurrer in action under the Transportation Act 1920 (49 USCA § 71 et seq.), and subsequently interposed an answer specifically denying material allegations of complaint, made general appearance sufficient to preclude a directed verdict on ground that summons was not served on any one as statutory agent for railroads over which shipment claimed to have been damaged was carried.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by the Gilinsky Fruit Company against James C. Davis, as Presidential Agent. Judgment for defendant, plaintiff appeals. Reversed and remanded for a new trial.

Harris & Hayhurst and Rue C. Gibson, all of Fresno, for appellant.

L. L. Cory and W. H. Stammer, both of Fresno, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages to some shipments of green fruit. The defendant answered, and a trial was had before the trial court sitting with a jury. The plaintiff introduced its proof and rested. Thereafter the defendant introduced his proof and rested. Later the plaintiff introduced proof in rebuttal, and then it rested. Thereupon the defendant made a motion that the jury be directed to bring in a verdict in favor of the defendant. The motion was granted, and a judgment based on that verdict was entered. In due time the plaintiff made a motion for a new trial, the motion was denied, and the plaintiff appealed from the judgment.

The motion for a directed verdict was based on the ground that summons was served on E. A. Van Wynen, statutory agent for the Southern Pacific Company, and was not served on any one as statutory agent for Modesto & Empire Traction Company, Atchison, Topeka & Santa Fé Railroad Company, or Missouri Pacific Railroad Company, the roads over which the plaintiff alleged in its complaint the shipment was carried. In its brief, the plaintiff quotes many parts of the record showing that the defendant did many different acts, each of which constituted a general appearance, and that the defendant's objections were dilatory and should have been so treated, and that the facts proved by the plaintiff made out a prima facie case, every element being supported by substantial evidence, and therefore no directed verdict should have been ordered. The defendant filed a brief in which he does not controvert any of the foregoing contentions. However, he asserts most earnestly that "under the Transportation Act of 1920 [49 USCA § 71 et seq.] the presidential agent can be sued only in connection with a cause of action against a particular railroad arising out of federal control, and service of summons upon him can only be made through the agent of that particular carrier which caused the alleged liability to arise." He then proceeds to quote the record showing that no summons was served on any one of the railroads specified in the complaint, and contends that the verdict was properly directed in his behalf. The general contention so made by the respondent is admitted by the plaintiff; but it replies that service or nonservice of summons had ceased to be a material factor in the case. It points to the record showing that the second amended complaint was filed June 29, 1923; that on July 10, 1923, the defendant, without limiting his capacity in any respect, filed a demurrer which was overruled; that on May 22, 1925, in the same manner he interposed an answer specifically denying the material allegations of the plaintiff's complaint; and that at no time and in no manner, by a special appearance therefor, or otherwise, did the defendant attempt to quash the service or claim nonservice of summons except as we will now state.

On September 16, 1926, the defendant filed an amendment as "of course" to his answer, and therein alleged that the summons was

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★Rehearing denied. Hearing denied by Supreme Court.

served on the Southern Pacific Company but not on any one of the roads mentioned in the complaint. On December 1, 1926, the defendant, with leave of the court, filed an amended answer which combined the original answer and the amendment thereto. Plaintiff asserts that, by these acts, the defendant waived any defect in the service of summons, and, conceding the full force and effect of the general rule contended for by the defendant, nevertheless, when a sovereign comes into court, the rules of practice are the same as those applicable to the humblest citizen. In reply, the defendant claims "the presidential agent has no power or authority to waive any of the terms of the Transportation Act of 1920." In this behalf he cites and relies on Stanley v. Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960; Tutsch v. Director General of Railroads, 52 Cal. App. 650, 654, 199 P. 861; Jenness v. Payne, 81 N. H. 308, 125 A. 679; Vassau v. Northern Pac. Ry. Co., 69 Mont. 305, 221 P. 1069; Davis v. Donovan, 265 U. S. 257, 44 S. Ct. 513, 68 L. Ed. 1008. In its reply brief, the appellant examined and distinguished each one of those cases, and showed that no one of them supported the claim made by the defendant. On the oral argument, the defendant made no attempt to show that the criticism of the authorities so made by the plaintiff was unsound. We have examined those authorities and do not find them applicable.

The rule applicable to the ordinary suitor is against the claim made by this defendant. 4 C. J. 1350; 3 Cal. Jur. 15. In the litigation entitled The Ulrik Holm (C. C. A.) 298 F. 849, the following facts were involved: The Ulrik Holm, a vessel owned by a Danish corporation, and the tug Calawissa, owned by the Redding Company, collided in the Boston Harbor. A libel was brought by the Redding Company and a cross-libel by the Danish corporation. Later, Walker D. Hines, Director General of Railroads of the United States, appeared as claimant of the Catawissa, and on his request was made a party respondent. On the trial, the District Court ruled against the Redding Company and in favor of the Danish corporation. Appeals were taken to the Circuit Court of Appeals. The Director General complained that the decree of the District Court was in effect a decree in persona, but the court replied that, even though it was, he had appeared in person, and, on his request, he had been made a party respondent in the cross-libel, and that the District Court had jurisdiction to enter a personal judgment against him as Director General. An application for a writ of certiorari was denied. Reading Co. v. Marius Nielson & Son, Inc., 266 U. S. 615, 45 S. Ct. 96, 69 L. Ed. 469. In the case of New Jersey Shipbuilding & Dredging Co. v. Davis (D. C.) 291 F. 617, the plaintiff was complaining of the acts of two different railroads which were under administration of the defendant. The defendant had retained an attorney, one for each of his agencies, and each attorney appeared for him generally. Process had not been served on the agent of either of the railroads. The defendant claimed that therefore the court had no jurisdiction of him. The court ruled against him, saying no suggestion can be found in the books of any such limitation upon a general appearance. In the case of Rosenzweig v. Hines (D. C.) 285 F. 622, the process was served on the Director General. At that time he was not acting and the service was unauthorized. The court said: "Although the director general was irregularly served with a summons and complaint, I think the designated agent had the right afterwards to waive any irregularity of that nature, and submit himself to the jurisdiction of the court by his general appearance, and answer to the merits, or by his consent to be substituted in the place of the director general. Having done so by his attorney, he could not in fairness at the trial take the position that he had not been properly served with process in his representative capacity, and thus oust the plaintiffs." The decision was affirmed by the Circuit Court of Appeals, 285 F. 1021. World Pub. Co. v. Davis (D. C.) 16 F.(2d) 130, involved the trial of several consolidated cases. Motions to quash service of summons were made and denied. Thereupon the defendant filed other pleadings in the cases. A trial was had, and one of the points made by the defendant was that he was not properly before the court. The court said: "I am clearly of the opinion that the defendant has made general appearances in each of the cases, and that this final contention is without merit."

Conceding freely, as the defendant contends, that the government is not liable to suit unless it consents thereto, and its liability to suit cannot be extended beyond the plain language of the statute authorizing it, we think that the facts of this case do not bring anything that we have said in conflict with that rule. True it is that under the Transportation Act the federal government consented to be sued. True it is that each one of the railroads, while under the operation of the federal government, was an agency of the federal government, but there are and have been, from time to time, analogous situations. A federal reserve bank is an agency of the federal government, but a general appearance by one of those banks is a waiver of jurisdiction of its person. Brookings State Bank v. Federal Reserve Bank (D. C.) 291 F. 659. National banks organized under the National Bank Act (12 USCA § 1 et seq.) are instruments designed to be used in aid of the government. However, in suits to which a national bank is a party one of those banks confers jurisdiction of its person by entering a general appearance. First National Bank of Charlotte v. Morgan, 132 U. S. 141, 10 S. Ct. 37, 33 L. Ed. 282. Moreover there are other statutes under which the federal government has consented to be sued. In actions brought under the Tucker Act (24 Stat. 505), it has been held that jurisdiction of the person is conferred by a general appearance. Everett Ry. Light & Power Co. v. United States (D. C.) 236 F. 806. We think it is clear that the general rule above cited, 3 Cal. Jur. 15, is applicable, and that at the time the motion for a directed verdict was made the plaintiff had made out a prima facie case, and, as the defendant had made a general appearance, the question of service of process had ceased to be of importance, and therefore the case should have been submitted to the jury. See generally 52 A. L. R. 327, note.

The judgment is reversed, and the cause is remanded for a new trial.

We concur: KOFORD, P. J.; NOURSE, J.

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98 Cal. App. 358

JOHNSON v. CLARKE. (Civ. 6653.)★

District Court of Appeal, First District, Division 2, California. April 18, 1929.

Rehearing Denied May 17, 1929. Hearing Denied by Supreme Court June 17, 1929.

1. Physicians and surgeons 🔑18(9)—Evidence of surgeon's negligence in removing portion of ureter and allowing portion of kidney to remain held insufficient to require submission to jury.

Evidence of surgeon's negligence in removing portion of ureter and allowing portion of kidney to remain *held* insufficient to require submission of case to jury, and surgeon's motion for nonsuit should have been granted.

2. Physicians and surgeons 🔑14(3)—Physician or surgeon cannot be held as warrantor of cures or of consequences other than those arising from breach of duty to skillfully perform operation.

In ordinary action for malpractice, physician or surgeon cannot be held as warrantor of cures or of consequences other than those arising from breach of his duty to skillfully perform operation.

3. Physicians and surgeons 🔑14(2)—Degree of care or skill required of physician or surgeon is that ordinarily possessed by local physicians and surgeons.

Degree of care or skill required of physician or surgeon is that ordinarily possessed and used by physicians and surgeons in good standing practicing in same locality.

4. Appeal and error 🔑927(3)—In reviewing denial of nonsuit, appellate court will review evidence in light most favorable to plaintiff.

In reviewing ruling denying defendant's motion for nonsuit, appellate court will review evidence in light most favorable to plaintiff.

5. Trial 🔑89—In action for malpractice, refusal to strike answer to plaintiff's hypothetical question assuming facts not in evidence held error, where plaintiff did not establish such facts.

In action for malpractice, refusal to strike surgeon's answer to plaintiff's hypothetical question assuming facts not in evidence *held* error, where plaintiff did not establish facts on which question was based as his counsel stated would be done.

6. Evidence 🔑553(4)—Hypothetical question should be based on facts in evidence.

Hypothetical question should be based upon facts which are in evidence.

7. Evidence 🔑553(1)—Hypothetical question may assume facts within limits of evidence, but must not be unfair or misleading.

Hypothetical question may assume any facts within limits of evidence, but must not be unfair or misleading.

8. Evidence 🔑571(3)—In action for malpractice, where matter in issue was one within knowledge of experts only, expert evidence was conclusive.

In action for malpractice, where matter in issue was one within knowledge of experts only and was not within common knowledge of laymen, expert evidence was conclusive.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action for damages for malpractice by Arthur Johnson against Austin Fisher Clarke. From a judgment for plaintiff, and from an order granting plaintiff a new trial on the issue of damages alone, defendant appeals. Reversed.

David C. Dutton and Dutton & Gilkey, all of Oakland, for appellant.

P. O. Solon and Wm. H. Hollander, both of Oakland, for respondent.

NOURSE, J. Plaintiff sued for damages, alleging malpractice on the part of defendant in his capacity as a physician and surgeon. The cause was tried with a jury, which rendered a verdict for plaintiff in the sum of $1,000. Plaintiff moved for a new trial on the issue of damages alone. His motion was granted, and the defendant appeals. Defendant moved for a new trial generally. His motion was denied. He takes a separate appeal from the judgment which was entered upon the verdict. Both appeals are taken upon typewritten transcripts.

In August, 1921, plaintiff incurred an injury somewhere near the left kidney from which he suffered for nearly three years. He consulted the defendant in June, 1924. On July 22d of that year the defendant operated upon the plaintiff. At the time he found that the left kidney was "a dead or functionless pus kidney." He removed practically all the interior of this kidney and a

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★Rehearing denied. Hearing denied by Supreme Court.

large amount of matter and pus. He also found that the left ureter failed to drain this kidney, as it was completely blocked. The physical condition of the plaintiff was such on the operating table that the defendant was unable to make any further examination. He drained a large amount of pus from the kidney, inserted a rubber tube to provide further drainage and closed the incision. The patient recovered quickly. His physical condition continued to improve for several months and until March, 1925, when he consulted an urologist for an examination. This urologist found that the left ureter was permanently stopped up, and that no urine was being discharged from the left kidney. He also found that the left kidney was dead and permanently functionless, but that there was an abscess in the lower portion of the ureter, and he advised the plaintiff to have the ureter removed. On April 14, 1925, defendant again operated on the plaintiff, this time removing about five inches of the left ureter. The plaintiff made a rapid recovery from this operation, gaining in weight and physical vigor. About two months thereafter he again suffered pain in the region of his left kidney, and another surgeon operated on him, removing the kidney capsule or shell.

The operation of April 14, 1925, is the basis of the action, the plaintiff claiming that defendant was negligent in removing the portion of the ureter and allowing a portion of the kidney to remain. To this charge of negligence the defendant makes answer that the ureter was the sole cause of plaintiff's ailment at the time, that he used all customary care and skill in the operation, that there was no negligence in not removing the kidney shell because it was functionless, and that plaintiff's subsequent ailments were due to his initial injury or to congenital deformities which could not have been anticipated at the time of the operation.

[1-4] Upon the completion of plaintiff's case the defendant moved for a nonsuit on the grounds that there was no evidence to show that he had done anything he should not have done, or that he had failed to do anything he should have done; that there was no evidence that anything done or undone by him was the proximate or any cause of any injury or damage to plaintiff; and that no medical testimony was produced to prove any negligence on his part. This motion was denied. It should have been granted. Appellant has assigned a number of errors occurring during the trial, but, as our examination of the evidence satisfies us that it is insufficient to support the judgment, it is unnecessary to consider these points other than the one relating to certain hypothetical questions.

"In an ordinary action for malpractice the physician or surgeon is not to be held as a warrantor of cures or of consequences other than those arising from a breach of his duty to skillfully perform the operation." Hall v. Steele, 193 Cal. 602, 605, 226 P. 854, 855. The degree of care or skill required of a physician or surgeon is that "ordinarily possessed and used by physicians and surgeons in good standing practicing in the same locality." Markart v. Zeimer, 67 Cal. App. 363, 364, 227 P. 683, 684, citing Perkins v. Trueblood, 180 Cal. 437, 181 P. 642, and other authorities. With these principles in mind we will review the evidence in the light most favorable to respondent.

Testimony relating to the first operation performed by the appellant was offered for the purpose of showing his knowledge of the physical condition of the respondent, but no claim of negligence was predicated upon that operation because barred by the statute of limitations. The uncontradicted evidence discloses that at the time of the first operation the appellant found that the respondent had a dead or functionless pus kidney, in which there was no substance other than matter and pus, which he removed, but that he did not remove the kidney capsule or shell; that in 99 per cent. of cases of that character, where the pus is drained out of a kidney capsule, the capsule closes up and depletes; that, at the time of that operation the appellant discovered that the left ureter was blocked, and that there was no drainage through it from the diseased kidney, but, because of the low physical condition of the patient, he was unable to operate on the ureter at that time. Prior to the second operation, which is the basis of the complaint, respondent visited Dr. Meads, a specialist in urology, for purposes of examination. After a thorough examination this doctor reported to appellant that the respondent's left kidney was functionless and dead, that there was pus coming from the left ureter, but not from the kidney, that there was an abscess in the lower portion of the left ureter, and that this ureter should be removed. The testimony of the appellant, who was called for the respondent under section 2055, Code of Civil Procedure, and the testimony of Dr. Meads, who was also called by respondent, tended unmistakably to prove that the operation complained of was performed with all due care and skill, and that they both believed at the time that the left kidney was dead and functionless; that, because of this fact, there could be no drainage from the kidney to the ureter; and that the removal of the latter was the proper and scientific method of treatment under the circumstances. This testimony was corroborated to some extent by Dr. Taylor, who was also called by respondent, and who testified that the two operations performed by appellant had greatly benefited the respondent.

[5] The only other witness who testified upon any material circumstance on the issue of negligence in respondent's case was

Dr. Beard. This witness, in answer to a hypothetical question which assumed that respondent's left ureter was open at the time of the second operation, and that the pus was draining from the left kidney to the bladder through this ureter, testified that it was bad medical practice to remove the ureter at that time. Appellant vigorously protested the propounding of this question to the witness upon the ground that it assumed facts not in evidence—the condition of the ureter at the time of the operation. His objection was overruled upon the assurance of respondent's counsel that they would establish those facts. This was not done, and appellant's motion to strike the answer should have been granted. On cross-examination the same witness testified that if the fact was that, at the time of the operation and prior thereto, this ureter was totally sealed and blocked up, it was good surgery to remove the portion of it as was done by the appellant. That such was the fact was proved by undisputed evidence which was that on the 9th of March, 1925, and at the time of the second operation in April following, this ureter was completely blocked up; that there was no kidney tissue in the left kidney; that there was no drainage from this kidney through the ureter; and that the stoppage of the ureter and the lack of function of the left kidney were both permanent. Other physicians called by the appellant were asked similar hypothetical questions upon cross-examination by the respondent. Their answers were to the same effect that, if the ureter were open and draining, it would be bad medical practice to remove it as was done by the appellant, the answers which would seem obvious to laymen as well. Two of these witnesses testified on cross-examination that before a surgeon should remove the ureter he should ascertain the condition of the kidney, and that it would be bad medical practice to remove the ureter without having done so. There was, however, no testimony that the appellant in this case did not employ the requisite care and skill in ascertaining this condition before he performed the second operation. His testimony was that he removed the cells of the kidney in the first operation, and the medical testimony is all in accord that, if this is done, the ureter could be safely removed without fear of trouble from the kidney. Before appellant performed the operation complained of, the respondent of his own accord consulted an expert urologist who was known as a specialist in that branch of medical practice. After a thorough examination of the patient this physician reported that the left kidney was dead and functionless; that the ureter was not draining from the kidney; that it was permanently functionless and he recommended its removal. If reputable surgeons are to be charged with malpractice and required to respond in damages for performing operations under circumstances of this character, then the law requires of them the exercise of more than ordinary professional care and skill, and makes them guarantors of the consequences of any operation which they may be called upon to perform in the course of the practice of their profession. To so hold would be an invitation to irresponsible quackery with its false promises of sure cures, and it would impose an unreasonable demand upon the reputable members of a most useful profession.

[6-8] A hypothetical question should be based upon facts which are in evidence. Snow v. Harris, 41 Cal. App. 34, 37, 181 P. 676. It may assume any facts within the limits of the evidence, but must not be unfair or misleading. Treadwell v. Nickel, 194 Cal. 243, 264, 228 P. 25. Where the question assumes facts directly in conflict with the undisputed facts in the case, it is wholly valueless as a hypothetical question, and an answer based upon such false assumption wholly fails to meet the demands of competent evidence. Estate of Gould, 188 Cal. 353, 356, 205 P. 457. In a case such as this, where the matter in issue is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive. Wm. Simpson Const. Co. v. I. A. C., 74 Cal. App. 239, 243, 240 P. 58.

Here the only competent evidence was that the left kidney was dead and functionless; that the ureter was permanently closed and had ceased functioning as a drain for the kidney; and that, because of these conditions, the operation performed by the appellant was in accord with good medical practice, and had no possible relation to the unfortunate condition which afterwards arose in respondent, a condition which could not reasonably have been foreseen by appellant at the time of the operation.

Under these circumstances the prejudice of these hypothetical questions, which assumed facts directly contrary to the facts in evidence, is apparent, and this error would require a reversal of the judgment. Such course must necessarily carry with it an order reversing the limited order granting plaintiff a new trial on the issue of damages alone.

Judgment and order reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

98 Cal. App. 268

PUTNAM v. PICKWICK STAGES, NORTHERN DIVISION, Inc. (Civ. 6697.)★

District Court of Appeal, First District, Division 1, California. April 13, 1929.

Rehearing Denied May 13, 1929. Hearing Denied by Supreme Court June 10, 1929.

1. Automobiles 🔑245(15, 81)—Negligence and contributory negligence in collision of bus with automobile held for jury under conflicting evidence.

In action for injuries on defendant's bus running into rear of plaintiff's automobile, negligence of bus driver and contributory negligence of plaintiff *held* for jury under conflicting evidence.

2. Automobiles 🔑246(26)—Requested instruction that automobilist was guilty of contributory negligence if she suddenly slackened speed or stopped, knowing bus was immediately behind her, held properly refused.

In action for injuries on bus running into rear of plaintiff's automobile, requested instruction that, if plaintiff knew bus was immediately behind her automobile and so close that if she stopped or materially slackened her speed it would likely result in injury, and, knowing such facts, plaintiff suddenly slackened speed or stopped, she was guilty of contributory negligence, *held* properly refused.

3. Trial 🔑251(8) — Requested instruction in collision action on duty of transportation company to passengers held properly refused as not involved in case.

In action for injuries on bus running into rear of plaintiff's automobile, requested instruction undertaking to state degree of care required of transportation companies to its passengers was properly refused as not being involved in case.

4. Appeal and error 🔑216(2)—Trial 🔑296(3) —Defendant cannot complain of failure to instruct on corresponding duty of plaintiff automobilist, where no such instruction was requested and matter was covered by other instructions.

In action for injuries on bus running into plaintiff's automobile from rear, defendant cannot complain that in giving instruction on duty of bus driver to keep vigilant lookout for vehicles ahead none was given as to corresponding duty of plaintiff, where defendant did not ask for instruction on plaintiff's duty and matter was covered by court in other instructions.

5. Appeal and error 🔑216(1)—Defendant failing to request instruction defining preponderance of evidence cannot complain of its omission.

Defendant failing to request court to give instruction defining term "preponderance of evidence" as used in several instructions is in no position to complain of court's failure to so instruct.

6. New trial 🔑102(1)—One seeking new trial for newly discovered evidence must show due diligence.

To justify granting of motion for new trial on ground of newly discovered evidence, the moving party must make a strong case and show due diligence to discover and produce evidence on former trial and that his failure to do so was not result of his own laches.

7. Appeal and error 🔑981—Granting or refusing new trial for newly discovered evidence will not be disturbed except on clear showing of abuse of discretion.

Action of court in granting or refusing new trial on ground of newly discovered evidence will not be disturbed except on clear showing of abuse of discretion.

8. New trial 🔑102(8)—Defendant knowing of importance of testimony of witnesses unavailable at time of trial, but not asking continuance, held not entitled to new trial for newly discovered evidence.

Defendant knowing of importance of testimony of certain witnesses who were not available at time trial was set, and failing to move for continuance or postponement of trial, must be held to have entered on trial at its peril and is not entitled to new trial for newly discovered evidence based on testimony of such witnesses.

9. Damages 🔑132(3)—$7,500 for dislocated vertebra causing permanent partial disability and for severe bruises causing pneumonia held not excessive.

Award of $7,500 for partial dislocation of vertebra resulting in considerable amount of disability and requiring plaintiff to continuously wear a surgical appliance and for severe bruises causing pneumonia *held* not excessive.

10. Appeal and error 🔑612(4)—Transcript certified by official reporter and trial judge as true, correct, and settled, allowed and made part of record, held sufficient.

Transcript on appeal certified by official reporter to be full, true, and correct transcript and certified by trial judge as true, correct, and settled, allowed and made part of record, *held* to meet requirements of law.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Dorothy C. Putnam against the Pickwick Stages, Northern Division, Inc., for personal injuries. From a judgment for plaintiff, and from an order denying new trial, defendant appeals. Affirmed.

B. P. Gibbs and Warren E. Libby, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

LANDIS, Justice pro tem. This action is one for damages resulting from an automobile accident. The cause was tried by jury and verdict for $7,500 returned in favor of the plaintiff. Judgment was thereupon entered in favor of the plaintiff for the damages so assessed by the jury. The appeals of the defendant are from the judgment and from an order denying a new trial.

★Rehearing denied. Hearing denied by Supreme Court.

Appellant bases its appeals upon the following five grounds:

1. The evidence does not justify the verdict. (a) The proof discloses no negligence on the part of defendant. (b) Defendant was guilty of contributory negligence as a matter of law.
2. The verdict is against law.
3. The court erred in its instructions to the jury.
4. Defendant's motion for a new trial should have been granted on the ground of newly discovered evidence.
5. The amount of the judgment awarded is excessive.

Briefly stated, plaintiff alleges: "That on August 30, 1925, while she was operating an automobile on Ventura boulevard, in Los Angeles county, California, and when slowing down on account of congested traffic when near the intersection of said boulevard and Laurel Canyon drive, the defendant, by its agent, so negligently operated one of its auto busses headed in the same direction that it ran into and struck the rear of her said automobile; that in said accident, caused alone by the negligence of defendant, plaintiff was hurt, in her health, strength and activity; received a profound shock to her nervous system, and bruises upon the head, body, and person; was made sick, sore and lame thereby and particularly receiving a straining and spraining of the muscles and ligaments of the neck, back, spine and hips, and a bruising and contusing of the lungs which resulted in traumatic pneumonia; that said injuries are permanent; that from said injuries plaintiff has suffered great physical pain and mental anguish, and will continue to suffer, all to plaintiff's damage in the sum of $15,000." Plaintiff also claims the following damages: $66 for services of physician and surgeon; $150 for nurse; $16.84 for medicines; $12 for massage treatments; $252 for loss of time during which she was unable to follow her employment as an instructress and in a clerical position in a school; and the sum of $89.40 damages to her said automobile; in all aggregating the sum of $15,586.24.

Appellant answered, specifically denying each of the material allegations of the complaint except that it admitted the agency of the driver of the autobus and that he was working within the scope of his authority, and, in addition thereto, alleged affirmatively that respondent was guilty of negligence, directly and proximately contributing to the happening of the accident in that she did not exercise ordinary care, or any care, for her own safety, but so managed and operated her said automobile as to cause and contribute to the happening of the accident.

[1] Plaintiff and the driver of defendant's autobus were the only witnesses to the accident who testified. With respect to the accident the material portion of plaintiff's testimony is as follows: She was driving a Cadillac touring car at 20 or 25 miles an hour and in line of other traffic on a very busy afternoon about 7 o'clock p. m.; that both headlights and tail-light were burning, and by reason of the slowing up of the line of traffic, particularly the automobile just ahead of her, her red "Stop" light at the rear of her car went on; she then put her hand out to the left and down, as required in such cases, and put on her brakes; before coming in contact with the automobile ahead of her, the defendant's stage which was being driven, according to her version within 3 feet of her car, struck her car, knocked her car into the car ahead of her, her car rebounded and was again struck by the stage; that she was driving her car 15 feet back of the car in front of her.

The material conflict between the testimony of plaintiff and the testimony of the driver of the stage with respect to the accident results from the testimony of the driver of the stage, which briefly stated is as follows: "When the car that Miss Putnam was driving seemed to hit something and bounce back, come to a sudden stop; at that time the stage was approximately 20 or 25 feet from plaintiff's car; I seen everything had stopped real sudden. I could not go to the left on account of traffic coming toward me. I was driving a right-hand drive car, and I was over a little bit to the left of her, to watch the signals and other cars coming toward me, and when I started to go to the right to miss her, I did not have room, and for fear of turning her over, I squared the car up and gave her a bump. I was almost stopped when I hit her." The stage driver also testified that he applied both his foot and emergency brakes, the condition of which was good; that he was traveling about 20 or 25 miles per hour; that the weight of his stage was approximately five tons; that after the accident, both he and plaintiff got out of their cars and gave to each other their respective names and numbers of their cars. The principal contention of defendant is that the car ahead of plaintiff suddenly slowed down, causing her to bump into it, she being too close or otherwise operating her car in such a manner as to be unable to prevent the collision; that the impact of plaintiff's car with the car ahead was the proximate cause of the accident and this was brought about by the negligence of the plaintiff or the driver ahead of her; and that such negligence precludes recovery from defendant, even though it, too, may have been negligent.

The testimony of plaintiff that she was 15 feet behind the car ahead of her, that when the traffic slowed down she gave a stop signal with her hand and also with the rear red "Stop" signal, that the light from the red "Stop" signal showed on the rear of her car, and that she applied her brakes, standing as it does, uncontradicted, is sufficient to warrant the conclusion that she employed the degree of care and prudence required of auto drivers using the public highway, and, considered in connection with her statements that were contradicted by defendant's driver, very clearly placed the evidence with the province of the jury to decide the question.

It is sufficient to say that the evidence was conflicting and that the jury were the judges of the credibility of the witnesses. If they believed the testimony favorable to the plaintiff, they could not have properly returned a different verdict.

Error is claimed by reason of the court's refusal to give the following three instructions:

1. An instruction directing the jury to return a verdict in favor of defendant and against the plaintiff. From what we have already said it is obvious that error was not committed in refusing this instruction.

[2] 2. This instruction reads as follows: "If you find from the evidence in this case that the plaintiff knew the defendant's stage was immediately behind her automobile and so close that if she stopped or materially slackened her speed it would likely result in injury and damage to plaintiff, and knowing said facts, the plaintiff did suddenly slack the speed, or stop, her automobile, such negligence proximately contributed to the accident then plaintiff cannot recover in this case and your verdict will be for the defendant." This instruction was properly refused.

[3] 3. This instruction in effect undertakes to state the degree of care required of transportation companies to its passengers, etc., a question not involved in this case, and was also properly refused.

[4] It is then contended by appellant that the court erred in giving the following instruction: "You are instructed that it was the duty of the defendant, through its driver in charge of the auto stage on the occasion in controversy, to have kept a vigilant lookout for vehicles ahead for the purpose of preventing driving against or striking same, and a failure, if any, on his part to have done so was negligence," and particularly as follows: That it was prejudicial to defendant, for the reason that it specifically imposes upon defendant's driver a duty which it does not with equal particularity impose on plaintiff; that it suggested to and left with the jury the impression that a higher degree of care in that respect was required of defendant than of plaintiff; and also suggested the thought that defendant's driver had in fact failed to keep a proper lookout for vehicles ahead. Although we agree with the contention of defendant to the effect that, while the instruction in itself is not improper, and while the defendant's driver was in duty bound to keep a vigilant lookout for vehicles ahead to avoid striking them, there was a corresponding duty so to do on the part of plaintiff, in view of the fact that the rule as thus declared was in effect given to the jury by the court in other instructions, coupled with the further fact that defendant did not ask for an instruction that such duty also applied to plaintiff, defendant cannot complain that none was given.

[5] Complaint is also urged that the court failed to define the term "preponderance of evidence," used in several of its instructions. Defendant, having failed to request the court to give such an instruction is in no position to complain. Wirthman v. Isenstein, 182 Cal. 108-111, 187 P. 12; Weaver v. Carter, 28 Cal. App. 241, 152 P. 325; Townsend v. Butterfield, 168 Cal. 564, 143 P. 760; O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809; Hardy v. Schirmer, 163 Cal. 272, 124 P. 993. The jury was very fully and fairly instructed.

Appellant also complains and urges that its motion for a new trial should have been granted and relies particularly upon the ground of newly discovered evidence which could not with reasonable diligence have been produced at the time of the trial.

[6, 7] To justify the granting of the motion on the ground of newly discovered evidence, the moving party must make a strong case and must show due diligence to discover and produce the evidence on a former trial, and that his failure to do so was not the result of his own laches, and the action of the trial court will not be disturbed except upon a clear showing of an abuse of discretion. Baker v. Joseph, 16 Cal. 173-180; Arnold v. Skaggs, 35 Cal. 684-688; Stoakes v. Monroe, 36 Cal. 383; Rockwell v. Italian-Swiss Colony, 10 Cal. App. 633, 103 P. 162; Foster v. National Ice Cream Co., 29 Cal. App. 484, 156 P. 985; Fresno Estate Co. v. Fiske, 172 Cal. 583, 157 P. 1127.

[8] With respect to the contention of appellant that the newly discovered evidence could not with reasonable diligence have been produced at the time of the trial, from the affidavits presented in support thereof it is shown that the newly discovered evidence consists of the testimony of G. C. Bourquin and P. S. Titus, both of whom were passengers on the stage at the time of the accident; that their whereabouts were discovered by advertising in newspapers, and, although the said discovery occurred after the trial, the showing clearly indicates that the advertisements also occurred after the trial. The accident happened August 30, 1925. Complaint was filed October 19, 1925, and answer filed October 30, 1925. The affidavit of B. P. Gibbs, one of the attorneys for defendant, and who it appears was conducting the investigation in connection with locating the whereabouts of the driver and the passengers, shows that affiant learned from Mr. F. E. Burdette, superintendent of the defendant, as early as January, 1926, that there were passengers on the

stage. It appears that the whereabouts of the witnesses were very readily ascertained. Affiant undertakes to justify his failure to advertise sooner for the reason that he first wanted to confer with Harris, the driver. He admits that he located Harris on January 4, 1927, but did not confer with him until January 25, 1927, about three weeks later and even then he neither employed the method available for locating the passengers that later proved to be effective, nor did he ask for a continuance or postponement of the trial which was set for a week later, but chose to go to trial without them and then did actually locate them within a very few days after the trial. Knowing, as it is admitted it did, of the importance of the testimony, defendant should have moved for a continuance, and, failing to do so, it must be held that it entered upon the trial at its peril. Berry v. Metzler, 7 Cal. 418; Klockenbaum v. Pierson, 22 Cal. 160; Scanlan v. San Francisco, etc., Ry. Co., 128 Cal. 586, 61 P. 271.

[9] The last question for consideration is whether or not the verdict is as a matter of law excessive. In the case of Kelley v. Hodge Transportation System, 197 Cal. 598–610, 242 P. 76, 81, the following rule is laid down, to wit: "Unless we are able to say that the award of damages made by the jury and sustained by the trial court was so grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision."

This rule is approved in the late case of Chappell v. San Diego & Arizona Railway Co., 201 Cal. 560, 258 P. 73. The following is a short résumé of plaintiff's testimony concerning her injury: I was struck from the rear; it was a perfect jolt from the rear, which gave me a veritable snap of my neck and back at the time of the accident. I had terrific pain up and down my spine and in the back of my neck; I was in bed four weeks. I was given treatments by Dr. Spiers. The doctor prescribed and I have continuously worn a surgical appliance from the middle of the body down to below the hips. I have pain in my back most of the time.

Briefly stated, the testimony of Dr. Ora I. Tower is as follows: I saw plaintiff on September 2, 1925; she was then in bed; she had quite a severe bruise over the left side to the left of the heart covering the third fourth, and fifth ribs; diagnosis of pneumonia was made, caused from an injury to the lungs. I think the pneumonia was due to her injury. I saw her at intervals of a week, ten days, or two weeks for several months. At the time of the injury I simply thought the back was sprained, but in March, 1926, X-rays showed that there was actually a shoving forward of one of the vertebræ, the fifth or lumbar vertebra. I referred her to Dr. Spiers, who is a specialist in orthopedic surgery.

D. Owen R. Stafford, who was a graduate physician and had practiced 26 years, testified: "I specialize in X-ray work; took an X-ray of plaintiff on March 18, 1926; it showed a partial dislocation of the fifth vertebra on the sacrum, the fifth lumbar vertebra; it would limit motion and cause probably a change of posture."

Dr. Homer W. Spiers, graduate physician and surgeon of Columbia College of New York City testified as follows: The X-rays show in the lateral view what is known as spondylolisthesis, or a forward dislocation of the fifth lumbar vertebra of the sacrum; described the treatment given; stated he did not believe that anatomically the condition of plaintiff could be changed; that cannot be replaced; it is a permanent partial disability.

The expert opinions above stated were quite materially contradicted by a Dr. Ledyard, called by the defendant.

Dr. Harold B. Barnard, an orthopedic surgeon, was called as an expert on behalf of the court, and testified: That he was connected with the Orthopedic Hospital as acting chief surgeon, and that he had examined the plaintiff at his office; that he made a physical examination of her, taking the usual history, and examined X-rays that the patient brought to him. He was asked and stated: "An examination of the patient and examination of further X-rays which I had taken at the conclusion of my physical examination, disclosed an injury to the low back region, characterized by a forward displacement of the last lumbar vertebra on the sacrum. The condition may be spoken of as spondylolisthesis, and is characterized by an alteration in the normal arrangement of this joint. The physical examination and history further disclosed that a considerable amount of disability has resulted from this accident, and there were further signs and symptoms which indicated without a doubt in my mind that she was not entirely recovered from this accident even on this date."

It is obvious that under the showing made, and guided by the rules of law announced, we are unable to say that the award of damages made by the jury and sustained by the trial court are excessive.

[10] With respect to plaintiff's motion for an order striking from the reporter's transcript on appeal certain portion of said transcript on the grounds that said matters are not authenticated as required by law and are not legally a part of the record on appeal in this action, the transcript as certified by the official reporter to be a full, true, and correct transcript and by the trial judge certified as

true and correct, and settled, allowed, and made a part of the record, meets the requirements of the law, and is therefore denied.

Judgment and order denying motion for new trial affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 337

Ex parte GRIGORIS. (Cr. 1541.)

District Court of Appeal, First District, Division 1, California. April 16, 1929.

Divorce ⚷269(2)—Court could order relator's arrest for not obeying order to show cause why he should not be punished for not paying alimony.

Court had authority to make order of arrest for failure of relator to obey an order duly served on him, requiring that he appear and show cause why he should not be punished for failure to obey a previous order with reference to payment of alimony.

Petition by Peter Grigoris, also known as Peter Gregory, for a writ of habeas corpus to be directed to the Sheriff of the City and County of San Francisco to secure the release of petitioner from custody under an order of arrest for failure to pay alimony. Writ denied.

Joseph A. Brown, of San Francisco, for petitioner.

PER CURIAM. Petition for writ of habeas corpus. It appears from the record that petitioner is held by the sheriff of the city and county of San Francisco under an order of arrest issued out of the superior court for failure to obey an order duly served upon him requiring that he appear and show cause why he should not be punished for failure to obey a previous order with reference to the payment of alimony. The court had full authority to make the order in question.

The petition is denied.

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98 Cal. App. 345

WALL ESTATE CO. v. CHAMBERLIN METAL WEATHER STRIP CO. (Civ. 6615.)

District Court of Appeal, First District, Division 2, California. April 17, 1929.

1. Appeal and error ⚷932(1)—Appellate court will assume that trial court allowed reasonable amount, in absence of allegation that appellant was compelled to pay amount claimed.

Where complaint in action for breach of contract alleged that plaintiff was compelled to employ other mechanics to perform work, but not that it was compelled to pay them amount alleged to have been paid, court was not obliged, by finding such allegations true, to find that plaintiff sustained damage in full amount paid, and appellate court will assume that court allowed as much as was reasonable under evidence, where plaintiff appeals on judgment roll alone.

2. Appeal and error ⚷1071(1)—Appellant cannot complain of finding for part of sum claimed, in absence of allegation that it was compelled to pay whole sum.

Allegations of complaint, in action for breach of contract, that plaintiff was compelled to employ other mechanics to perform work and paid them certain sum, being insufficient to authorize recovery of any part of such sum, in absence of allegation that plaintiff was compelled to pay it, findings that such allegations were true were also insufficient, and plaintiff, appealing on judgment roll alone, cannot complain of finding that it sustained damages in lesser sum, including part of such amount.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the Wall Estate Company against the Chamberlin Metal Weather Strip Company. From a judgment for plaintiff in an unsatisfactory amount, it appeals. Affirmed.

Gillogley, Crofton & Payne, of San Francisco, for appellant.

Hugh F. Keon, Jr., of San Francisco, for respondent.

KOFORD, P. J. Plaintiff commenced this action for $1,565.42 damages for breach of contract. The court awarded it only $683.32. Plaintiff appeals upon the judgment roll alone, claiming that the findings are such that the full amount of damages should be awarded by the judgment.

The findings show the following facts: Defendant agreed to waterproof two walls of plaintiff's apartment house for $230 and to calk between the window frames and the masonry for $155, and promised that the work would be done in such a proper and workmanlike manner as to prevent water from leaking through the walls. Defendant finished the work and received the agreed payment, but did not perform the work well, and, as a result, water leaked through the walls and damaged the interior decoration of the apartment house. The court found all of the allegations of the complaint to be true except paragraph IX. That paragraph read: "That by reason of the foregoing facts plaintiff has sustained damages in the sum of $1,565.42." The court found with respect to this allegation that plaintiff sustained damages in the sum of $683.32 only.

[1] Paragraph VII of the complaint claimed the items of $125 and $148.32 for damages to the interior of the building and paragraph VIII of the complaint declared upon the bal-

ance of the damages claimed by the plaintiff. It is assumed by plaintiff and appellant that the items in paragraph VII were allowed, but that, owing to an error of the court in determining the proper measure of damages, only a part of the claim set forth in paragraph VIII was allowed. That paragraph reads as follows: "That thereafter plaintiff was compelled to employ other mechanics to perform the work which the said defendant agreed to perform according to its contract hereinbefore referred to, and that said mechanics were obliged to remove the defective material placed on said walls by said defendant. That plaintiff paid to said mechanics the sum of $1,292.10 for removing the said inferior materials used by defendant, and for performing and completing in a workmanlike manner the said work which the defendant agreed to do and perform by its said contract hereinbefore referred to."

It will be seen that, while this paragraph alleges that plaintiff was *compelled* to employ mechanics to perform work, it is not alleged that plaintiff was *compelled* to pay said mechanics the sum of $1,292.10 for the work, but only that plaintiff did in fact pay that amount. There is no finding, therefore, to the effect that all of said sum was necessary or reasonable for the purpose alleged. For this reason the court was not obliged, by finding paragraph VIII true, to conclude or find, in response to paragraph IX of the complaint, that the plaintiff had sustained damage in the full amount paid to the said mechanics. Subtracting the two items of interior damage alleged in allegation VII from the $683.32 allowed by the court, it would appear that $410 was allowed by the court in response to the allegation in paragraph VIII "That plaintiff paid to said mechanics the sum of $1,292.10, etc." Presumably the court allowed as much as was reasonable under the evidence. The evidence not being before us, we assume that this decision was in accord with the testimony, and hence the findings are not inconsistent with the judgment.

[2] After oral argument appellant filed a closing brief urging two new points attacking finding No. II, which reads: "That with respect to the allegations of allegation IX of said complaint, the court finds and concludes from the foregoing facts that the plaintiff sustained damages in the sum of $683.32."

It is claimed that this is only a conclusion of law; that if it is a finding of fact it is an ultimate fact assuming to summarize probative facts previously found upon; that, therefore, in either case the said finding No. II must be ignored in favor of the preceding probative facts. These contentions, considered as an abstract point of law, have considerable merit. It is evident that appellant feels that, if that finding or conclusion is ignored, then all the damages claimed in paragraph VIII of the complaint would go into the judgment by force of the findings which declare said paragraph VIII true. But as we have pointed out, the allegations of that paragraph of the complaint are too deficient to have that effect.

The allegations of paragraph VIII being insufficient to state a proper case for damage to the extent of any part of the $1,292.10 paid to mechanics, it follows that the findings which declare paragraph VIII true are for the same reason insufficient in the same respect. Now, if finding No. II be such a conclusion of law or such a finding of ultimate fact as must be totally disregarded, then the real conclusion of law which appears later in the court's decision and which states that plaintiff is entitled to judgment for $683.32 damages for breach of contract would not be supported by any finding of fact on the question of damages except that which finds true the two items of paragraph VII. This would necessarily have the effect of cutting down the judgment by the sum of $410, the amount which the court evidently allowed under allegation VIII. In other words, if appellant's attack upon the court's finding of $683.32 damages be sustained, the fact that the findings found allegation No. VIII of the complaint to be true would not result in an increase in the amount of the judgment. If the defendant had appealed and urged this point, it might result in a reduction of the judgment or a new trial; but he has not appealed. The evidence is not before us and we are not in a position to determine that a new trial would be just. Without considering the evidence, we cannot say that the court should have found whether the full sum of $1,292.10 was reasonable and necessary. The legal points presented upon this appeal do not require a new trial. No error has been pointed out harmful to the appellant.

The judgment is therefore affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

HOFFMAN v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY, et al. (Civ. 6608.)★

District Court of Appeal, First District, Division 2, California. April 17, 1929.

Rehearing Denied May 17, 1929. Hearing Granted by Supreme Court June 13, 1929.

1. Master and servant ⟹387—Employer could not be held guilty of serious and willful misconduct for violating orders of Department of Industrial Relations, where there was no evidence he knew of orders (Workmen's Compensation Act, § 6).

Building contractor, whose employee was injured, could not be held guilty of serious and

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★Hearing granted. 284 P. 451.

willful misconduct, making him liable for penalty under Workmen's Compensation Act, § 6 (St. 1917, p. 836, as amended by St. 1919, p. 912 and by St. 1923, p. 375), for violating certain safety orders issued by Department of Industrial Relations, where there was no evidence that he ever saw or heard of such orders.

2. Master and servant ⚷115(3)—Where two stories of building are erected, statute requiring temporary floors to protect workmen requires that temporary floors be laid (St. 1921, p. 452).

Where two stories of building have been erected, it then becomes necessary, under St. 1921, p. 452, requiring temporary floors to protect workmen, to lay temporary floors.

3. Master and servant ⚷115(3)—Space which need not be covered with temporary floors to protect workmen constructing building is space for elevator shaft or similar space; "except such space as may reasonably be required for the proper construction of such building" (St. 1921, p. 452, § 1(b).

Phrase "except such space as may reasonably be required for the proper construction of such building," in St. 1921, p. 452, § 1 (b), requiring temporary floors to protect workmen constructing building applies to elevator shaft or similar space which is ordinarily kept clear and used from basement to roof as passageway for hoisting and lowering of materials.

4. Master and servant ⚷115(3)—Building contractor could not justify his violation of statute requiring temporary floors to protect workmen by showing ignorance of law (St. 1921, p. 452).

Building contractor could not justify his violation of St. 1921, p. 452, requiring temporary floors to protect workmen, by showing that he did not know existence of law.

5. Evidence ⚷65—Employer was presumed to know law requiring temporary floors to protect workmen constructing building (St. 1921, p. 452).

Employer was presumed to know law under St. 1921, p. 452, requiring temporary floors to protect workmen constructing building.

6. Master and servant ⚷405(6)—Evidence justified finding building contractor's acts violating statute requiring temporary floors to protect workmen constituted serious and willful misconduct, making him liable for penalty (St. 1921, p. 452, § 1(b); Workmen's Compensation Act, §§ 6, 31(b).

Evidence justified finding of Department of Industrial Relations that acts of building contractor, whose employee was injured when floor on which he was standing gave way, which floor violated St. 1921, p. 452, § 1 (b), requiring temporary floors to protect workmen, by covering span exceeding thirteen feet with boards two inches thick not supported by intermediate brace and not laid tightly together, constituted serious and willful misconduct, making him liable for penalty under Workmen's Compensation Act, § 6, St. 1917, p. 834, as amended by St. 1919, p. 912, and by St. 1923, p. 375, and section 31(b) (St. 1917, p. 860).

Proceeding under the Workmen's Compensation Act by Paul Broschinsky, claimant, for injuries, opposed by Leo Hoffman, employer. The Department of Industrial Relations, Division of Industrial Accidents and Safety, awarded compensation, and the employer applies for certiorari to review the award. Affirmed.

George D. Collins, Jr., of San Francisco, for petitioner.

G. C. Faulkner, Frank J. Burke, and F. W. Sawyer, all of San Francisco, for respondents.

STURTEVANT, J. This is a proceeding brought to review an award heretofore made by the respondents in a proceeding brought before the respondents by Paul Broschinsky in an endeavor to obtain the compensation payable to him as an employee because of injuries sustained by him in an accident which befell him when, in the course of his employment, the floor on which he was standing gave way and he fell to the ground below. Through an abundance of precaution, he named as defendants Leo Hoffman and his insurance carrier, the Metropolitan Casualty Company, and he also named Charles S. Hoffman and Ludwig W. Fleigner, doing business as Golden Gate Iron Works, and their insurance carrier, the State Compensation Insurance Fund. This multiplicity of defendants arose because of the debatable question whether Leo Hoffman was but the agent of Golden Gate Iron Works and the latter was, in truth and in fact, applicant's employer, or whether Leo Hoffman was an independent contractor and the applicant was his employee. The respondents adopted the latter theory, and dismissed all defendants except Leo Hoffman and his carrier.

The case then proceeded against the remaining defendants. That Leo Hoffman, as employer, and Metropolitan Casualty Company, as his carrier, were liable to the applicant, was not disputed. But the respondents held that the employer was guilty of "serious and wilful misconduct," and that the compensation payable should be increased 50 per cent. It also held that the employer's carrier was liable for the sums based on section 9 of the Workmen's Compensation Act (St. 1917, p. 836, as amended by St. 1919, p. 913, and St. 1925, p. 640), but that the penalty of 50 per cent. added under section 6 of said act (St. 1917, p. 834, as amended St. 1919, p. 912, and St. 1923, p. 375) should be borne solely by the employer. They made this segregation of liability in conformity with the statute. Sections 6 and 31b (St. 1917, p. 860). The employer has filed in this court his petition praying to have annulled that portion of the award so made against him, claiming that he was not guilty of "serious and wilful misconduct," and, as he carried insurance, the burden should rest on his carrier and that he should have been dismissed. The accident occurred while the applicant was acting as helper in the erection of a steel-frame apartment house at Palo Alto, Cal. The Golden Gate Iron Works had the contract to furnish the material and erect the frame. Leo Hoffman had the contract to do the erecting for the Golden Gate Iron Works. The building being erected was one consisting of five stories and a roof. It had no excavation under it, but commenced at the ground level. Immediately before the accident happened the work had progressed to a point where the first and second stories had been erected, a temporary plank floor had been laid over the beams, and columns for the third story had been assembled on the temporary floor and the workmen were engaged in distributing those columns in piles for the purpose of putting the columns in place. In some places the span between the beams was over 13 feet. At the particular place where the accident occurred, the span from center to center was 15 feet 2 inches. Through a mutual arrangement between Leo Hoffman and the general contractor, the wooden floor joists, consisting of pine boards 16 feet long, 12 inches wide and 2 inches thick, were delivered on the job by trucks, and Leo Hoffman had the privilege of hoisting the planks and distributing them on any floor and using them as temporary flooring. In accordance with this arrangement, his employees had, the day before the accident, hoisted and distributed the planking, and in this manner had constructed the temporary floor. Neither at the span where the accident occurred nor in any other span, so far as the record discloses, was an intermediate beam or other device used to support the temporary flooring. The employer testified that to insert an intermediate beam of wood might necessitate the use of a saw, but that there was no saw on the job, and he had never seen a saw on an erecting job. As to whether the planks were laid close together there was much dispute. In this regard the evidence is clear to the effect that the columns projected somewhat above the beams of the floor, and bolts projected from the columns and beams in places. Because of these two facts, no floor was laid from one column to the opposite column on any given string of columns, and the planking alongside of the columns was distant, according to the evidence, from 1½ inches to 3 inches, thus leaving a space of possibly 16 inches instead of 12 inches in the event that a plank should break.

Paul Broschinsky went to work on the day of the accident. During that day the men were engaged in distributing the columns for the third story. At about 3 o'clock in the afternoon, while so engaged, Paul Broschinsky and another fellow laborer, J. Jensen, both happened to step on the same plank at the same time. As they did so the plank broke. Jensen succeeded in catching hold of a support and did not fall to the ground. However, Paul Broschinsky was not so fortunate, and he fell to the ground, suffering the injuries which are the subject-matter of this claim. An examination of the broken plank disclosed that it was a piece of timber sawed from immediately adjacent to a knot, and the board so produced was apparently clear on one side, but it had the rings of a knot on the other side. This board had been placed on the temporary floor knot side down. Evidence was introduced that from time to time the respondents had issued certain safety orders, and that those orders had been posted on some of the buildings which were being erected by Golden Gate Iron Works. There is no evidence that this petitioner, Leo Hoffman, was engaged on any one of said buildings, nor that he ever saw or heard of the orders or the contents thereof. There is no claim that any one of the orders was posted on the building on which this accident arose. There was evidence that on a date three or four months prior to the accident, while erecting another building, one of the agents of the respondents had occasion to bring to the attention of Leo Hoffman that he was violating chapter 334 of the Statutes of 1921, p. 452; that is, the particular statute other provisions of which are involved in this application.

[1] The petitioner claims that it may not be said that he was guilty of "serious and wilful misconduct" because he violated certain safety orders issued by the respondents. That claim, we think, is well founded. As we have shown above, there is no evidence that he ever saw or heard of such orders. He did not willfully violate an order which, so far as the record shows, he had never seen nor heard of.

[2, 3] As to chapter 334, Statutes 1921, p. 452, the petitioner claims he did not violate any of its provisions. This claim is based on the fact that no column of the third story had been erected at the time of the accident, and therefore the duty to lay temporary floors had not arisen. This point involves a construction of the statute. It is not necessary to quote the entire statute. It is not claimed that the statute applies to a building of one or two stories. It is not claimed that the statute applies to a higher building at any instant of time before the second story has been erected. But after that instant it then becomes necessary to lay a temporary floor. This is so for two reasons: The clear purport of the statute is to create a device, not for the absolute prevention of accidents, but for lessening the injury to the human body that may fall, and lessening the effect of falling missles which may fall and hit a human body. The statute by its terms seeks to limit those falls to two stories. Two stories having been erected, it then becomes necessary to lay temporary floors. The floors having been laid, the next act is to assemble on that floor the

columns to be incorporated into the next story. Although no one of those columns has been erected, the matter of arranging for the erection of them and for the assembling of them creates a potential danger which the statute is aimed to protect against just as effectively as against acts done in the actual erection of one or more of them. There is only one exception as to the zone which need be covered with a temporary floor—"except such space as may reasonably be required for the proper construction of such building." Section 1, subd. (b), c. 334, Stats. 1921, p. 452. That expression, we understand, applies to the elevator shaft or similar space which is ordinarily kept clear and used, from the basement to the roof, as a passageway for hoisting and lowering of materials. But such space, so excepted, is not involved in this case.

From the facts which we have hereinabove enumerated, we think it is clear that there was evidence that the building on which the accident occurred, and the stage to which the erection had progressed, came within the provisions of chapter 334, Statutes 1921, p. 452; and we also think it is clear that there was evidence that this petitioner had violated the provisions of said act by covering a span exceeding 13 feet with boards which were only 2 inches thick, and which were not supported by an intermediate brace, and which were not laid tightly together. Chapter 334, Stats. 1921, § 1, subd. (b).

[4] In the next place, he claims that he was not guilty of "serious and wilful misconduct" even though he violated the provisions of chapter 334 of the Statutes of 1921, p. 452. He rests that claim on several different contentions. He claims that he did not know of the contents, and that nobody called the contents of said statute to his attention. However, as we have shown, the contents of the statute were called to his attention. Furthermore, "in neither a criminal nor civil cause, in any circumstances, can one justify his act by the naked showing that he did not know of the existence of the law." 10 Cal. Jur. 760, § 72.

[5, 6] He then asserts that, even though he violated the statute, that mere violation of the statute is not "serious and wilful misconduct." He quotes from Helme v. Great Western Milling Co., 43 Cal. App. 416, page 421, 185 P. 510, 512, as follows: "'Wilful misconduct' means something different from and more than negligence, however gross. The term 'serious and wilful misconduct' is described by the supreme court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences.' (In re Burns, 218 Mass. 8 [Ann. Cas. 1916A, 787, 105 N. E. 601].) The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence. To constitute 'wilful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." He also cites and quotes from E. Clemens Horst Co. v. Industrial Acc. Com., 184 Cal. 180, 188, 189, 193 P. 105, 108 (16 A. L. R. 611) as follows: "'Serious misconduct' of an employer must, therefore, be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees. * * * Next, as to whether such serious misconduct was 'wilful.' It has frequently been said that wilful misconduct involves the *knowledge* of the person that the thing which he is doing is wrong. [Citing cases.] Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as 'evince a reckless disregard for the safety of others and a willingness to inflict the injury complained of.'"

With the rule of law as stated by the petitioner, we fully agree. However, we think that the facts of this case bring it within, rather than exclude it from, the rule quoted. It will be conceded that the violation of one statute may be far more serious than the violation of another statute, and that the violation of the same statute under one set of facts may not be serious, whereas under a different set of facts it will be quite serious indeed. When, as here, men are at work at high elevations standing on narrow beams or temporary floors, if an accident happens, the possibilities of danger are many, and the probability is strong that, if injury occurs, it will be deplorable. It is therefore plain that the violation of the provisions of chapter 334, Statutes 1921, under the facts of this case, could be said to be "serious misconduct." The employer was presumed to know the law. 10 Cal. Jur. 760. Moreover, there was some evidence that he actually did know it. There was evidence that some of the spans were more than 13 feet, and over which the law required that the temporary floors be laid; that under those long spans it was necessary to insert an intermediate brace; that, to lay the boards tightly together between the columns as well as over the rest of the floor, the planks must be cut to set in between columns; and that they must be supported from below so as to fill the gaps and avoid the protruding nuts and bolts; and that to do these things the employer knew that the crew needed, but that it did not have and never had had, a saw. As the crew had no saw, the employer knew that it could not lay the temporary floors in compliance with the law, and that any failure to do so was fraught with danger to the life and limb of every member of the crew. These facts the petitioner did not attempt to deny, but he attempted to justify his noncompliance with the terms of the statute by making a showing as to what others did and a showing of the inconvenience of a full compliance. In view of these facts, we have no hesitancy in saying that there was evidence before the respondents from which they had the right to say that, in the instant case, there was on the part of the petitioner "the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." In re Burns' Case, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. It follows that the finding that the acts of the employer constituted "serious and wilful misconduct" was not in excess of jurisdiction.

The award is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

98 Cal. App. 198

PACIFIC FINANCE CORPORATION v. ROFFALLI et al. (Civ. 3747.)

District Court of Appeal, Third District, California. April 10, 1929.

1. Pleading 🔑243—Permission to amend complaint should have been granted, where error was merely clerical mistake.

In action upon a conditional sale agreement for motortruck, permission to amend complaint, by substituting one date for date given as defendant's default in making payment as provided by contract, should have been granted, where it was clear that error sought to be corrected was merely clerical mistake, because no installment became due on date of contract mentioned in complaint which was that of contract.

2. Sales 🔑479(7)—Complaint alleging that none of installments falling due subsequent to date of conditional sale agreement had been paid held sufficient allegation that particular installment was unpaid.

In action upon conditional sale agreement for motortruck, complaint alleging that none of installments falling due subsequent to date of contract had been paid *held* sufficient allegation that particular installment which became due had not been paid.

3. Corporations 🔑433(1)—Authority to execute assignment of conditional sale agreement was sufficiently shown, though corporate seal was not attached, where one who executed it testified he was secretary and general manager of assignor.

In action upon conditional sale agreement for motortruck, authority to execute assignment of conditional sale agreement to plaintiff was sufficiently shown, though corporate seal was not attached nor affixed to assignment, where one who executed assignment in name of seller testified that he was secretary and general manager of seller.

4. Trial 🔑163—Motion for nonsuit held insufficient as not showing wherein plaintiff failed to prove case.

In action upon conditional sale agreement for motortruck, motion for order nonsuiting plaintiff, upon ground that evidence did not show any right of recovery, *held* insufficient, in that it did not show wherein plaintiff had failed to prove its case.

5. Sales 🔑479(8)—Nonsuit held error, where plaintiff proved sufficient case to support judgment in its favor, in absence of evidence to contrary.

Where plaintiff in action upon conditional sale agreement for motortruck proved sufficient case to support judgment in its favor, in the absence of evidence to contrary, judgment of nonsuit *held* error.

6. Dismissal and nonsuit 🔑58(4)—Insufficiency of complaint is not ground for granting nonsuit (Code Civ. Proc. § 581, subd. 5).

Insufficiency of a complaint is not a ground for granting a nonsuit under Code Civ. Proc. § 581, subd. 5, providing that an action may be dismissed or judgment of nonsuit entered by court upon motion of defendant, when upon trial plaintiff fails to prove sufficient case for jury.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by the Pacific Finance Corporation against Accardo Roffalli and another. Judgment adverse to plaintiff, and it appeals. Reversed.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

A. S. Maloney and Charles Bagg, both of San Bernardino, for respondents.

FINCH, P. J. The complaint alleges that on February 27, 1925, Robert Barr, Inc., being the owner of a truck, sold and delivered it to defendant Accardo Roffalli, who will be referred to as the defendant, on a conditional sale contract for $895.03, of which the sum of $230 was paid in cash, the balance to be paid as follows: $52.80 on the 27th of each of the months of March, April, and May, 1925, and $33.71 on the 27th of every month thereafter until the whole amount of the contract price was paid; that Robert Barr, Inc., on the day the contract was executed, assigned and transferred to the plaintiff, the contract and the seller's interest in the truck; "that there is now due and unpaid the sum of $33.71 on the payment, which by the terms of the said contract became due and payable on the 27th day of February, 1925, nor have any of the instalments subsequently becoming due been paid." The other allegations of the complaint are such as are appropriate in an action for the recovery of personal property. The prayer is for the recovery of the truck or its value, if delivery thereof cannot be had. The complaint was filed April 13, 1926.

[1, 2] During the trial the plaintiff asked permission to amend the complaint by substituting March 27, 1926, for February 27, 1925, as the date of the defendant's default in making payment as provided in the contract. The court denied the request. Leave to amend should have been granted. It is clear that the error sought to be corrected was merely a clerical mistake, because no installment became due on February 27, 1925, the date of the contract. The complaint was sufficient, however, without the proposed amendment. The allegation that none of the installments falling due subsequent to February 27, 1925, had been paid is a sufficient allegation that the installment which became due March 27, 1926, had not been paid. The evidence shows that the defendant made all payments up to and including the one which became due February 27, 1926, but that he failed to pay the one which fell due March 27, 1926.

[3] Respondent contends that the evidence fails to show that the assignment of the contract to the plaintiff is valid, because "no corporate seal was attached or affixed nor was there anything to show that Robert Barr seller was an officer of the corporation authorized to execute such an instrument." Robert Barr, who executed the assignment in the name of the assignor, testified that he was the secretary and general manager of Robert Barr, Inc., and that the corporation had a seal, but "we never put the seal on the contracts." The contract and the assignment thereof were admitted in evidence. Authority to execute the assignment was sufficiently shown. 6 Cal. Jur. 1109. An officer of the plaintiff corporation testified that the plaintiff purchased the contract "from Robert Barr, Incorporated, and has had possession of it continuously since that time."

Respondent further contends that he "was not in default in his payment on February 27, 1925," and that "there was no right of possession based on such default." Plaintiff's right of possession, however, as already stated, was shown by the allegation and proof that the payment falling due March 27, 1926, had not been paid.

[4-6] Counsel for defendant, at the close of the evidence offered by plaintiff, made the following motion: "We move the court for an order nonsuiting the plaintiff in this case upon the ground that the evidence does not show any right of recovery."

In response to the motion the court said: "I don't think the complaint has ever stated a cause of action. According to the allegations of the complaint there was nothing due on the 27th, therefore there could be no forfeiture on that date. The motion will be granted."

Judgment of nonsuit was entered accordingly, and the plaintiff has appealed. The motion for a nonsuit was insufficient, in that it did not show wherein the plaintiff had failed to prove its case. 9 Cal. Jur. 548; Masero v. Bessolo (Cal. App.) 262 P. 61; Henley v. Bursell, 61 Cal. App. 511, 215 P. 114. Further, as stated, the plaintiff proved a sufficient case to support a judgment in its favor, in the absence of evidence to the contrary. Insufficiency of a complaint is not a ground for granting a nonsuit. Code Civ. Proc. § 581, subd. 5; Scott v. Sciaroni, 66 Cal. App. 577, 581, 226 P. 827. Besides, as already indicated, the complaint is sufficient.

The judgment is reversed.

We concur: ROLFE L. THOMPSON, J.; PLUMMER, J.

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98 Cal. App. 282

WILLIAMS v. LEON T. SHETTLER CO. et al.
(Civ. 5638.)

District Court of Appeal, Second District, Division 1, California. April 15, 1929.

Infants ⚷56—Minor's false representation of age does not prevent disaffirmance of contract (Civ. Code, § 35).

Civ. Code, § 35, does not prevent disaffirmance of contract, made by minor over 18 years old, because of his false representation that he was over 21.

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Action by Sydney M. Williams by J. Jacobson, guardian ad litem, against the Leon T. Shettler Company, a corporation, and others. Judgment for plaintiff, and defendants appeal. Reversed in part, and otherwise affirmed.

Frank D. McClure and Wm. M. Aydelotte, both of Los Angeles, for appellants.

Nadia Williams, of Glendale, for respondent.

HOUSER, J. On an installment contract, plaintiff, who was a minor, purchased an automobile from the defendant Shettler Company for the sum of $1,530.24. In partial payment of the purchase price of said automobile plaintiff transferred to said defendant another automobile valued at $450, together with the sum of $150 in cash. Twelve days thereafter, because of alleged fraud of said defendant in the transaction, and because plaintiff was a minor, plaintiff disaffirmed the agreement entered into between the parties, restored to the said defendant the automobile which plaintiff had purchased from it, and demanded the return to him of the automobile and the $150 in cash, which he had delivered to said defendant at the time the agreement was executed. The said defendant Shettler Company having refused to comply with any part of such demand, action was brought by plaintiff through his guardian ad litem, not only against the said defendant, but as well against the defendant Pacific Finance Corporation, to which last-named company the installment contract for the purchase of the automobile by plaintiff was alleged to have been sold and assigned. From a judgment rendered by the court in favor of plaintiff for the sum of $500 against each of the defendants, this appeal is prosecuted.

No complaint is made by appellants as to any of the findings of fact made by the trial court, other than as to two specified findings, that the evidence was insufficient to support them. Without here setting forth the evidence upon which the findings to which objection is made are based, it may suffice to state that it was ample to sustain the conclusions reached thereon by the trial court.

Appellants also contend that, in view of the fact that, at the time the agreement was entered into, plaintiff falsely represented to the defendant Shettler Company that he was 22 years of age, he should not have been permitted thereafter to disaffirm the contract. Neither section 35 of the Civil Code, which is authority for the disaffirmance of a contract made by a minor over the age of 18 years, nor any other statutory provision to which attention has been directed, contains any intimation that fraud of the nature of that practiced by plaintiff will have the effect of preventing the minor from disaffirming the contract. The following authorities are to the contrary: Lee v. Hibernia Savings & Loan Society, 177 Cal. 656, 171 P. 677; Maier v. Harbor Center L. Co., 41 Cal. App. 79, 81, 182 P. 345; Flittner v. Equitable Life Assurance Soc., 30 Cal. App. 209, 216, 157 P. 630.

The final specification of error by appellants is to the effect that the record contained no evidence upon which to base the judgment against the defendant Pacific Finance Corporation, which contention on the part of appellants is in no way controverted by respondent; nor do the findings of fact disclose any foundation for such a judgment. It follows that as to said Pacific Finance Corporation the judgment should be, and it is, reversed; otherwise the judgment should be, and it is, affirmed.

We concur: YORK, J.; McLUCAS, Justice pro tem.

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98 Cal. App. 291

AMERICAN-LAFRANCE FIRE ENGINE CO. OF CALIFORNIA v. BAGGE et al.

(Civ. 3755.)

District Court of Appeal, Third District, California. April 15, 1929.

1. Sales ⚿479(1)—Where conditional sale contract limited seller's remedy upon default to repossession of trucks, he could not declare balance due and sue therefor.

Under conditional sale contract providing that in case of default in payment of installments seller might repossess trucks sold, seller's remedy was limited to that specified, and he could not upon default declare remaining installments due and bring action for balance.

2. Sales ⚿353(1)—Complaint under common counts for goods, wares, and merchandise sold within two years last past sufficiently states cause of action as against general demurrer.

A complaint in common-law form of a count in indebitatus assumpsit for goods, wares, and merchandise sold, alleging that defendant is indebted to plaintiff in a sum specified for goods, wares, and merchandise sold within two years last past, sufficiently states a cause of action as against a general demurrer.

3. Pleading ⚿53(2)—Complaint by way of common counts may set forth inconsistent causes of action.

Complaint by way of common counts may set forth different inconsistent causes of action.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the American-Lafrance Fire Engine Company of California against Ernest Bagge and another, doing business as Bagge Bros. From a judgment for defendants, plaintiff appeals. Reversed in part with directions, and affirmed in part.

Walter M. Campbell, of Los Angeles, for appellant.

Henry Hay and Victor H. Kendrick, both of Los Angeles, for respondents.

PLUMMER, J. This cause is before us upon an appeal by the plaintiff from a judgment rendered in favor of the defendants, after demurrer to the plaintiff's complaint had been sustained without leave to amend.

The complaint is in two counts. The first is, to recover the sum of $60,712, with interest, on a conditional sales contract covering 15 trucks alleged to have been sold by the plaintiff to the defendants. The second cause of action is set forth by way of common counts, for goods, wares, and merchandise sold and delivered to the defendants. The demurrer of the defendants was based upon the objection that neither the first nor the second cause of action set forth sufficient facts to enable the plaintiff to maintain the suit. The demurrer was also directed against the first cause of action on the further ground that it was ambiguous, uncertain, etc. The court sustained the demurrer to both counts without leave to amend.

The conditional contract upon which the first cause of action set out in the plaintiff's complaint is set forth as an exhibit and is made a part of the first cause of action. This conditional contract, as it appears in the transcript, sets forth the price at which the property is to be sold; that the title shall not pass to the purchaser; that the purchaser shall keep the property free of all taxes, liens, and incumbrances; that payment shall be made at certain dates, beginning on or before 120 days after the date of the contract; and further provided that in the event of a failure to pay any of the installments at the time they became due, then and in that case the seller might at his election declare the whole amount remaining unpaid, due, and payable. This portion of the contract appears to have been signed by the respective parties, and then there was added thereto the following: "The total price of said trucks is $70,601.32, including insurance, no part of which has been paid; in lieu of the cash payment of fifteen thousand four hundred forty-three and 8/100 ($15443.08) dollars thereon the seller has agreed to deliver possession of said trucks to the purchaser without payment, upon condition that said purchaser shall keep said trucks in use for compensation and shall turn over to the seller, as received by him, all earnings thereof, after deducting only the drivers' wages of not exceeding an average of $8.00 per day and the expenses for oil and gas; out of the amounts so received the seller shall retain interest, insurance expense and any necessary repair bills, and shall credit the balance thereon on the first payment mentioned in the above schedule until twelve thousand four hundred forty-three and 8/100 ($12443.08) dollars shall have been so credited, at which time the purchaser shall pay out of his own funds an additional sum of three thousand ($3000.00) dollars; the balance of fifty-five thousand one hundred fifty-eight and 17/100 ($55,158.17) dollars shall then become due and payable in eighteen (18) monthly payments—one (1) for three thousand one hundred fifty and 17/100 ($3150.17) dollars; sixteen (16) for three thousand one hundred fifty ($3150.00) dollars and one (1) for one thousand six hundred eight ($1608.00) dollars, with interest from date of the completion of payment of $15,443.08 first above mentioned, and the seller shall have the right to date the notes described by inserting in each the date upon which the seller shall have received the balance of the $15,443.08, provided, however, if the same shall not have been received within 120 days from the date hereof the seller may, at its option, terminate this contract and repossess such trucks. It is further understood that the purchaser shall submit to the seller monthly for audit the statements made by his employers and his statement of wages of drivers and expenses of oil and gas above mentioned. Supplement entered into contemporaneously with the execution of the above contract.

"American-Lafrance Fire Engine
Company of California,
"By J. E. Armstrong,
"Bagge Bros., Purchaser,
"By Ernest Bagge."

[1] The allegations of the first cause of action, based upon what we have just set forth, are as follows: "That said defendants have not paid the installment of $17,325.78, or any part thereof, except the sum of $9889.31, leaving a balance of said first installment amounting to $7436.47 unpaid, and said defendants have not paid the remaining eighteen installments, or any part or portion thereof, or any interest thereon. That the plaintiff, on account of the default of said defendants in not paying the whole of the said first installment with interest thereon, on or before 120 days after April 12, 1926, has elected to declare, and has declared all of said installments to be due and payable, and that there is now due, and owing and unpaid from said defendants to the plaintiff, under said contract, and upon the promissory notes aforesaid, the sum of $60,712.01 with interest thereon from the 10th day of August, 1926, at the rate of 8 per cent per annum."

The principal case relied upon by the appellant for a reversal herein as to the first cause of action is that of Johnson v. Kaeser, 196 Cal. 686, 239 P. 324, and cases there cited. An examination of the case above mentioned discloses that the contract sued upon is worded entirely different from the one involved in this action. In that case the seller was given an election as to whether he would repossess himself of the property or declare the entire purchase price due and institute suit for the unpaid portion thereof. By the addition or supplement or rider to the conditional contract of sale in this case, or by whatever name it may be designated, the seller explicitly limited its right, in the event of a failure to receive payment in a certain amount during 120 days after the sale, to repossess itself of the property mentioned in the contract, and having set forth these facts in its complaint in the first cause of action therein, it proceeded to do exactly what the trial court stated—"pleaded itself out of court." It had but one remedy under the conditional contract of sale, and its pleadings show that the plaintiff has mistaken its remedy so far as the first cause of action is concerned. The second cause of action is in the following words and figures:

"For a second and separate cause of action plaintiff alleges as follows:

"I. That the plaintiff is a corporation duly organized, existing and doing business under the laws of the State of California, with an office and place of business in the city of Los Angeles, county of Los Angeles, in said state.

"II. That the defendants Ernest Bagge and Walter Bagge at all the times hereinafter mentioned were and are now copartners doing business under the firm name and style of Bagge Bros.

"III. That within two years last past the defendants became indebted to the plaintiff for goods, wares and merchandise sold by the plaintiff to the defendants at their special instance and request in the sum of $73,439.45, no part of which has been paid except the sum of $9889.31.

"IV. That said defendants have not, nor has either of them, paid to the plaintiff the said sum of $73,439.45, nor any part thereof except the sum of $9889.31, and that there is now due, owing and unpaid from the defendants to the plaintiff the sum of $63,550.14, as follows: $60,712.01, with interest thereon from the 10th day of August, 1926, and $2838.13, with interest thereon from February 17, 1927, at the rate of eight (8%) per cent per annum, and that demand has been made upon said defendants for the payment of said sum, but that they have failed, neglected and refused to pay the same, or any part thereof.

"Wherefore, plaintiff demands judgment against said defendants for the sum of $60,712.01, with interest thereon from the 10th day of August, 1926, at the rate of eight (8%) per cent per annum, and for the sum of $2838.13, with interest thereon from the 17th day of February, 1927, and for attorney's fees in the sum of $1500.00, and for its costs in this behalf expended, and for such other and further relief as to the court may seem just in the premises.

"Walter M. Campbell,
"Attorney for Plaintiff."

[2, 3] The demurrer to this cause of action, as stated, is general only, and if a cause of action is set forth by way of common counts, it is sufficient, and the demurrer should have been overruled. An inspection of the second cause of action we think shows without controversy that it sets forth sufficient facts to render it immune against a general demurrer. That a party may plead his cause of action by way of common counts is no longer an open question in this state. In the case of Miller v. Abrahamson, 9 Cal. App. 396, 99 P. 534, the rule is thus stated: "A complaint in the common-law form of a count in indebitatus assumpsit for money had and received, alleging 'that defendant is indebted to plaintiff' in a sum specified in the complaint 'for money had and received by defendant to the use of the plaintiff' and another person, 'within two years last past,' sufficiently states a cause of action." In the case at bar, instead of "money had and received," the complaint reads, "goods, wares and merchandise sold." Nor does it matter, in the use of common counts, if the complaint sets forth different causes of actions, that the causes of actions so set forth are inconsistent. Tanforan v. Tanforan, 173 Cal. 270, 159 P. 709. Other cases might be cited, but the cases referred to in the opinions of the cases here mentioned are sufficient to show that a pleading by way of common counts is admissible in this state, and that the plaintiff in this action, in setting forth its second cause of action by way of common counts, has pleaded sufficient facts to render it immune against a general demurrer. It therefore follows that the court erred in sustaining the defendants' demurrer to the plaintiff's second cause of action. The mere fact that the trial court may have been of the opinion that the plaintiff, in pleading its first cause of action upon a contract, had set out sufficient facts to justify the conclusion that the plaintiff could not prove its second cause of action, furnished no grounds upon which to sustain the defendants' demurrer to the second cause of action.

It is therefore ordered that the judgment of the trial court, in so far as it is based upon the order sustaining the demurrer to the second cause of action set out in the plaintiff's complaint, be, and the same is, hereby reversed, and the trial court is directed to overrule the defendants' demurrer as to said second cause of action, and permit the defendants to answer thereto, if so advised, within such time as may be fixed by the trial court according to law.

It is further ordered that the judgment of the trial court based upon its order sustaining the defendants' demurrer to the first cause of action set out in plaintiff's complaint, be, and the same is, hereby affirmed.

It is further ordered that neither party to this action recover costs on appeal.

We concur: FINCH, P. J.; ROLFE L. THOMPSON, J.

COZAD (STEVICK, Assignee) v. RAISCH IMPROVEMENT CO. (Civ. 3159.)★

District Court of Appeal, Third District, California. April 10, 1929.

Rehearing Denied May 10, 1929. Hearing Granted by Supreme Court June 6, 1929.

Judgment 🔑576(1)—Judgment held conclusive as to all matters presentable on motion to quash execution, regardless of error.

Where there was no showing of mistake, inadvertence, surprise, or excusable neglect at hearing of motion to set aside order quashing execution on those grounds, and at hearing of motion to quash question of plaintiff's right to an execution was clearly before court on its merits, conceding that court may have committed error in considering certain grounds of objection to original order of execution which would have called for reversal on appeal, it had jurisdiction to act, and judgment having become final without appeal or other direct attack, it is conclusive, whether matter was rightly or wrongly decided as to all matters presented or which could have been presented at hearing.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by D. W. Cozad against the Raisch Improvement Company. Judgment for plaintiff was affirmed by the Superior Court. The judgment was assigned to Guy Le Roy Stevick. Execution was issued, but was subsequently recalled and quashed. A motion of the assignee to set aside the order quashing the execution was granted, and defendant appeals. Reversed.

A. B. Weiler and Herbert Choynski, both of San Francisco, for appellant.

Edwin H. Williams, of San Leandro, and Alfred C. Skaife, of San Francisco, for respondent.

FINCH, P. J. It may be gathered from the evidence in this case that the Fidelity & Deposit Company of Maryland "executed a policy of employer's liability insurance on behalf of" the defendant, such liability not to exceed $5,000 for injury to "any one person on any one accident." The plaintiff recovered judgment against the defendant for damages in the sum of $5,898.95 resulting from such an injury. The defendant appealed from the judgment, and the Fidelity & Deposit Company of Maryland executed an undertaking to stay execution. The judgment was affirmed on appeal, and in due time judgment was entered against the surety for the amount of the judgment against the defendant. The surety paid the judgment against it and caused the judgment against the defendant, to the extent of $898.95, to be assigned to Guy Le Roy Stevick, one of the respondents herein. Execution on the judgment against the defendant was thereupon issued in the sum of $898.95. On notice duly given the defendant moved the court "to satisfy said judgment of record and to recall and quash said execution." The Fidelity & Deposit Company of Maryland contested said motion and introduced evidence in opposition thereto. Thereafter the court made and entered the following order:

"This cause having been heretofore submitted on motion to recall and quash execution comes now the court and orders, that said motion be, and the same is hereby granted."

Thereafter Stevick, on due notice, moved the court for an order setting aside the order quashing the execution on the ground, among others, "that said order was made through mistake, inadvertence, surprise and excusable neglect." The other grounds of the motion went to the merits of the original motion to quash the execution. The court granted the motion to set aside the order quashing the execution, and the defendant has appealed therefrom. At the hearing of the motion there was no showing of mistake, inadvertence, surprise, or excusable neglect; but evidence was introduced tending to show that the court committed error in quashing the execution. No evidence was presented which was not or might not have been introduced at the hearing of the motion to quash. At that hearing, "the question of plaintiff's right to an execution was clearly before the court on its merits, and, conceding that the court may have committed error * * * in considering certain grounds of objection to the original order, which would have called for reversal on appeal, it had jurisdiction to act in the premises, and the judgment having become final, without appeal or other direct attack, it is conclusive, whether the matter was rightly or wrongly decided, as to all matters presented or which should have been presented on the hearing." Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 513, 197 P. 334, 338. The case cited is conclusive against respondents, and it is deemed unnecessary to pursue the subject further.

The order is reversed.

We concur: PRESTON, Justice pro tem.; PLUMMER, J.

98 Cal. App. 349

RADDATZ v. MYERS et al. (Civ. 6655.)†

District Court of Appeal, First District, Division 2. California. April 17, 1929.

Rehearing Denied May 17, 1929. Hearing Denied by Supreme Court June 13, 1929.

1. Executors and administrators 🔑85(9)—Administratrix of husband's estate cannot recover from widow's executors household furniture not identified as that left by husband.

Administratrix of husband's estate *held* not entitled to recover from executors of surviving wife's estate household furniture in her possession at time of her death, in absence of evidence identifying it as furniture left by husband.

★Rehearing denied. Hearing granted 281 P. 1017.

† Rehearing denied. Hearing denied by Supreme Court.

2. Executors and administrators ⚿85(9)—Administratrix of husband's estate cannot recover jewelry from widow's executors, in absence of evidence rebutting presumption of her ownership thereof (Code Civ. Proc. § 1963).

Administratrix of husband's estate *held* not entitled to recover jewelry from surviving wife's executors, where only evidence tending to rebut presumption, under Code Civ. Proc. § 1963, that person exercising acts of ownership or commonly reputed to be owner is owner of property, and that husband gave jewelry to wife before his death, was inference that three articles listed in inventory and appraisement of his estate might have been articles in wife's possession at time of her death.

3. Limitation of actions ⚿103(1)—Administratrix's action to recover jewelry from executors of intestate's widow, dying 12 years after husband, held barred though trust was claimed, where trust was repudiated sufficient length of time before suit.

Action by administratrix of husband's estate to recover possession of jewelry, household furniture, etc., from executors of surviving wife, who died 12 years after husband, *held* barred by statute of limitations, whether action sounded in replevin or was founded on trust resulting from wife's relation as joint executrix of husband's estate.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Helen C. Raddatz, special administratrix of the estate of George W. Patterson, deceased, against R. Holtby Myers and another, executors of the last will of Jean Patterson, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

E. J. Talbott, of San Francisco, for appellant.

Milton Marks, of San Francisco, for respondents.

NOURSE, J. Plaintiff sued in replevin as special administratrix of the estate of George W. H. Patterson, deceased, to recover possession of certain personal property consisting of jewerly, cash, and household furniture, which she alleged was in the possession of the defendants as executors of the estate of Jean Patterson, the deceased wife of George W. H. Patterson. Plaintiff also asked for a decree quieting her title, as such administratrix, in and to the property. The trial court gave judgment for the defendants, and the plaintiff has appealed on a typewritten transcript.

[1, 2] The judgment is affirmed for the following reasons: George W. H. Patterson died testate in April, 1913; his wife, Jean Patterson, survived him 12 years. Upon his death, Jean Patterson and another immediately qualified as joint executrices of his estate. Long prior to the death of George W. H. Patterson, and until her death in 1925, Jean Patterson had in her possession the jewelry in suit, openly wearing it and displaying it as her own. After the death of George W. H. Patterson, Jean Patterson continued to live in the house occupied by them at the time of his death and continued to use the household furniture left in the home. Some furniture was shown to have been in the possession of Jean Patterson at the time of her death, but no effort was made to identify it as the same furniture which had been left by her husband.

Hence, as to the furniture, there is a total failure of proof on plaintiff's part; as to the cash item, the claim was apparently abandoned as no proof was offered; as to the jewelry, the trial court invoked the presumption "that a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership" Code Civ. Proc., § 1963, and that, as the jewelry consisted mainly of articles of female adornment, it might be presumed that the husband gave them to his wife prior to his death. There is no evidence tending to rebut the presumption invoked except the inference that three articles of jewelry listed in the inventory and appraisement in the estate of George W. H. Patterson might have been the same articles which were in Jean Patterson's possession at the time of her death in 1925.

[3] But, aside from the merits of the controversy, the trial court found that plaintiff's cause of action was barred by the statute of limitations. Though the action sounds in replevin, the appellant now argues that it is founded on the trust resulting from Jean Patterson's relation as point executrix of the estate of her husband. But upon this theory there was a repudiation of the trust as to the only property which was identified in this proceeding, and this occurred from 12 to 15 years before this action was commenced. Upon either theory the lapse of time was far beyond any period of limitation applicable.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

98 Cal. App. 257

BOGUE v. ROETH et al. (WALKER, Intervener). (Civ. 3708.)★

District Court of Appeal, Third District, California. April 12, 1929.

As Modified on Denial of Rehearing May 11, 1929. Hearing Denied by Supreme Court June 10, 1929.

1. Animals 🔑26(1)—Parties pasturing cattle had lien for amount due while cattle remained in their lawful possession (Civ. Code, § 3051; 1 Deering's Gen. Laws 1923, Act 4344).

Under Civ. Code, § 3051; St. 1869–70, p. 723; 1 Deering's Gen. Laws 1923, Act 4344, parties to whom cattle were delivered for pasturage were entitled to lien thereon to secure payment of amount due under contract while cattle remained in their lawful possession.

2. Animals 🔑26(4)—Valid tender of full amount due for pasturage discharged lien and entitled owner to prompt delivery of stock (Civ. Code, § 3051; 1 Deering's Gen. Laws 1923, Act 4344).

Valid tender of full amount due for pasturage of cattle discharged lien therefor under Civ. Code, § 3051; St. 1869–70, p. 723; 1 Deering's Gen. Laws 1923, Act 4344, and entitled owner to prompt delivery of stock.

3. Animals 🔑26(4)—Noncompliance with demand for delivery of cattle on valid tender of full amount due for pasturage created liability for all damages accruing therefrom.

Failure of parties pasturing cattle to comply with owner's demand for delivery thereof on valid tender of full amount due rendered them liable for all damages accruing therefrom.

4. Tender 🔑22—Denial of plaintiff's alleged right to possession of cattle was not sufficient denial of specifically alleged tender of amount due for pasturage (Civ. Code, § 3051; 1 Deering's Gen. Laws 1923, Act 4344).

Mere denial of plaintiff's alleged right to possession of cattle, which defendants claimed right to retain only to secure their lien for pasturage under Civ. Code, § 3051; St. 1869–70, p. 723; 1 Deering's Gen. Laws 1923, Act 4344, did not amount to sufficient denial of specifically alleged tender of amount due for pasturage.

5. Tender 🔑22—Sufficiency of plea of alleged tender must be raised by demurrer or answer.

The sufficiency of a plea of tender must be raised by either a demurrer or an answer.

6. Pleading 🔑129(2)—Plea of tender will be deemed admitted, unless expressly denied.

A plea of tender must be expressly denied, or will be deemed to have been admitted.

7. Tender 🔑24—Allegation in answer and defendant's trial of case on theory that much larger sum than amount tendered was due warranted assumption that tender was futile, so as to obvioate necessity of paying amount into court.

Affirmative allegation in answer that sum, greatly exceeding amount tendered and found by jury to be due, was due defendants for pasturage of plaintiff's cattle, and trial of case by defendants on theory that they were entitled to such sum, *held* to warrant assumption that tender was futile, so that it was unnecessary for plaintiff to pay amount into court to keep tender good.

8. Tender 🔑18—Ordinarily, tender which apparently will not be accepted need not be kept good.

Ordinarily, a tender need not be kept good, when it appears that it will not be accepted.

9. Tender 🔑15(3)—Mere objection to amount of tender will be deemed waiver of other alleged defects.

A mere objection to amount of claim tendered will be deemed a waiver of all other alleged defects of tender, such as inability to pay, character of money offered, or invalidity of check.

10. Pleading 🔑129(2)—Defendants not denying tender could not first question during trial plaintiff's ability to pay or failure to keep tender good by cross-examining witnesses on subject.

Defendants, having tacitly admitted plaintiff's tender of amount claimed to be due for pasturage by failure to deny it, were precluded from first questioning during trial plaintiff's ability to pay money offered or failure to keep tender good, and hence could not cross-examine witnesses on subject.

11. Pleading 🔑245(3)—Refusal to permit amendment of answer to deny alleged tender of amount due, on motion first made during trial, held not abuse of discretion.

Trial court did not abuse his discretion in refusing to permit defendants to amend their answer, so as to deny plaintiff's alleged tender of amount due, on motion first made during trial.

12. Replevin 🔑52—Holder of valid contract to purchase personalty involved in replevin suit has interest entitling him to intervene (Code Civ. Proc. § 387).

One holding a valid contract to purchase personal property involved in replevin suit has an interest in the matter in litigation, entitling him to intervene as a party to action under Code Civ. Proc. § 387.

13. Replevin 🔑52—Interest of any kind or magnitude in subject-matter is sufficient to authorize intervention, though intervener may protect interest in some other way (Code Civ. Proc. § 387).

Any interest in subject-matter, of whatever kind or magnitude, is sufficient to give right to intervene under Code Civ. Proc. § 387, whether or not intervener may protect his interest in some other way.

14. Replevin 🔑52—Holder of valid contract to purchase cattle, sought to be replevined, from plaintiff, had interest entitling him to intervene (Code Civ. Proc. § 387).

One holding valid contract to purchase cattle, sought to be replevined by vendor from one

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★Rehearing denied. Hearing denied by Supreme Court.

claiming lien for pasturage under Civ. Code, § 3051; St. 1869–70, p. 723; 1 Deering's Gen. Laws 1923, Act 4344, had such an interest in delivery and possession thereof, so that he might market them at a profit, as entitled him to intervene under Code Civ. Proc. § 387, though he might have maintained separate action for damages against vendor for failure to deliver them pursuant to contract.

15. Replevin ⚷52 — Interest authorizing purchaser's intervention in seller's replevin suit held not altered or terminated by delivery of cattle to seller (Code Civ. Proc. § 387).

The interest authorizing purchaser of cattle to intervene, under Code Civ. Proc. § 387, in replevin action by seller against one claiming pasturage lien, was not altered or terminated by delivery of cattle to plaintiff, pursuant to cash deposit in bank, accompanied by conditional trust agreement reserving lien, to secure payment of pasturage account.

16. Appeal and error ⚷719(7)—Appellants cannot question form of instructions not specified as error in bill of exceptions (Code Civ. Proc. § 648).

Under Code Civ. Proc. § 648, appellants, specifying no other instructions than those offered by them and refused as error in bill of exceptions, are precluded from questioning form of any other instructions.

17. Appeal and error ⚷1033(5)—Instruction that plaintiff tendered amount due for pasturage on later date than that shown by complaint and evidence in replevin held not prejudicial to defendants.

Where complaint in replevin alleged that plaintiff tendered amount claimed to be due for pasturage of cattle "about May 9," and evidence showed that both plaintiff and intervener demanded delivery thereof and offered to pay such amount on May 10, defendants were not prejudiced by instruction that it was admitted that tender occurred on May 25th, though contrary to instruction to award plaintiff damages for loss in weight of cattle since May 10 following such tender, as defendants profited if jury estimated damages from later date.

18. Trial ⚷194(10)—Instruction to find for intervener, if plaintiff and defendants in replevin wrongfully failed to deliver cattle to intervener "when" he had right to possession thereof, held not erroneous as charge that he had absolute right of possession.

Instruction to find for intervener against both plaintiff and defendants in replevin, if they wrongfully failed to deliver cattle to intervener "when" he had right to possession thereof, *held* not erroneous as positive charge that he had absolute right to possession; intent being that word "when" should be construed as meaning "if" or "in the event."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, When.]

19. Trial ⚷285 — Instructions should receive reasonable construction upholding judgment.

Instructions should receive such reasonable construction as will uphold, rather than defeat, a judgment.

20. Appeal and error ⚷750(8)—Excessiveness of verdicts cannot be raised on appeal, where specifications of error fail to designate insufficiency of evidence to support amount of damages found (Code Civ. Proc. § 648).

Question whether verdicts for plaintiff and intervener in replevin are excessive cannot be raised on appeal, where specifications of error fail to designate insufficiency of evidence to support amount of damages found, as required by Code Civ. Proc. § 648.

21. Appeal and error ⚷1068(4)—Failure of instruction in replevin to define market value held immaterial, where bill of exceptions failed to specify insufficiency of evidence to support amount of damages found (Code Civ. Proc. § 648; Civ. Code, § 3353).

That intervener's instruction in replevin suit failed to state, in language of Civ. Code, § 3353, that "market value" meant value of property to seller, which he could have obtained in market nearest place at which it should have been accepted by buyer, *held* immaterial, where bill of exceptions failed to specify insufficiency of evidence to support amount of damages found, as required by Code Civ. Proc. § 648.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Replevin by C. B. Bogue against George Roeth and others, individually and as copartners doing business under the firm name and style of Roeth, King & Roeth, in which L. E. Walker intervened. From judgments for plaintiff and intervener, defendants appeal. Affirmed.

George R. Freeman, of Willows, for appellants.

W. T. Belieu, of Willows, for intervener respondent.

THOMPSON, J. This is an appeal from separate verdicts and a judgment for damages in favor of the plaintiff and also in favor of the intervener in an action to replevin 1,150 head of cattle which were held by the defendants upon a claim of lien to secure the payment of an account for pasturage.

The defendants held a lease on 7,500 acres of pasture land in Glenn county. The plaintiff was the owner of more than 1,100 Hereford cattle, for the grazing of which he contracted to pay the defendants not to exceed $8,250 computed at the rate of $2.50 apiece per month for 1,000 cows for a period of three months, and $2 apiece per month during the same period for all stock in excess of that number, estimated at about 125 additional cows. Pursuant to this agreement plaintiff's cattle were delivered to the defendants for pasturage in December, 1924, and a large proportion of them were retained until the latter part of May, 1925. 395 cows were redelivered May 10, 1925. The remaining stock was held by the defendants under a claim of lien to secure the unpaid charge for pasturage. April 5, 1925, the plaintiff contracted to sell to the intervener, L. E. Walker, 1,050 head of cattle at a specified price, agreeing to deliver the stock prior to May 10, 1925. Upon this last-mentioned date the plaintiff tendered defendants the sum of $8,250 in full payment of what was claimed to be the agreed maximum cost of pasturage, and thereupon demanded delivery of his cattle, which was refused by the defendants upon the ground that they were entitled to approximately $15,000 for accrued cost of pasturage. Thereupon this suit was instituted. On June 16, 1925, by agreement, $16,000 was deposited in escrow with a Willows bank to secure the payment of the pasturage account, and the cattle were then released. In the meantime the market value of beef cattle declined materially, and both the plaintiff and the intervener thereby sustained a substantial loss.

Upon the trial three separate verdicts were rendered, one in favor of the plaintiff for damages in the sum of $1,134; one in favor of the defendants for pasturage in the sum of $8,250; and the third in favor of the intervener for damages in the sum of $3,454.89. A judgment in accordance with these verdicts was then entered, from which this appeal was perfected.

The record discloses the fact that on April 5, 1925, the intervener, Walker, contracted to purchase 1,050 head of these cattle from the plaintiff to be delivered by May 20th; that 674 head of cattle were not so delivered for the reason that defendants held them upon a claim of lien for pasturage; that "the plaintiff C. B. Bogue and the intervener L. E. Walker in turn demanded of the defendant Roeth, King & Roeth the delivery of said cattle consisting of 674 head on May 10, 1925, and (then) offered to pay defendants the pasturage on said cattle up to that time amounting to $8,250," which tender by both the plaintiff and the intervener was refused on the sole ground that defendants claimed they were entitled to a greater sum of money for pasturage; that the cattle were then fat beef cows fit for market; and that the price of beef cattle for the season was then at its peak, but that the value and condition of the cattle rapidly depreciated thereafter, so that when they were actually delivered to the plaintiff between June 13 and 18, 1925, they had become what was termed "feeder cattle" only; that upon resale of the stock a substantial loss was sustained by both the plaintiff and the intervener. The amount of damages thus suffered by the plaintiff was fixed by the jury at $1,134, which loss is supported by the record, together with damages which were awarded to the intervener in the additional sum of $3,454.89.

The proceedings of this trial are presented by means of a bill of exceptions. The appellants contend that the record discloses no interest of the intervener in the litigation authorizing an intervention pursuant to section 387 of the Code of Civil Procedure; that the evidence fails to show a tender of the money found to be due for pasturage, sufficient upon which to warrant a judgment for damages; that the trial court erred in refusing to permit an examination of witnesses on the subject of a tender, and in refusing to permit an amendment of their answer during the trial to specifically deny the alleged tender; and that the court erred in giving to the jury and refusing certain instructions.

[1-3] While the cattle remained in the lawful possession of the defendants, they were entitled to a lien upon the stock to secure the payment of the amount for pasturage which was actually due under the terms of their contract. Section 3051, Civ. Code; Stats. of Cal. 1869–70, p. 723, 1 Deering's Gen. Laws of 1923, p. 1626, Act 4344. A valid tender of the full amount due to the defendants had the effect of discharging the lien and entitling the plaintiff to prompt delivery of the stock. 26 R. C. L. 654, § 39. A failure to comply with this demand for delivery under such circumstances created a liability against the defendants for all damages which accrued therefrom. Loughborough v. McNevin, 74 Cal. 250, 257, 14 P. 369, 15 P. 773, 5 Am. St. Rep. 435.

[4-9] The complaint admitted that $8,250 was due to the defendants, and alleged a tender of that amount. The answer failed to deny the alleged tender. It specifically disclaimed that "only the sum of $8,250 was due for pasturage," and upon the contrary asserted that $14,833.85 was due the defendants. The mere denial of plaintiff's alleged right to the possession of his cattle did not amount to a sufficient denial of the tender of money which was specifically alleged. The defendants' only claim of right to retain the custody of the stock was to secure their lien for pasturage. In the absence of a special demurrer, the tender was adequately pleaded. The sufficiency of a plea of tender must be raised by either a demurrer or an answer. A plea of tender must be expressly denied, or it will be deemed to have been admitted. 38 Cyc. 170; 24 Standard Enc. of Proc. 771. The affirmative allegation contained in the answer that a sum was due the defendants which was greatly in excess of the amount tendered and found by the jury to have been due, together with the fact that the case was tried on the part of the defendants upon the theory that they were entitled to this larger sum of money, furnishes sufficient basis upon which to assume that plaintiff's tender of $8,250 was futile, and it was therefore unnecessary for him to pay that amount into court to keep the tender good. Ordinarily a tender need not be kept good when it appears that it will not be accepted. 26 R. C. L. 624, § 3, p. 643, § 24. Moreover, a mere objection to the amount of a claim tendered will be deemed to be a waiver of all other alleged defects of the tender, such as inability to pay or the character of money offered or the invalidity of a check. 26 R. C. L. 628, § 7.

[10,11] Aside from the question of damages resulting from defendants' refusal to deliver the stock to plaintiff, the sole issue upon which the pleadings were drawn and upon which the case was tried was the amount due to the defendants for grazing the cattle. Having tacitly admitted the tender by their failure to deny it, the defendants were precluded from questioning, for the first time during the process of the trial, the plaintiff's ability to pay the money offered, or his failure to keep the tender good. The court, therefore, correctly sustained objections on the part of the plaintiff to defendants' cross-examination of witnesses upon this subject. Nor was there an abuse of discretion on the part of the court in refusing to permit defendants to amend their answer so as to deny the alleged tender, which motion to amend was first made during the process of the trial.

[12-14] There is no merit in the defendants' contention that L. E. Walker, who held a valid contract for the purchase of 1,050 head of the cattle sought to be replevined in this suit, possessed no such interest in the subject of this litigation as would entitle him to intervene under section 387 of the Code of Civil Procedure, which provides in part: "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." One who holds a valid contract to purchase personal property which is involved in a suit of replevin has an interest in the matter in litigation entitling him to intervene as a party to the action. Loughborough v. McNevin, supra; Gaines v. Clark, 51 App. D. C. 71, 275 F. 1017, 1019; 20 Cal. Jur. 520, § 25. "The code does not attempt to specify what or how great that interest shall be, in order to give a right to intervene. Any interest is sufficient. The fact that the intervenor may or may not protect that interest in some other way is not material." Coffey v. Greenfield, 55 Cal. 382; Dennis v. Kolm, 131 Cal. 91, 63 P. 141. In the present case the matter in litigation consisted primarily of the right to the possession of the cattle, incident to which there was also involved the question of damages for unlawfully detaining them from the owner. Certainly the purchaser of the cattle was interested in the delivery and possession of the stock so that he might market them at a profit. This interest entitled him to intervene, even though he might have maintained a separate action for damages against the vendor of the cattle for failure to deliver them pursuant to contract.

[15] The interest in the outcome of the replevin action authorizing the intervention of the respondent under section 387 of the Code of Civil Procedure, was not altered or terminated by the delivery of the cattle to the plaintiff pursuant to the deposit of cash accompanied by the conditional contract which was equivalent to a surety bond. The conditional trust deposit and agreement specifically reserved the appellants' lien.

In lieu of a surety bond, $16,000 in cash was deposited in trust with the Glenn County Bank at Willows accompanied with a written agreement, by the terms of which the appellants' lien on the cattle for pasturage was specifically reserved. It authorized delivery of the stock pending the litigation "without waiving any of the aforesaid liens." This escrow agreement and cash deposit constituted a mere undertaking to obtain possession of the cattle without releasing the lien. The determination of the priority of liens was an important issue preserved by the terms of the escrow transaction. The delivery of the cattle was therefore conditional, and did not affect the merits of the cause. The damages sought to be recovered by the intervener accrued prior to the release of the cattle. In 5 Cal. Jur. 178, § 15, it is said: "The effect of delivery upon undertaking is simply to give the party the possession of the property pending the litigation, and not to divest either the title or the lien of the other party. * * * The title does not vest * * * until the judgment. * * * Accordingly, he cannot sell it so as to convey good title even to an innocent purchaser. * * * The property remains in the custody of the law and all parties must take notice." Hunt v. Robinson, 11 Cal. 262; Bailey v. Security Trust Co., 34 Cal. App. 348, 167 P. 409; Riverside Portland Cement Co. v. Taft, 192 Cal. 643, 221 P. 357. The separate verdict in favor of the intervener is, therefore, supported by both the law and the record in this case.

[16] We find no prejudicial error in the instructions given or refused. On this appeal the appellants are precluded from questioning the form of any instructions, except those which were offered by the defendants and refused as appears in paragraph 12 of the bill of exceptions, for the reason that no other instructions are specified therein as error. Section 648, Code Civ. Proc. These challenged instructions, as well as the specifications of error, are confined entirely to the defendants' theory of the insufficiency of the alleged tender; the failure of plaintiff to have paid the money into court or to perform acts to keep the tender good; the legal right of the respondent, Walker, to intervene and his right to the possession of the cattle.

[17] It is true that plaintiff's instructions A and B conflict as to the actual date of the tender of the amount for pasturage which was found to be due. The complaint alleged that the tender was made on May 9th. Plaintiff's instruction A declares that: "* * * If you find * * * that the plaintiff had contracted * * * to sell his cattle * * * and that said cattle shrunk in weight between May 10th and June 13th, 1925, and you * * * also find that the plaintiff is entitled to the possession of said cattle * * * on May 10, 1925, following

the tender of the plaintiff to the defendants of the sum of $8,250 which tender is admitted by the defendants * * *," under such circumstances plaintiff would be entitled to damages against the defendants for such sum as would compensate him for the loss in the weight of the cattle. Plaintiff's instruction B directly instructed the jury that it was an admitted fact that the tender occurred on May 25th. The record shows that both the plaintiff and the intervener demanded the delivery of the cattle, "on May 10, 1925, and (then) offered to pay defendants the pasturage on said cattle up to that time amounting to $8,250.00." Both the pleadings and the evidence support the conclusion that the tender actually occurred "about May 9th," or specifically on May 10th. This last-mentioned date is, therefore, the time upon which the plaintiff was entitled to possession of the cattle, and from which time damages for loss of the weight of the cattle should be computed. If the jury estimated such damages from the later date of May 25th the defendants profited thereby, and may, therefore, not complain. Plaintiff's instruction B is not prejudicial, and hence should be disregarded.

[18-21] It is contended that the intervener's instruction H was a positive charge that he had an absolute right to the possession of the cattle. We are of the opinion this instruction may reasonably be construed otherwise. It read: "If you should find from the evidence in this case that both plaintiff and defendants wrongfully failed to deliver said cattle to Intervener *when* he had a right to their possession then your verdict should be in favor of Intervener and against both plaintiff and defendants." It seems apparent that the meaning which was intended to be conveyed by this instruction is that the italicized word "when" should be construed to mean "if" or "in the event." At least it is reasonable to conclude the court, by means of this instruction, directed the jury that, if they should find that both plaintiff and defendants failed to deliver the cattle to the intervener *in the event* "he had a right to their possession, then your verdict should be in favor of Intervener. * * *" Instructions should receive such reasonable construction as will uphold, rather than defeat, a judgment. After examining all of the challenged instructions, we are of the opinion that the jury was not misled thereby. While several of them are open to the construction placed upon them by the appellants, there appears to be no prejudicial error. With respect to the period of time during which the jury were permitted to compute damages, it was plainly informed in intervener's instruction K that: "You are only to consider the condition of the market price of cattle between May 10, 1925, when intervener claims he demanded the same, and the date he received them." Neither the amount of damages which was awarded to the plaintiff, nor the amount which was assessed in favor of the intervener, is questioned. It is not claimed that the amount of either of these verdicts is excessive. This question may not be raised on this appeal, for the reason that the specifications of error fail to designate the insufficiency of evidence to support the amount of damages found to have accrued. Section 648 of the Code of Civil Procedure provides that a bill of exceptions "must specify the particulars in which such evidence is alleged to be insufficient." Mills v. Brady, 185 Cal. 317, 196 P. 776; Clarkson v. Moir, 53 Cal. App. 775, 201 P. 474. It is, therefore, immaterial that intervener's instruction M omitted to state in the language of section 3353 of the Civil Code that the term "market value" meant "the value of property to a seller thereof * * * which he could have obtained therefor *in the market nearest to the place* at which it should have been accepted by the buyer. * * *"

Upon the principles of law heretofore announced with respect to a tender of money acknowledged to be due, the adequate pleading thereof, the failure of the defendants to specifically deny the alleged tender and the right of the owner to the possession of the stock, together with defendants' liability for damages for detaining the cattle, the court properly refused to give to the jury defendants' instructions which are contained in paragraph 12 of the bill of exceptions. These are the only instructions adequately challenged by the record.

The judgment is, therefore, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

RECLAMATION DIST. NO. 833 et al. v. AMERICAN FARMS CO. (Civ. 3706.)★

District Court of Appeal, Third District, California. April 12, 1929.

Rehearing Denied May 11, 1929. Hearing Granted by Supreme Court June 10, 1929.

1. **Waters and water courses 🔑101—Water developed for rice culture by deep pumps is not natural water or riparian to owner's lands.**

Water developed by owner of rice lands by means of deep pumps is not natural water or water riparian to owner's lands.

2. **Waters and water courses 🔑162—Rice grower, not within drainage districts, has no right to flow water developed by pump into drainage district works.**

Rice grower, not within drainage districts, who develops water by deep pumps for irrigating lands, has no right to flow such water down to and into works of drainage districts.

3. **Waters and water courses 🔑179(4)—Evidence held to warrant injunction restraining user of water developed by deep pumps from draining water through drainage district works.**

Evidence that water, developed by owner of rice lands by means of pumps, eventually reached works of drainage district through natural channels, *held* to warrant injunction restraining defendant from draining his lands through plaintiff's works.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Reclamation District No. 833 and others against the American Farms Company, a corporation. Judgment for defendant, and plaintiffs, other than the one first named, appeal. Reversed, with directions.

George F. Jones, of Oroville, and Jerome D. Peters, of Chico (W. H. Spaulding, of San Francisco, of counsel), for appellants.

George E. Crothers, C. A. S. Frost, and Treadwell, Van Fleet & Laughlin, all of San Francisco, for respondent.

MONCUR, Justice pro tem. This is an appeal from a judgment of the superior court of Colusa county in an action brought by plaintiffs to restrain the respondent herein from draining waters used by said respondent for irrigating rice grown on its property, down to and into the drainage works of appellants. The appellants herein, drainage district No. 100 and Butte Creek drainage district are drainage districts located in Butte county containing approximately 20,000 and 35,000 acres, respectively. Reclamation district No. 833 is a reclamation district containing approximately 38,000 acres, also located in Butte county. Reclamation district No. 833, however, is not a party to this appeal; it having withdrawn from the case immediately prior to the trial in the superior court. Appellant districts were organized for the purpose of draining water, after its use for the irrigation of rice on land in Butte county, so as to convey it into the Sacramento river without causing damage to land lying below the districts.

It appears from the evidence that, for many years prior to the growing of rice in Butte county, the water of Butte creek, each year during the summer and fall months, spread over thousands of acres of land in Colusa county known as the Butte basin, and had no natural outlet into the Sacramento river until such time as the winter water flowing down Butte creek raised this water level of the Butte basin and caused it to flow over the rim thereof into Butte slough, and thence into the Sacramento river. However, after the commencement of rice culture in Butte county, the summer and fall flow of water from the drainage of these rice lands increased to such an extent that the level of water in Butte basin was raised in the months of September and October to an elevation which caused lands around the rim of the basin to be flooded, thereby damaging the crops of the owners of these lands. This situation resulted, in the year 1919, in the granting of an injunction, by judgment of the superior court of Colusa county, against the individuals owning lands in appellant districts, who were then growing rice. These rice growers were enjoined from continuing the flow of water into Butte basin, to the damage of individuals and corporations owning land therein. A large number of landowners in reclamation district No. 833 were also parties defendant to this action and made subject to the injunction. Respondent American Farms Company was not, at the time of the commencement of said action in 1919, engaged in the business of raising rice. As a result of this injunction, appellant districts were organized for the purpose of constructing works necessary to convey this drainage water a distance of approximately 20 miles, first, through Butte creek, to which it was brought by smaller natural channels and artificial cuts, thence into the Butte sink or basin, and from the Butte sink through an artificial cut, locally known as Moulton cut, into Butte slough, and thence into the Sacramento river. In the organization of these districts, the acquisition of flowage rights, and the construction of drainage works, a large amount of money was expended. Respondent owns about 2,200 acres of land in Butte county, which is not in any drainage district. Through this land are several waterways, one of which is known as Cottonwood creek. No water naturally flows in these channels during the months of September and October of each year. All of them converge into the Cherokee canal, at a point a short distance below the south boundary line of respondent's land, and the Cherokee canal in turn empties its waters into Butte creek, and thence into Butte basin. The

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★Rehearing denied. Hearing granted 285 P. 688.

drainage works of appellants are located approximately 16 miles in a southerly direction from the southern boundary of respondent's property. Respondent had devoted about 75 acres to the growing of rice in 1915, and some 140 acres in 1917 but it was not until 1921 that it engaged in the rice-growing business upon a large scale, some 300 acres being planted in that year, and thereafter, until 1926, it had grown from 350 to 675 acres each year. For the purpose of irrigating its rice land, the respondent drilled eight deep wells from which, by pumping, it developed a flow of water varying from 1,600 gallons to 1,900 gallons per minute per well. After using this water for irrigation, the surplus was drained into Cottonwood creek, from which it flowed into the Cherokee canal.

It is the contention of appellant that said water, after flowing into Cherokee canal, finds its way down through the various waterways until it reaches the canals and works of appellant districts, and that respondent is seeking to enjoy the benefits of the large expenditures made by appellant districts and by reclamation district No. 833, in the way of cuts, levees, flowage rights, ditches, etc., without joining in and bearing its fair share of the costs thereof, and that the flowing of this drainage water from the land of respondent through the canals and works of appellant districts constitutes a continuing nuisance, which the appellant districts are entitled to enjoin. Respondent contends that it has the right to flow its drainage waters into natural channels in the ordinary course of rice farming, and that, if such natural channels carry said water through the works of the drainage districts, it is not the legal right of the districts to enjoin it from so doing. In other words, that it has the inherent right to flow this water into any natural waterway existing on its land, no matter where it flows thereafter.

The court found that appellant districts were the owners of certain rights of way and easements in what is known as the Butte sink, consisting of flowage rights, canals, and levees as follows: An artificial canal and waterway known as Moulton cut, which diverts the water of Butte slough out of and away from Butte slough and through Butte basin; a certain drain known as Butte drain at the lower end of Butte basin, together with certain weirs and levees by which the water in Butte creek basin may be raised or lowered; that respondent farms a portion of its lands to rice, and during all the times mentioned in the complaint continuously had been irrigating, with water pumped from beneath the surface of the land, the land above described, by means of several deep well pumps; that the water so pumped is part of the percolating waters of the watershed upon which said respondent's land is situated; that the waters thereof so brought to the surface, and which are not consumed in such irrigation, are drained upon defendant's said land into natural and ancient water courses, only to the extent necessary in the proper, reasonable, and careful irrigation of said land, and without flowage or seepage upon any property of plaintiffs, and without seepage or flowage out of the natural channels of said natural water courses; and all of said land of the defendant is within the watershed of certain natural water courses which naturally drain into Butte slough, and all of the water drained from said land drains through said water courses into the said Butte slough, but there is no evidence showing that any thereof ever reached any of the canals, works, or easements of the plaintiffs, and the same could only reach the same by being artificially diverted by the plaintiffs, from the said Butte slough through the said Moulton cut; that said respondent intends to continue to drain said water from its rice lands into the said natural water courses, but does not threaten to drain the same into any canals, ditches, or easements of plaintiff districts, and there is no evidence showing that the said water has ever in any way damaged the said rights of way or easements of plaintiffs, or that the same will in any wise damage or injure the same, and it is untrue that, if the same should continue, it will ripen into any easement or right against the plaintiffs.

We will first consider the contention of respondent that it has the right to flow its drainage water into natural channels on said land in the ordinary course of rice farming, and that, if such natural channels carry said water through the works of the drainage districts, it has the right so to do, irrespective of where the water flows after leaving the natural channels on its own land. In support of its contention, respondent cites many cases, but it is our opinion that none of the California cases cited apply to the facts shown by the record in this case; the rule in such matters in this state being different than the rule as found by the courts of a number of the other states. Rather does it seem to us that the rule applicable herein is that stated in the case of Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11, from which decision we will quote later on in this opinion. It seems to us that from the evidence in this case it clearly appears that, at the time of the commencement of the action in 1919, had respondent been growing rice and discharging the surplus waters into the said natural waterways, it would have been a proper party to the action, and would have been subject to the same injunctive process as were the other rice growers.

We quote the following testimony of Mr. Polk, a witness for plaintiffs, as follows:

"Q. Now, Mr. Polk, you have shown these drainage districts, and I will ask, for what purpose were these districts organized? A.

Primarily, for the purpose of taking care of the drainage waters caused by the irrigation of rice.

"Q. And what was the necessity of taking care of that? A. The necessity was caused by injunction suits having been brought by certain lands in the lower end of the Butte Basin known as the Moulton lands; and injunction suits were brought by them against the districts and other parties preventing the drainage of rice water on account of damage to bean crops and other crops.

"Q. Now, Mr. Polk, what is the watershed of this territory embraced within the districts, also embracing the lands of the defendants—the watershed; which way does the water flow; where is its natural outlet? A. Its natural outlet is in the Butte Basin; down Butte Creek and tributaries thereof and into the Butte Basin.

"Q. Now, originally, where did that water go; say around 1910 or 1915? A. Originally went into the Butte Basin, which is in the nature of a swamp, a basin, and collected all the water from Butte Creek and didn't really have any outlet excepting in flood times. * * *

"Q. Now, then, what if anything was done to perfect an outlet for the waters placed within the Butte Basin? A. Prior—about the time the rice water began flowing into that territory the people owning what is known as the Moulton lands, dug a certain cut or canal from that into Butte Slough, through the rim on the edge of the basin.

"Q. And the purpose of that Moulton Cut was what? A. To lower the water table in the basin caused by the drainage waters coming in. * * *

"Q. What physical effect did the digging of the Moulton Cut have on that locality? A. Tend to lower the surface of the water in the basin, which was spreading out over the cultivated lands adjacent to the basin. * * *

"Mr. Peters: I will ask you the hypothetical question: From your experience and knowledge as an engineer would you say whether or not water drained from 300 acres of rice in section, say 7, township 19 north, range 3 east, and into the Cherokee Canal, would find its way down Butte Creek into Butte Basin and through the easements and rights of way of the plaintiff districts? A. I believe some of it would."

On cross-examination the witness testified as follows:

"Q. Now, what injury would happen to this Cut, Butte Creek Drain, from May to October, if any, by having, say two or three second feet of water come through more than would otherwise come? A. Just two second feet additional?

"Q. Yes. A. And only two?

"Q. Yes. A. Pretty hard to answer that; might have been full enough so two second feet would run it over the edge the same as putting another drop in the bucket.

"Q. Have you any reason to believe that it was so in 1926? A. Oh, no, it being an accumulation of that particular two feet of other water and two feet continuously from other sources would do the damage."

We also quote from the testimony of Harry F. Cauthard, a witness for plaintiffs, as follows:

"Q. From your experience as an engineer would you say whether or not water from 300 acres of rice, drained off the same, say, section 1, township 19 north, range 2 east, whether or not the water so drained would find its way into Butte Creek and thence on down into Butte Sink through the rights of way and easements of the District and into the Sacramento River? A. It would."

The following testimony of Frank S. Robinson, a witness for defendants, is quoted.

"Q. Well, now, using these methods, can you state in an approximate way the amount of that run-off from the American Farms property? * * * A. My measurements didn't start until some time the early part of September.

"The Court: 1926? A. 1926.

"Mr. Treadwell: And continued until about what time? A. The early part of October, I believe; I haven't the dates exactly.

"Q. From your knowledge of rice culture would that period be the period of high run-off or low run-off? A. Probably the highest run-off occurred during that period or shortly succeeding.

"Q. Well, then, give it for that period the best you can? A. You refer to the run-off from the property itself or —.

"Q. (Int.) Yes. A. My figures show that when I started there was an approximate run-off of two second feet, which increased to approximately ten second feet and dropped again—I beg pardon, I am misstating there—the run-off from the American Farms Company property itself varied from approximately two second feet to four second feet."

Nowhere does it appear in the record that there is any contradiction of the testimony of Mr. Polk that, if there were no interference with the drainage of irrigation waters from respondent's land, they would not naturally commingle with the other waters discharged into the various waterways by the rice growers and eventually find their way down into the natural drainage areas referred to in the evidence. It appears without contradiction, therefore, that respondent's irrigating waters, amounting to from two to four second feet, are discharged into the said natural waterways on its lands; that said waters are mingled with other surplus irrigating waters from rice lands, and all of such mingled waters ultimately find their way down to, into, and through the works of appellants. Therefore, even if some of the said waters are taken out of said waterways below respondent's property, and used for irrigating rice, yet it cannot be said that thereby appellants' works are not subjected to the use by respondent of carrying the latter's surplus irrigating waters.

What is said in the case of Learned v. Castle, supra, seems to be particularly applicable, therefore, to the evidence in this case: "It is true that when the damage was done at that time, the water from the canal was mingled with water from other sources, which (it may be admitted) was of a larger volume than that of the water brought there by defendants; and it may have been difficult to separate the mingled elements of mischief, and calculate with any great" extent of "exactness the proportionate amount of damage done by each. But surely there was no warrant for finding that all the damage was done by the other water, and none (practically) by the water poured onto plaintiffs' land by the canal. A wrongdoer who contributes to a damage cannot escape entirely because his proportional contribution to the result cannot be accurately measured. (In a case like the one at bar, it would be at least as near justice to hold him for all the damages as to hold him for none.) And we think the evidence did not warrant the finding that the damage caused by the acts of defendants was to the extent only of one dollar. But the amount of the damage, estimated in money, was immaterial. That finding was only as to the damage done in 1878, when there was water on the land from other sources. The findings show that the waters diverted by the canal 'flow' upon plaintiffs' land, which would not flow there if allowed to take their natural course; and that the embankments erected by defendants 'cause' such artificial flowing. And to thus wrongfully cause water to flow upon another's land which would not flow there naturally is to create a nuisance per se. It is an injury to the right, and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude. (Richards v. Dower, 64 Cal. 64 [28 P. 113], and cases there cited; [Tootle] v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766; Wood on Nuisances, 2d Ed., p. 639.) The right to an injunction, therefore, in such a case does not depend upon the extent of the damage measured by a money standard; the maximum, de minimis, etc., does not apply. the main object of the action is to declare a nuisance, and to prevent the continuance by a mandatory injunction."

In Galbreath v. Hopkins, 159 Cal. 297, at page 301, 113 P. 174, 176, the court said: "It is, of course, clear under the law that unless the defendants have acquired a right by prescription to discharge the water from the pond by artificial means upon the land of plaintiff, they have no right to do so at all. While the owner of upper land has the right to have the waters from his land flow in their natural course down upon the lands below, he has no right, by the construction of ditches or other artificial means, to turn waters which have naturally accumulated in ponds or depressions on his land upon the land of his neighbor lower down (Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213; Gray v. McWilliams, 98 Cal. 157, 35 Am. St. Rep. 163, 21 L. R. A. 593, 32 P. 976), and where water is thereby caused to flow upon the land of another which would not naturally flow thereon, this is an invasion and injury to his right of property and a nuisance per se, the continuance or maintenance of which he has the right to have enjoined. (Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11; Wood v. Moulton, 146 Cal. 317, 80 P. [92].)"

[1-3] The water which respondent develops on its land by means of pumps is not natural water or water riparian to the land of said company. Mayberry v. Alhambra Addition Water Co., 125 Cal. 444, 54 P. 530, 58 P. 68; Butte Canal Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769; Paige v. Rocky Canal Co., 83 Cal. 84, 21 P. 1102, 23 P. 875. Under the rule as stated in Learned v. Castle, supra, and cases therein cited, respondent would have no right to so flow such surface irrigating waters that they would flow down to and into respondent's works. We are satisfied, therefore, that the finding of the court hereinbefore referred to not only failed to find upon the material issues involved in this action, but also that, where there is an attempt to so find, such findings are contrary to the evidence.

Finding No. IX is hereby amended to read as follows: "That the defendant, American Farms Company, in the enjoyment and occupation of the real property above described, is now farming the same, to wit, a portion thereof consisting of 434½ acres or thereabouts to rice; and it is now and during all the times mentioned in said complaint continuously has been irrigating, with water pumped from beneath the surface of the land, the land above described by means of several deep-well pumps; that said wells consist of eight wells varying in depth from 520 to 575 feet; that the water thereof is part of the percolating waters of the watershed upon which said defendant's land is situated; that the waters thereof are brought to the surface by means of pumps and used in irrigating defendant's said lands, and the portion of said water which is not consumed in such irrigation is drained upon defendant's said land into natural and ancient water-courses only, and that said waters do flow or seep down to, upon and through the property of plaintiffs."

Finding No. X is hereby amended to read as follows: "All of said land of the defendant is within the watershed of certain natural water-courses which naturally drain into Butte Slough, and all of the water drained from said land drains through said water-course into the said Butte Slough; that said water so drained from defendant's land commingles with other waters drained from other rice lands within the boundaries of appellant districts, and flow down to, into and through the canals, works and easements of said plaintiffs."

Finding No. XI is hereby amended to read as follows: "That said defendant American Farms Company intends to continue to drain said irrigation water from its rice lands into the said natural water-courses, and does threaten to drain the same into the canals, ditches and easements of the plaintiff districts, and will continue so to drain said irrigation water from its said lands unless restrained by this court, and that if permitted to continue to drain said irrigation water, as aforesaid the same will damage and injure the plaintiffs and will ripen into an easement or right against said plaintiffs."

Also, the further finding is hereby added: "That said action is not barred by the provisions of sections 1006 and 1007 of the Civil Code of the State of California, or by either of said sections, and/or by the provisions of sections 318 and 319 of the Code of Civil Procedure of this State."

It is further ordered that the conclusions of law be amended to read as follows: "From the foregoing facts the court finds and decides that defendant American Farms Company be enjoined and restrained from draining or permitting to flow, or permitting to seep from its land water pumped from wells upon the property of said defendant, into, over, across or through the canals, drainage ditches and easements of plaintiff drainage districts, or either of them. That plaintiff drainage districts recover their costs of suit."

The judgment is reversed, and the trial court is directed to enter judgment for plaintiffs in accordance with the findings as hereinbefore amended.

We concur: FINCH, P. J.; THOMPSON, J.

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98 Cal. App. 118

R. S. SMITH, Petitioner, v. SUPERIOR COURT OF ALAMEDA COUNTY and Warren V. Tryon, Judge Presiding, Respondents. (Civ. 6850.)

District Court of Appeal, First District, Division 1, California. April 4, 1929.

Certiorari to Superior Court, Alameda County; Warren V. Tryon, Judge.

C. Brooks, of Oakland, for petitioner.

PER CURIAM. Petition for certiorari. It appears therefrom that the petitioner, as plaintiff in an action in claim and delivery commenced in the justices' court, sought the immediate possession of certain personal property described in the complaint. After judgment in that action an appeal was taken to the superior court. The cause came on for hearing, and the sole issue presented was whether or not plaintiff was entitled to the possession of the property involved. It is petitioner's contention herein that the superior court in rendering judgment went outside the issue and found defendants to be the owners free and clear of any right, title, or interest of plaintiff, and that this finding is contrary to the evidence and not involved within the issues of the case.

It seems clear to us that the findings and judgment when read together show that the trial court was merely dealing with the question of the right of possession of the property and not with any question involving the ownership of the same.

The application is denied.

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98 Cal. App. 223

AWBREY v. DE ROSE. (Civ. 6748.)★

District Court of Appeal, First District, Division 1, California. April 12, 1929.

Rehearing Denied May 11, 1929. Hearing Denied by Supreme Court June 10, 1929.

1. Trial ⚷339(3)—Under statute providing that informal or insufficient verdict may be corrected under court's advice, or jury be again sent out, court must remand jury to render proper verdict (Code Civ. Proc. § 619).

Under Code Civ. Proc. § 619, providing that when verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by jury under advice of court, or jury may be again sent out, it is the duty of court to remand jury to render a verdict in proper form and in conformity with issues submitted.

2. Trial ⚷339(1)—Court held warranted in declining to receive insufficient and informal verdict and in permitting amendment by jury (Code Civ. Proc. § 619).

In action to recover secret profits made by real estate agent in sale or exchange of property, where verdict first agreed upon by jury was both insufficient and informal and had not been recorded, court was warranted in declining to receive it and in permitting jury to make amendment under Code Civ. Proc. § 619, providing that, when verdict is announced, if it is informal or insufficient, in not covering issue submitted, it may be corrected by jury under advice of court, or jury may again be sent out.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Mary Awbrey against J. N. De Rose. Judgment for plaintiff, and defendant appeals. Affirmed.

Owen D. Richardson, of San Jose, and Donald B. Richardson, of San Francisco, for appellant.

★Rehearing denied. Hearing denied by Supreme Court.

John W. Sullivan, of San Jose, for respondent.

TYLER, P. J. [1, 2] Action to recover secret profits made by a real estate agent in the sale or exchange of certain properties. The complaint is in three counts. The first pleads, in substance, that plaintiff was the owner of a ranch in Santa Clara county, and defendant agreed to act for her as agent in the sale or exchange of the same, and to obtain the best possible price therefor. It is then alleged that while defendant was so employed he entered into a secret arrangement with one Thomas to exchange plaintiff's property for property owned by Thomas, and in order to carry out the transaction he procured plaintiff to deed to him her ranch for a certain sum, and thereafter made the exchange from which he derived secret profits in the sum of $3,400. The second count is for money had and received, and the third for an alleged conversion of such sum. Trial was had by jury, and a verdict was rendered in favor of plaintiff in the sum of $2,000. As grounds for reversal appellant claims that the verdict was rendered in an irregular manner, and the evidence is insufficient to justify the conclusion that he was the agent of respondent in the exchange of the properties. The prayer of the complaint was for money damages, and one of the forms of verdict handed to the jury required a verdict in dollars and cents. Instead of following this form, the jury, after inserting therein an award of damages in favor of plaintiff for the sum of $400, also found in her favor for an assignment of a certain deed of trust involved in the exchange on the theory that such security had been received by appellant while acting as respondent's agent. After reaching this conclusion the jury came into court, and, in response to the court's inquiry as to whether it had reached a verdict, the foreman stated that it had. The verdict was passed to the clerk, who read it. Thereupon the court expressed the opinion that it was not in harmony with the pleadings or the form of verdict given to the jury. Defendant moved that the verdict be received and recorded. The court refused the motion and sent the jury back, with instructions to pass upon the issues as submitted to it. Thereafter the jury returned its verdict in favor of plaintiff for the amount hereinabove stated. It is appellant's contention that the first verdict rendered was complete, as it awarded to respondent damages in the sum of $400; that the balance of the verdict was surplusage and the court had no power to send the jury out again. Section 619 of the Code of Civil Procedure provides that, when a verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out. Under this section it is the duty of the court to remand the jury to render a verdict in proper form and in conformity with the issues submitted. Garlick v. Bower, 62 Cal. 65. Here manifestly the verdict first agreed upon was both insufficient and informal, and, inasmuch as it had not been recorded, the court was warranted in declining to receive it and in permitting the jury to make the amendment. Redo y Cia v. First Nat. Bank, 200 Cal. 161, 252 P. 587. Nor is there any merit in the contention that the evidence is insufficient to justify the conclusion that appellant was the agent of respondent. The record contains abundant evidence upon the subject.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

98 Cal. App. 278

ROBINSON v. CHAPMAN and consolidated case. (Civ. 6688.) ★

District Court of Appeal, First District, Division 1, California. April 15, 1929.

Rehearing Denied May 15, 1929. Hearing Denied by Supreme Court June 13, 1929.

1. Limitation of actions ⟹195(1)—Where it is understood compensation for services rendered deceased is to be paid at termination thereof, presumption hiring was by month does not apply (Civ. Code, § 2011).

Where it is understood expressly or by reasonable implication that compensation for services rendered a deceased person is to be paid at termination of rendition of services, it is a continuing one for which compensation may be recovered when services terminate, and presumption under Civ. Code, § 2011, that hiring is by the month, does not apply.

2. Limitation of actions ⟹50(2)—Evidence showing deceased's relatives from 1915 until 1924 performed services at deceased's request and that deceased assured them they would be compensated supported finding claims were not barred by statute.

Evidence showing that claimants, who were, respectively, first and second cousins of deceased, performed personal services for deceased from July, 1915, until her death in 1924 at her special request, and that deceased had from time to time assured them they would be compensated and rewarded if they would perform duties she required, and that no definite time was fixed for payment and no exact amount fixed, *held* to sustain finding that claims for services were not barred by statute of limitations as being for hiring from month to month.

3. Executors and administrators ⟹227(1)—Sufficiency of claim presented to administrator is not tested by rules of pleading.

Sufficiency of claim presented to administrator is not to be tested by rules of pleading.

★Rehearing denied. Hearing denied by Supreme Court.

4. Executors and administrators ⚷236—Court could determine, after administrator rejected claims on ground they were outlawed, whether limitations prevented enforcement.

It was proper for court to determine, after administrator rejected claims on ground they were outlawed on their face, whether or not bar of statute of limitations prevented enforcement of claims.

Appeals from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Actions for services by Alice E. Robinson and by Susan E. Robinson against I. F. Chapman, as administrator of the estate of Alice J. Mills, deceased. The cases were consolidated. From the judgments against defendant, defendant appeals. Affirmed.

I. F. Chapman, of San Francisco, for appellant.

Dozier & Kimball, of San Francisco, for respondent.

TYLER, P. J. Actions to recover the reasonable value of services. The trial court rendered two judgments against defendant, appellant herein, as administrator of the estate of Alice J. Mills, deceased. The actions upon which the judgments were rendered were consolidated and tried together, and by stipulation both appeals are presented on a single record. The complaints alleged the rendition of services to the said deceased covering a period of some nine years. Judgment was in favor of Alice E. Robinson for $3,412 and in favor of Susan E. Robinson for $3,217. This is an appeal from both judgments. Appellant relies upon two contentions for reversal. He first claims that the causes of action are barred by the statute of limitations and, second, that the services sued for were gratuitously rendered and without expectation of compensation. The facts show that Alice J. Mills died December 1, 1924, leaving estate consisting of real and personal property of the value of $45,000. On March 2, 1925, appellant I. F. Chapman was appointed and qualified as administrator of the estate. On November 16, 1925, each plaintiff filed her respective claim against said estate and each was rejected by said administrator. Suit was thereupon instituted by the claimants.

[1, 2] It appeared at the trial that decedent was a first cousin of Susan E. Robinson and a second cousin of Alice E. Robinson. Each of these relatives of the deceased had, from July, 1915, until the death of Alice J. Mills on December 21, 1924, performed services for Mrs. Mills at her special request. The services were of a constant and continuous nature. Plaintiff acted as her nurse and companion, dressed and undressed her, waited on her, prepared and served her with meals, administered medicines and performed unpleasant but necessary duties. Alice J. Mills was a very large woman and she had suffered a paralytic stroke about 1916, and was in consequence more or less helpless and hard to manage by reason of her condition. A guardian had been appointed for her and during the last year of her illness such guardian had requested Mrs. Robinson and her daughter to assist in relieving the regular nurse of Mrs. Mills. There was no controversy concerning the nature and character of the services rendered by plaintiffs or of their value or duration. During the long period of the performance of the services deceased had, from time to time, assured the plaintiffs they would be compensated and rewarded if they would perform the duties she required. There was no direct evidence to show that any definite time was fixed for payment of the services, nor was there any evidence to show the exact amount that was to be paid, and appellant claims that the situation is therefore controlled by the case of Corato v. Estate of Corato, 201 Cal. 155, 255 P. 825. It is there held that in an action upon a claim against the estate of a deceased person for personal services, where the evidence does not show any agreement, either expressly or by implication, for the terms of service, time of payment, or rate or value of the services, and no custom on the subject is alleged or proved, the presumption, under section 2011 of the Civil Code, is that the hiring was by the month, and the statute of limitations forecloses a recovery for any period except during the two years immediately preceding the death of the decedent. It is further pointed out in the decision, however, where it is understood expressly or by reasonable implication that the compensation is to be paid at the termination of the rendition of the services, it is a continuing one for which compensation may be recovered when the services terminate and the presumption that the hiring is by the month does not apply, citing Mayborne v. Citizens' T. & S. Bank, 46 Cal. App. 178, 188 P. 1034. Here the court expressly found that the claims were not barred and the only reasonable inference to be drawn from the evidence sustains this finding. Deceased was possessed of a substantial fortune and no reason appears why the services rendered should have been rendered gratuitously; on the contrary, the evidence expressly shows that the deceased throughout the period of her sickness assured plaintiffs that they would be compensated. Nor is there any circumstance which in any manner dispels the reasonable presumption to be drawn from the evidence that the services were to be compensated, or paid for, when the employment terminated. The fact that no payments were made during the lifetime of the deceased, though constant as-

surances were expressly given by her throughout the entire period of her illness that payment would be made, is a circumstance going to support the finding. Cases of this character depend more or less upon the facts of the particular case; the inquiry in each case being whether it can be reasonably inferred that the services were or were not to be paid for at the termination of the employment. The fact that the parties are more or less remotely related is also a circumstance to be considered, for while a relation might be satisfied with such an arrangement concerning payment a stranger would not. Mayborne v. Citizens' T. & S. Bank, supra. We are of the opinion that the evidence supports the findings upon this subject.

[3, 4] Defendant presents the further argument that, the claims being outlawed on their face, he, as administrator, was justified in rejecting them and his act in so doing concludes plaintiffs. The purpose of presenting a demand to the administrator is to advise him of its nature and there is no requirement that it should state the facts with all the detail necessary in a complaint, nor is its sufficiency to be tested by the rules of pleading. It was proper for the trial court to determine, after the conclusion of the administrator, whether or not the bar of the statute prevented enforcement of the claims. Cavanaugh v. Cavanaugh (Cal. App.) 271 P. 109.

The judgments are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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98 Cal. App. 284

FAVOT v. KINGSBURY, Surveyor General, etc. (Civ. 3671.)

District Court of Appeal, Third District, California. April 15, 1929.

1. Mines and minerals 🔑4—Surveyor general, satisfied that land contained valuable mineral deposits, should have withheld it from sale until judicial determination of its character (St. 1897, p. 438, § 2).

Under St. 1897, p. 438, § 2, it was duty of surveyor general to withhold school land, claimed to contain valuable mineral deposits, from sale until its character had been judicially determined, where satisfied from claimant's affidavit that it contained such deposits, as shown by his statement, in reply to claimant's communication that latter's mining locations were all right.

2. Mines and minerals 🔑4—Act requiring surveyor general to withhold from sale school lands claimed to contain valuable mineral deposits held not repealed as to rights acquired thereunder (St. 1897, p. 438, § 2; St. 1915, p. 605).

St. 1897, p. 438, was not repealed as to rights acquired thereunder by St. 1915, p. 605, which merely changed method of selling school lands which surveyor general was authorized to sell, and hence does not apply to lands which it is his duty to withhold from sale under section 2 of former act until judicial determination of question whether they contain valuable mineral deposits.

3. Constitutional law 🔑93(1)—One entering school lands to explore for minerals and expending considerable sums therein, with knowledge of surveyor general and subsequent purchasers, acquired vested right to continue such occupation and exploration (St. 1897, p. 438, § 3; St. 1915, p. 605).

One entering on school lands to explore for minerals, under sanction of St. 1897, p. 438, § 3, fully complying with all requirements of such act, and expending considerable sums in developing claims and placing improvements thereon, with knowledge of surveyor general and subsequent purchasers of land under St. 1915, p. 605, acquired vested right to continue occupation and exploration as long as he complied with such requirements.

4. Constitutional law 🔑92—State cannot divest or impair vested rights, whether by statute, ordinance, or constitutional amendment.

The state has no power to divest or impair vested rights, whether by legislative enactment, municipal ordinance, or change in Constitution.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Suit by Hyppolite Favot against W. S. Kingsbury, as Surveyor General of the State of California and ex officio Register of the State Land Office, and others. Judgment for plaintiff, and defendant Kingsbury appeals. Affirmed.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for appellant.

Rowan Hardin, of Sonora, for respondent.

JAMISON, Justice pro tem. This appeal is by W. S. Kingsbury alone, is brought up on the judgment roll, and the facts found by the trial court are admitted to be true.

That court found that on June 14, 1880, the plat of survey of section 16 in township 1 south, range 15 east, Tuolumne county, California, containing the premises in controversy, was accepted by the Department of the Interior, and that at that date no mining claims were shown to be in said section, and that same was not returned by the United States deputy mineral surveyor as being mineral in character, and that on said date title to said section and all mineral contained therein vested in the state of California by virtue of a school land grant contained in the Act of March 3, 1853, 10 U. S. Stat. 244–246; that on April 1, 1897, an act of the Legislature of the state of California was approved, said act being entitled "An act to repeal an act entitled 'An act regulating the sale of mineral lands belonging to the state,' approved March 28, 1874, and the acts amendatory thereof, and to provide for the sale of mineral lands under United States laws," the same being chapter 270, p. 438, Statutes of 1897. Sections 2 and 3 of said act read as follows:

"Sec. 2. When it shall be shown by affidavits or otherwise, to the satisfaction of the surveyor general, that any portion of a sixteenth or thirty-sixth section belonging to the state is valuable for its mineral deposits, the surveyor general shall not approve any application to purchase the same, nor shall the register of the state land office issue a certificate of purchase therefor, until the question of the character of the land has been referred, for determination, to a court of competent jurisdiction, in the manner provided by section thirty-four hundred and fourteen of the Political Code, and adjudged not to be valuable as mining land.

"Sec. 3. The sixteenth and thirty-sixth sections belonging to the state, in which there may be found valuable mineral deposits, are hereby declared to be free and open to exploration, occupation, and purchase of the United States, under the laws, rules, and regulations passed and prescribed by the United States for the sale of mineral lands."

In the year 1900 respondent, a citizen of the United States, located the Feliciana quartz mine, including portions of lots 1, 2, 7, and 8 in said section 16, amending same in December, 1900, same being duly recorded; that since that date respondent has continuously held, worked, and operated said mine, sinking shafts, running drifts, and performing general work thereon, and performing the annual assessment work of $100 per annum and has expended work and labor and placed improvements thereon to the amount of $10,000; that said mining claim contains a vein of gold-bearing quartz from 12 to 40 feet in width, assaying from $5 to $7 per ton; that on March 30, 1903, respondent duly located the Diablo quartz mining claim adjoining the said Feliciana mining claim, and situated in said section 16, and on this claim he has expended work and labor and placed improvements to the amount of $5,000 and has done the annual assessment work thereon. There are several veins of quartz on the claim averaging from $2.50 to $3 per ton.

In the year 1901 respondent filed in the office of appellant his affidavit showing the land embraced in the said Feliciana mining claim to be valuable for mineral deposits, and at said time filed with said affidavit a plat and survey showing the said location as it existed on the ground, which affidavit and plat was received by the surveyor general and filed in his office. On January 24, 1918, respondent communicated with appellant and at that time appellant wrote him that if the aforesaid lots in said section 16 contained valuable mineral deposits, that same were open to exploration, occupation, and purchase by the United States under the laws, rules, and regulations prescribed by the United States for the sale of mineral lands in accordance with the provisions of section 3 of said act of 1897. On the 9th day of June, 1920, while respondent was temporarily absent from the county of Tuolumne, the aforesaid lots were sold at public auction by appellant, as surveyor general of the state of California, pursuant to the provisions of chapter 389, page 605, Statutes of 1915, to defendants Holmes, Corcoran, and Knowles, and on the 10th day of June, 1920, said Knowles deeded a half interest in said lot 7 to defendant Webb. All of said defendants, at the time of the sale of said land and prior thereto knew and had known that respondent was in possession of the said mining claims, and that respondent claimed possession of same by virtue of said mining locations, and that he had for many years worked said property for the minerals contained herein; that on June 18, 1920, when respondent returned to said county of Tuolumne and learned of said sale, he filed in the office of appellant an application to contest the sale of said property; and that in June, 1920, he also filed a contest in the United States land office at Sacramento, but the Land Department of the United States dismissed same for the reason that the title to said section 16, together with the mineral therein contained, passed to the state of California upon the approval of the survey thereof in 1880 and that, therefore, the Land Department of the United States had no jurisdiction to entertain respondent's contest.

Appellant refused to refer the matter of the contest of the character of said land to the superior court of said county of Tuolumne, but, unless restrained by the court, will prepare and forward to the Governor of the state of California a patent for said land in favor of said defendants Holmes, Corcoran, and Knowles.

The judgment of the court, in substance, was that appellant, as surveyor general of the state of California and ex officio register of the state land office, be enjoined and restrained from preparing a state patent from the state of California to said defendants Holmes, Corcoran, and Knowles for any part of said lots embraced within the exterior boundaries of the said mining claims, and from sending such patent to said Governor, with recommendation and certificate to the effect that said defendants Holmes, Corcoran, and Knowles are entitled to a patent for said lands so embraced within the boundaries of said mining claims, and also that said defendants be enjoined and restrained from asserting any title in or to, or right of possession of, said lands lying within the boundaries of said mining claims.

Chapter 389, Statutes of 1915, approved May 19, 1915, provided that the surveyor general should sell at public auction all the unsold portions of the 500,000 acres granted to the state for school purposes, and the unsold portions of the listed land selected of the United States in lieu of the sixteenth and thirty-sixth sections, and losses to the school grant, and repealed all acts in conflict with that act. It was under the alleged authority conferred by this act that appellant sold the said sixteenth section to the said defendants Holmes, Corcoran, and Knowles.

Appellant contends that respondent, having failed to take advantage of the said act of 1915, or preceding acts, to acquire from the state title to the land embraced within the boundaries of his said mining claims, has, by the sale of said sixteenth section to defendants Holmes, Corcoran, and Knowles, lost his right to acquire such title, and that by virtue of the provisions of section 17 of chapter 303, page 404, Statutes of 1921, as amended by chapter 385, page 593, Statutes of 1923, he has become a trespasser upon said section 16.

Said section 17 provides in substance that any person who has entered upon lands coming under the provisions of this act (lands upon which there are mineral deposits), and is holding or developing such land, is guilty of a trespass, and the claims being exerted are declared null and void, and any property placed upon said land is forfeited to the state. It is conceded that, because of the fact that, when the title to said section 16 passed from the United States to the state of California in 1880, no mining claims were shown to be in said section, and that same had not been returned by the United States deputy surveyor as being mineral in character, not only did the state acquire title to said section 16, but also to all mineral therein contained. United States v. Sweet, 245 U. S. 563, 38 S. Ct. 193, 62 L. Ed. 473; Ivanhoe Min. Co. v. Keystone Consolidated Min. Co., 102 U. S. 167, 26 L. Ed. 126; Natoma Water & Min. Co. v. Bugbey, 96 U. S. 165, 24 L. Ed. 621; Saunders v. La Purisima Co., 125 Cal. 159, 57 P. 656.

[1] Section 2 of the act of 1897 prohibited the surveyor general, when it was shown by affidavit or otherwise, to his satisfaction, that any portion of said section 16 is valuable for mineral deposits, from approving any application for the purchase of same, and also prohibited the register of the state land office from issuing any certificate of purchase therefor, until the question of the character of the land had been referred for determination to a court of competent jurisdiction, and had been adjudged not to be valuable as mining land. It does not appear that any such reference was ever made, though it does appear that appellant was satisfied, from the affidavit that was filed in his office by respondent, that the lands embraced within the boundaries of respondent's mining claims contained valuable mineral deposits, for we find that respondent alleged in his complaint that during the year 1902 he communicated with appellant and asked him whether or not he had received the said affidavit and plat, and in reply to that communication appellant stated that he had received them, and that respondent's mining locations were all right, and that he would have no trouble, and this allegation was not denied by appellant. Under these conditions it was clearly the duty of appellant to withhold the land so claimed to contain valuable mineral deposits from sale until its character in that respect had been judicially determined.

[2] The trial court held, as a conclusion of law, that the act of 1897 was not repealed, as to the rights acquired thereunder, by the act approved May 19, 1915, and in this conclusion we are of the opinion that the trial court committed no error. The said act of 1915 merely changed the method by means of which the unsold portions of sections 16 and 36 could be sold, and of course would have application only to such land as the surveyor general was authorized to sell; that is to say, that if, pursuant to the provisions of section 2 of said act of 1897, it had been shown to the satisfaction of the surveyor general, by affidavits or otherwise, that any portion of sections 16 or 36 were valuable for mineral deposits, it was his duty to withhold the same from sale until the character of said land had been judicially determined, and same had not been adjudged valuable as mining land.

[3, 4] In 1921 an act of the Legislature was passed and approved (Stats. 1921, p. 1305), repealing the said act of the Legislature of 1897, but providing: "Such repeal shall be without prejudice to any rights or remedies of any person acquired under said act prior to February 15, 1921, or to any defenses then existing in behalf of the state or any officer thereof for any act performed in his official capacity, but all such rights, remedies and defenses are hereby expressly reserved to all such persons and to the state and its officers, respectively." It is manifest that by the act of 1897 the Legislature intended to permit the sixteenth and thirty-sixth sections to be exploited, occupied and purchased where valuable mineral deposits were located upon them, in the same manner that the United States permitted same to be done. It is also manifest that the Legislature in passing the said act of 1897 labored under the erroneous belief that this purchase would have to be from the United States. However that may be, it was the intent of the Legislature, as shown by this act of 1897, to encourage the development of minerals upon the said sections.

Under the sanction of this act respondent entered upon that portion of said sixteenth section covered by his mining claims, has fully complied with all the requirements of the act, and in so doing has expended considerable sums of money in the development of said claims and in placing improvements thereon, and all this has been done with the knowledge of this appellant and the other defendants. In the case of Mery v. Brodt, 121 Cal. 332, 53 P. 818, the Supreme Court, speaking of the nature and character of the holding of the locator of a mining claim, said: "The locator of a mining claim under the laws of the United States has the right to the exclusive possession and enjoyment of that claim; he has an estate of inheritance; he has a title which can only pass by deed. The land is withdrawn from the public domain. There is an outstanding grant from the United States, and the government has no right to pass any title to a third party." It is clear that it was the intention of the Legislature, by the said act of 1897, to invest the locator of a mineral claim in the sixteenth or thirty-sixth sections with the same rights therein that were given the locator upon government land. Such being the case, respondent acquired a vested right to continue in the occupation and exploration of his said mining claims as long as he continued to comply with the requirements of said act of 1897. The state has no power to divest or to impair vested rights whether such attempt be made by legislative enactment, by municipal ordinance, or by change in the Constitution of the state. 12 C. J. p. 956; Estate of Wellings, 197 Cal. 189, 240 P. 21; Richmond Wharf & Dock Co. v. Blake, 39 Cal. App. 1, 177 P. 508; James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082; 6 English and American Ency. p. 955.

Regarding the questions as to whether or not respondent can acquire title to his said mining claims, and, if so, what procedure should be followed in so doing, we are not called upon to determine on this appeal.

We are of the opinion that the findings are sustained by the admitted facts of this case, and that the judgment should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

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WHEELER v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.
(Civ. 6797.)

District Court of Appeal, First District, Division 1, California. April 13, 1929.

1. Appeal and error 🔑343—Trial 🔑388(1)—Findings were unnecessary, where judgment was decided on question of law, and failure to file them did not postpone running of period for appeal.

Where judgment was decided upon question of law, findings were not required, and failure to file them did not postpone running of 60-day period for appeal from judgment.

2. Appeal and error 🔑348(1)—Service of notice of entry of judgment held not essential to set time running for appeal (Code Civ. Proc. § 939).

Service of notice of entry of judgment *held* not essential to set time running within which appeal from judgment could be taken under Code Civ. Proc. § 939.

Proceeding by Clayton E. Wheeler against the Board of Medical Examiners of the State of California and others. From the judgment, defendants appeal. On motion to dismiss appeal. Dismissed.

Bradford M. Melvin and Melvin & Sullivan, all of San Francisco, and Otto Emme, of Los Angeles, for appellants.

Livingston & Livingston, of San Francisco, for respondent.

PER CURIAM. [1, 2] Motion to dismiss appeal. It appears from the record that the judgment appealed from was entered November 27, 1928. The time for taking an appeal expired 60 days thereafter or on January 26, 1929. The notice of appeal was filed February 14, 1929. No notice of intention to move for a new trial or notice of motion for a new trial has ever been made or filed. Appellants claim that, as no findings of fact or conclusions of law have ever been filed, judgment has never been rendered, and the 60-day period has not therefore commenced to run. No findings were necessary. The judgment sought to be appealed from was decided upon a question of law. Nor was notice of the entry of judgment necessary. Section 939 of the Code of Civil Procedure does not require the service of notice of entry of judgment in order to set the time running within which an appeal from may be taken. Schainman v. Kierce, 199 Cal. 249, 248 P. 905.

It follows that the appeal must be dismissed, and it is so ordered.

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WOOD, State Superintendent of Banks, v. HAMAGUCHI et al. (Sac. 4228.)★

Supreme Court of California. April 18, 1929.

Rehearing Denied May 16, 1929.

1. Banks and banking 🔑44—Statute permitting superintendent of banks to assess bank stockholders without limit, for purpose of paying claims of creditors of bank in liquidation, held void (St. 1917, p. 581, as amended by St. 1925, p. 905; Const. art. 12, §§ 2, 3, 24; Civ. Code, §§ 322, 349).

St. 1917, p. 581, as amended by St. 1925, p. 905, permitting state superintendent of banks to make such assessments against stockholders as he may determine necessary for liquidating banks' affairs, without limit on amount of assessments to any one stockholder, and permitting levying of further assessment or assessments, if sums first collected are inadequate, *held* void as violative of Const. art. 12, § 3; Civ. Code, § 322, making stockholder of corporation individually liable for such proportion of corporation's debts, contracted while he was stockholder, as amount of his stock bears to entire subscribed capital stock of corporation, notwithstanding Const. art. 12, §§ 2, 24, permitting dues from corporation to be secured by individual liability of corporators and other means prescribed by law, and Civ. Code, § 349, authorizing directors of corporation to proceed by action to recover amount of assessments against stockholders.

2. Constitutional law 🔑34—Constitutional provision fixing stockholders' liability is self-executing, and effect thereof may not be limited by Legislature (Const. art. 12, § 3).

Const. art. 12, § 3, fixing liability of each stockholder of corporation for such proportion of corporation's debts, contracted during time he was stockholder, as amount of his stock bears to entire subscribed capital stock, is self-executing and any attempt by Legislature to limit its effect is unconstitutional and void.

3. Corporations 🔑217—Legislature may not create personal liability of stockholder for corporate debts in excess of liability created by Constitution (Const. art. 12, §§ 2, 3, 24; Civ. Code, §§ 322, 349).

Legislature may not create personal liability of stockholder for corporate debts in excess of liability provided by Const. art. 12, § 3, notwithstanding sections 2, 24, providing for secur-

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★Rehearing denied.

ing dues from corporation by individual liability of corporators and Civ. Code, §§ 322, 349.

4. Banks and banking ⚷44—Statute providing for assessments against stockholders on liquidation of banks held not justified as exercise of police power because violative of constitution (St. 1917, p. 581, as amended by St. 1925, p. 905; Const. art. 12, § 3).

St. 1917, p. 581, as amended by St. 1925, p. 905, permitting superintendent of banks to make such assessments against stockholders as he may determine necessary for purpose of liquidating banks' affairs and paying creditors, *held* not authorized as exercise of police power on account of violation of Const. art. 12, § 3, fixing liability of stockholders of corporation.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Will C. Wood, as Superintendent of Banks and trustee in charge of the liquidation of the First Bank of Livingston, against H. Hamaguchi, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Albert A. Rosenshine and Elbert W. Davis, both of San Francisco, for appellant.

Theodore M. Stuart, of Fresno, and F. M. Ostrander, of Merced, for respondents.

LANGDON, J. This is an appeal from a judgment in favor of defendants in an action brought by appellant, as superintendent of banks of the state of California, to recover the amount of an assessment levied upon the stockholders of the First Bank of Livingston, a banking corporation in liquidation. The assessment was levied, and the action thereon was brought under and by virtue of chapter 496 of the Statutes of 1917, p. 581, as amended by chapter 420 of the Statutes of 1925, p. 905, the material portions of which read as follows:

"Section 1. Whenever the superintendent of banks shall hereafter take possession of the business and property of any bank doing business in this state for the purpose of liquidating its affairs, as provided by law, he may at any time during the process of such liquidation determine whether it shall be necessary to assess the members or stockholders of such bank in order to promptly pay the claims of the creditors of such bank in full and he shall make such assessments as he may determine to be necessary for that purpose.

"Section 2. Any such assessment shall be levied by order of the superintendent of banks, under his official seal, which order shall be executed in duplicate, one to be filed in the office of the superintendent of banks and one with the papers in the liquidation proceedings in the county in which said bank shall have been located.

"Said order shall specify the amount of the assessment, and shall fix a date on which the said assessment shall be due and payable, which said date shall not be less than thirty nor more than sixty days from the time of making the order levying the assessment. The said assessment shall be payable to the superintendent of banks at his office, or at such other place as may be specified in the order levying the assessment.

"Notice of such assessment shall be given by causing a copy of said order to be published once a week for four successive weeks in one or more newspapers of general circulation devoted to the publication of general news, published at the place where the principal place of business of the bank was located, or if there be no newspaper at such place, then the publication shall be made in some other newspaper of the county, if there be one, otherwise in a newspaper published in an adjoining county. Notice of such assessment shall also be given by causing a copy of said order to be personally served upon each stockholder, or, in lieu of personal service, sent through the mail, postage prepaid, addressed to such stockholder at his place of residence or business, if known, and if not known, at the place where the principal office of the bank was situated. Said copies of said order shall be so personally served or placed in the mail within fifteen days after the making of the order levying the assessment. * * *

"Section 3. If any stockholder of said bank shall fail to pay the said assessment in full upon the date specified in the said order as the date on which said assessment shall be due and payable, a right of action shall immediately accrue to the superintendent of banks to recover the amount of said assessment or the amount remaining unpaid thereon from the stockholder or stockholders failing to pay the same in full. * * *

"Section 5. All sums collected from any such assessment, less the reasonable expenses of collection, shall be used by the superintendent of banks in the liquidation of claims against the bank in the same manner as assets of the bank are so used. If such assessment, first made, shall prove inadequate to pay all of the creditors of the bank in full, the superintendent of banks may levy further assessment or assessments and proceed to collect same in like manner."

The complaint alleges the matters and things necessary to show compliance with the provisions of the statute above set forth, including the due levying of an assessment of $100 a share upon the capital stock and the refusal of the defendants to pay. Defendants demurred to the complaint, contending that the statute under which the assessment was levied violated the Constitutions of the state of California and of the United States. The demurrers were sustained, and, upon failure of the plaintiffs to amend, a judgment was entered dismissing the action as to each of the defendants.

The appeal is on the judgment roll alone, and the only question raised is as to the constitutionality of the assessment statute. It is the position of the trial court and of respondents here that the statute we are considering violates section 3 of article 12 of the state Constitution, as that section prescribes an exclusive liability of stockholders for corporate debts. The said constitutional provision reads as follows: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation."

It is the contention of appellant that the foregoing constitutional provision merely provides the minimum liability of a stockholder, and that the Legislature may prescribe an additional liability. This position, appellant contends, is aided by sections 2 and 24 of article 12 of the Constitution of California. Section 2 provides: "Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law." Section 24 provides that the Legislature shall pass all laws necessary for the enforcement of the provisions of the article.

[1, 2] It is to be observed that the statute under attack here comes into operation only when the superintendent of banks has taken possession of the business and property of a bank for the purpose of liquidation, while the constitutional provision (section 3, art. 12) draws no distinction between the individual liability of a stockholder in a solvent corporation and one in an insolvent corporation. Furthermore, the constitutional provision covers liability for debts and liabilities of the corporation, while the so-called Bank Act provides for an individual liability to meet all the charges of collection as well as the payment of the debts of the corporation. Furthermore, the constitutional provision restricts the liability of a stockholder to such proportion only of its debts, contracted while he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the capital stock; while the so-called Bank Act permits recovery of assessments against a stockholder who had purchased his stock after all the debts of the corporation had been contracted. It also puts no limit upon the amount that one stockholder shall be compelled to pay except the limit of sufficient money to pay all expenses of liquidation and all debts. The superintendent of banks is given power to levy one assessment after another in the event that the first assessment does not result in the collection of the money required, and, as a consequence, there is an extreme possibility under the act, pointed out by respondents, that a single solvent stockholder, with one share of stock, which had been purchased after all the debts and liabilities of the bank had been contracted, may be compelled to pay the entire debts of the bank and the expenses of liquidation.

For many reasons, therefore, the statute we are considering is in violation of section 3 of article 12 of our Constitution; and, indeed, it is admitted to be so by appellant, who contends that it is permissible under sections 2 and 24 of said article 12 and under the general police power reserved to the people.

In the case of French v. Teschemaker, 24 Cal. 518, provisions almost identical with those of sections 2 and 3 of article 12 were considered by the court. Said section 2 appeared in our Constitution of 1849 as section 32 of article 4 and in identically the same language. Section 3 of article 12 appeared in our Constitution of 1849 as section 36 of article 4, but it did not contain the limitation that the liability existed only as to debts contracted or incurred while the person was a stockholder, nor did it declare the percentage of the stockholders' liability. Said section 36 of article 4 of the Constitution of 1849 read as follows: "Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities." In the case of French v. Teschemaker, supra, the court remarked that there was an apparent repugnancy between the two provisions, but declared that if section 36 was read as imposing "a liability separate and distinct from that imposed by the thirty-second section, it is clear that the latter has no office to perform, and is, in effect, stricken from the constitution." It was also held that section 36 was not self-executing and required legislative action. The Legislature, at the time of the decision of the French Case, had enacted two measures, one in 1850 and one in 1853; one providing that "each stockholder of any corporation shall be individually and personally liable for a portion of all its debts and liabilities, proportioned to the amount of stock owned by him" (St. 1850, p. 350, § 32); and the other providing that "each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder." (St. 1853, p. 90, § 16.) Considering this situation, the opinion in the French Case states:

"It is true that the legislature, in supplying what was needed and omitted from the Act of 1850, left out the provision of that Act which defines the word 'proportion'; yet, although neither by itself affords a perfect rule, the two combined contain what is omitted in the thirty-sixth section of the Constitution and is needed to give it a practical operation.

"If we read the thirty-sixth section in the manner suggested it is made to harmonize with the thirty-second, and each is made to serve a useful purpose, and neither is allowed to sacrifice the other.

"Such seems to us to be the reasonable and proper construction to be given to the thirty-sixth and thirty-second sections of the Constitution. By such reading harmony is preserved and some force and effect is given to each. Any other reading must manifestly sacrifice one section to the ambition of the other, and practically strike it from the Constitution.

"Under this construction, the Legislature has the power to say, not that the stockholder shall not be liable for any of the debts of the corporation but that he shall be liable for his portion, and to say what that portion shall be. Thus the Constitution is made to say to the legislative department of the government, the stockholder shall be individually and personally liable for his proportion of the debts and liabilities of the corporation, but to your wisdom and sound discretion is intrusted the power to adjust the mode and measure of the liability. It is the duty of the legislature to carry out this provision according to its spirit, and to fix the liability of the stockholder at a figure adequate to guard effectually against the evils for which the Constitution seeks, through the co-operation of the legislature, to provide a remedy.

"But the exercise of this power is subject to the rule that 'all laws of a general nature shall have a uniform operation,' as provided in section eleven of article I of the Constitution, and the same rule of liability must be imposed upon all stockholders of corporations and joint stock associations. The Constitution knows no distinction between persons, and the legislature cannot discriminate, or grant an indulgence to one which is not accorded to another. Every general law must have a uniform operation; that is to say, it must operate equally on all persons and upon all things upon which it acts at all.

"Where, under the Constitution, a law must impose some indeterminate liability upon a class of persons, as, for example, stockholders of a corporation, it must impose the liability, at whatever rate it may be fixed, upon all alike, and cannot exempt one any more than it can exempt all; nor can it attach a lower rate of liability to one than it does to another; nor can it attach a greater or less liability to the stockholders of one corporation than it does to the stockholders of another."

The statutory limitation upon the stockholders' individual liability when the French Case was decided has now been incorporated into the Constitution itself, namely, that the stockholders' liability extends only to those debts contracted or incurred during the time he was a stockholder, and he cannot be held liable for any greater amount than the proportion which his stock ownership bears to the total amount of the subscribed capital stock, under section 3 of article 12.

It has been decided (Western Pacific Ry. Co. v. Godfrey, 166 Cal. 346, 136 P. 284, Ann. Cas. 1915B, 825) that section 3 of article 12 of our Constitution is self-executing, and any attempt by the Legislature to limit its effect is unconstitutional and void.

It appears from some of the decisions cited by appellant that a number of the states declare affirmatively in their Constitutions that stockholders in banking corporations carry a liability different from and greater than the stockholders in other corporations. The California Constitution draws no such distinction, but treats the stockholders of all corporations alike in this respect. In the case of McGowan v. McDonald, 111 Cal. 67, 43 P. 418, 52 Am. St. Rep. 149, the court said: "But the provisions of the Constitution of 1849 applied to the stockholders of all corporations, without regard to the character of the business to be transacted, and the same is true of the Constitution of 1879." Therefore, the decisions from other jurisdictions, based upon constitutional provisions different from our own, are not helpful here.

The complaint in this case discloses that the plaintiff is not seeking to collect from the defendants any unpaid installments upon the purchase price of their stock, and it makes no attempt to plead a cause of action under section 3 of article 12 or under section 322 of our Civil Code, which embodies in statutory form the provisions of said section 3.

It is contended by appellant that the Legislature has created, by section 349, Civil Code, a personal liability against stockholders of different corporations which is in excess of and in addition to the liability created by section 3 of article 12, and that these various liabilities have been enforced by the courts, and that they must be justified either under the general police power of the state or under the directions of sections 2 and 24 of article 12 of the Constitution. The cases cited relate, first, to liability for unpaid subscriptions, which is a liability dependent upon contract and enforceable without a specific code section; second, to assessments upon paid-up stock, enforceable by sale of the stock. The cases in these two groups do not deal with the personal liability of a stockholder, and hence are not in conflict with section 3 of article 12. But one case is cited which deals directly with the personal liability of a stockholder attempted to be created by section 349 of our Civil Code, and that is the case of Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 P. 994. That case contains the following language: "If the decisions, statutes and provisions of the constitution relating to the personal liability of a stockholder to the creditors of the corporation, and the principles upon which they are based, could be considered here, and the matter were an open question, we should have grave doubts of the right of the directors to collect by personal action any assessment levied to pay a debt of the corporation which was not alleged to have been created during the time the person sued was a holder of stock in such corporation. But the right of the corporation to proceed and sell stock in cases of delinquency has so often been held to be an entirely separate and distinct right from the personal liability of a stockholder to the creditors of the corporation because of his ownership of stock in the company, that we do not regard the question open for consideration here. (People's Home Savings Bank v. Stadtmuller, 150 Cal. 110 [88 P. 280].)" The case cited deals with an unpaid stock subscription, and no authority is cited which supports the statement that the question of the personal liability of a stockholder for an assessment levied to pay a debt of the corporation, which is not alleged to have been created during the time the person sued was a holder of the stock in such corporation, is no longer an open question. If the foregoing language from Bottle Mining & Milling Co. v. Kern be considered a determination of the validity of such personal liability of the stockholder under the provisions of section 349, Civil Code, or under any other legislative enactment, we decline to follow it, but prefer the reasoning in the case of In re South Mountain, etc., Mining Co., Bankrupt (D. C.) 5 F. 403, wherein the court, in speaking of section 349 of our Civil Code, said:

"The statute does not, in terms, declare or create the liability. It merely authorizes the directors 'to elect to proceed by action to recover the amount of the assessments.' Its language would be satisfied by restricting its operation to those cases where such an action can be maintained; that is, to those cases where stock has been subscribed for, and an obligation assumed to take and pay for it." The opinion continues: "Section 349 confers, as we have seen, the right to proceed by action to recover any delinquent assessment; and if this power be not restricted, as I have suggested, to cases wherein the stockholder has, by express or implied contract, agreed to pay, it will extend to all cases of assessments levied to meet expenses or conduct business, as well as to pay debts, and may be exercised against a stockholder who has paid his subscription in full, or who has already been assessed up to the par value of his stock. This result, startling and absurd as it is, seems to be the necessary consequence of the construction of section 349 contended for.

"It will not be disputed that the ordinary rule which requires such a construction to be given to the provisions of a statute as will make them consistent and harmonious should be applied to the provisions of our code with regard to corporations.

"By section 322, as amended March 15, 1876, the individual liability of a stockholder of a corporation is limited to such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole stock of the corporation; and, on payment of his proportion of any debts due from the corporation, incurred while he was a stockholder, he is relieved from any further personal liability for such debt.

"I am unable to reconcile these provisions with a construction of section 349 which would give it the effect and operation contended for. * * *

"The section just referred to limits his personal liability for the corporate debts incurred while he is a stockholder to such proportion of those debts as the number of shares owned by him bears to the whole number of shares of the capital stock. But, if he is personally liable on the assessment to be levied, he may be obliged, if he is the only solvent stockholder, to pay the whole amount of the indebtedness of the corporation, provided it does not exceed the fanciful and exaggerated par value mentioned in the articles. * * *

"Will it be contended that a stockholder who has paid his full proportion of the debts incurred, while he was a stockholder would still remain personally liable to pay any assessment that may be levied, and that such a payment, which the statute declares shall relieve him from any further personal liability for such debts, and shall be a good defense in an action brought by a creditor, shall be unavailable in an action brought by an assignee in bankruptcy in behalf of creditors to collect an assignment levied for the payment of debts?"

And, finally, the decision of the court is: "That section 349 does not create, and was not intended to create, any personal liability for assessments, unless from the terms of the stockholders' subscription such liability was incurred. That the remedy of the creditor against the stockholder personally is limited and defined by section 322 of the code, and his liability cannot be extended beyond the limits therein prescribed."

[3] It appears, therefore, that the liability asserted against the defendants here is in violation of section 3 of article 12, and that section 2 of the same article of the Constitution does not authorize, expressly or by implication, a legislative violation of the following section; that sections 322 to 349, inclusive, of the Civil Code are not to be construed as creating a personal liability of a stockholder for corporate debts which would be in excess of or in violation of the provisions of section 3 of article 12 of the Constitution.

[4] It but remains to consider the remaining contention of appellant that authority is found for the liability imposed by the so-

called Bank Act, in the general police powers of the state. This contention requires little discussion. The case of Frost v. City of Los Angeles, 181 Cal. 22, 183 P. 342, 6 A. L. R. 468, cited by appellant in support of his contention, contains language to the effect that, while the legislature possesses the entire police power of the state, such power is limited by the provisions of the Constitution of California and the Constitution of the United States. Volume 12 of Corpus Juris, p. 929, states this limitation as follows: "However broad the scope of the police power it is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden to it by the state constitution." The following cases are to the same effect: Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; In re Smith, 143 Cal. 368, 77 P. 180; San Diego, etc., Ass'n v. City of East San Diego, 186 Cal. 254, 200 P. 393, 17 A. L. R. 513. And in People v. Holder, 53 Cal. App. 45, 199 P. 832, the court said: "It is well settled that the police power cannot be made a cloak under which to overthrow or disregard constitutional rights."

Having come to a conclusion, in harmony with the trial court, that our state Constitution limits the liability of a stockholder for corporate debts in accordance with the provisions of section 3 of article 12, we cannot hold that the police power is unrestrained by such constitutional provision.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.

207 Cal. 106

In re WIRT'S ESTATE.

HIRAM LODGE NO. 18, FREE AND ACCEPTED MASONS, OF DELAWARE, OHIO, et al. v. COX et al. (L. A. 9733.)

Supreme Court of California. April 23, 1929.

1. Evidence 🔑22(1)—California court will not take judicial knowledge that Masonic lodges outside state are "charitable" institutions; "eleemosynary" (Const. art. 20, § 9).

California court will not take judicial notice that Masonic lodges outside state are charitable institutions, within meaning of Const. art. 20, § 9, providing that no perpetuities shall be allowed except for eleemosynary purposes; term "eleemosynary" being synonymous with "charitable."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Eleemosynary; Second and Third Series, Charitable.]

2. Appeal and error 🔑891—Reviewing court will not hear original evidence as to eleemosynary character of lodge, where purpose was to secure reversal, but will remand case (Const. art. 20, § 9; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Where Masonic lodge contended that bequest to it was absolute and did not create trust in perpetuity within Const. art. 20, § 9, but requested that if court made finding against its contention it be permitted to offer further proof on question whether it was eleemosynary in character, and court ignored such request, reviewing court will not hear such proof on appeal under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, but will remand case, since such statute is inapplicable where production of original evidence is for purpose of securing reversal.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Gary Wirt, deceased. Contest by Charles H. Cox and others, opposed by Hiram Lodge No. 18, Free and Accepted Masons of Delaware, Ohio, and another. From a judgment directing distribution, Hiram Lodge No. 18, Free and Accepted Masons of Delaware, Ohio, and another appeal. Reversed and remanded, with instructions.

Superseding former opinion in 263 P. 271.

Harry K. Sargent, of Los Angeles, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondents.

RICHARDS, J. This appeal is from an order of decree of distribution of the estate of Gary Wirt, deceased, who died on or about November 6, 1924, at Long Beach, Cal., leaving a last will and testament, wherein, after providing for the payment of his just debts and liabilities, he devised the residue of his estate to a trustee, who is directed to hold, control, invest and reinvest the same, applying the income and such portion of the principal thereof as might be necessary for the support and maintenance of his brother, Sam V. Wirt, during the term of his natural life, and further providing that upon the death of his said brother all the residue of his estate should be equally divided between Hiram Lodge No. 18, F. & A. M. of Delaware, Ohio, and Jackson Lodge No. 146, F. & A. M. of Seymour, Ind., share and share alike, which lodges were each to place its share of the residue of his estate in a special fund, "to be known as the Gary Wirt fund, and only the income of said fund shall be used for current expenses" of each of said lodges. Said will was duly admitted to probate and the administration thereof proceeded up to the time for final distribution thereof, whereupon each of said Masonic lodges presented and filed a petition for distribution to them of the residue of said estate in accordance with the terms of the will. The heirs at law of said decedent appeared and filed their contest and objection to such distribution, alleging as the sole ground of such contest "that the bequest in the will of said deceased was and is void under the provisions of article XX, § 9 of the Constitution of the state of California"; wherefore they prayed for the distribution of the entire residue of the estate. The matter of this contest came on for hearing before the trial court, and upon such hearing it was decided by the court "that the bequest in said will to Hiram Lodge No. 18, F. & A. M. of Delaware, Ohio, and Jackson Lodge No. 146, F. & A. M. of Seymour, Ind., was and is void under the provisions of article XX, § 9, of the Constitution of the state of California." Thereupon the court made its order and decree for the distribution of the residue of said estate to the heirs at law of said deceased. The Masonic lodges in question have taken and are now prosecuting their appeal from said order of the court.

Section 9 of article 20 of the state Constitution provides that: "No perpetuities shall be allowed except for eleemosynary purposes." The term "eleemosynary" as used in the foregoing provision has been held to be synonymous with "charitable" as the latter word is used and understood in treatises and decisions upon the subject of trusts. Estate of Sutro, 155 Cal. 727, 102 P. 920. It is not confined to almsgiving or charity shown exclusively to the poor, but includes all charitable purposes, such as schools, asylums, hospitals, and religious institutions. People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L. R. A. 269.

Upon the hearing of this matter in the trial court the appellants insisted upon an interpretation of the will of the testator to the effect that it was his intention as expressed therein that the bequest to these Masonic lodges was to be absolute and that no trust in perpetuity was intended to be created thereby. It was at the outset apparently conceded by them that if a trust in perpetuity was intended to be thus created, the devotion of the income of the subject-matter of said trust to the payment of the "current expenses" of these lodges was not a charitable or eleemosynary purpose. This concession, however, was subsequently and during the hearing of the matter in this court expressly withdrawn. From the record herein and from the briefs and argument of counsel upon this appeal, it appears that at the conclusion of the hearing in the trial court the question as to the proper interpretation of said will and as to whether or not a perpetuity such as would be void under the foregoing provision in the state Constitution was submitted for decision to the trial court upon briefs of counsel thereafter to be filed, and that in the briefs of counsel for the appellants the trial court was requested, in the event it should make its finding against the contention of these residuary legatees thus far made, it would permit them to offer further proof upon the question as to whether, in fact, these two Masonic lodges, as to their main purposes, were eleemosynary in character, and as to whether the matter of the application of the income to be derived from the residue of said estate to "current expenses" was incidental to the main object of these organizations, and hence was in the nature of a charitable bequest. The trial court, in deciding that these two bequests were void under the foregoing provision of the state Constitution, ignored the foregoing request. Upon the final presentation of this matter upon appeal to this court, counsel for the appellants presented an application purporting to be made under the provisions of section 956a of the Code of Civil Procedure (as added by St. 1927, p. 583) for leave to produce evidence before this court that said Masonic lodges were, in fact, charitable or eleemosynary institutions within the intent and meaning of the exception contained in the foregoing section of the state Constitution. Said application was supported by certain affidavits, and the question of the propriety of granting the same, or what order it would be appropriate to make in the premises, was presented to the court upon final argument upon the merits of this appeal. In the course of the argument the following colloquy occurred:

"Mr. Justice Richards: What do you say as to the appellants' position to the effect that when this matter was submitted on briefs in the trial court, he made the request in his brief, if the court should determine that the question as to whether these legacies were eleemosynary was a question of fact, that he be permitted to introduce evidence upon that subject, which request, apparently, the court ignored. Counsel comes here and renews that request?

"Mr. Ford (of counsel for respondents): Answering you honestly, if I were one of the members of the court I would be inclined to grant counsel's request.

"Mr. Justice Richards: You have no objection to this court referring it back to the trial court to take further testimonny on that subject?

"Mr. Ford: No; I have not."

[1] The primary question presented upon this appeal and argued elaborately by respective counsel was the question as to whether or not both the trial court and this court were bound and entitled to take judicial notice of the fact that the Masonic Order, as a most ancient and practically world-wide organization or group of organizations, was, as to the main and essential objects of its existence, a charitable institution, and was also

bound and entitled to take judicial notice of the fact that the two particular lodges of Masonry named in the will of said testator, and located one in Ohio and the other in Indiana, were also, as a matter of judicial knowledge, to be held to be so essentially charitable as to the main objects and purposes of their organization as to bring them fairly within the terms of the exception to be found in the foregoing clause of the state Constitution as to entitle them to be the recipients of the benefits in perpetuity provided for in the will of said testator. An investigation of the foregoing two phases of this inquiry has satisfied us that there is considerable conflict in the authorities to which we have been cited from other jurisdictions bearing upon both phases of said inquiry. We do not deem it necessary to pass upon the first of these phases thereof, for the reason that whatever conclusion we might arrive at respecting the essentially eleemosynary character of the institutions of Masonry as exemplified by the numerous lodges thereof which exist within the state of California, and are therefore within the range of the immediate jurisdiction of this court, and hence possibly the proper subject for the application of the principle of judicial notice, we would not be entitled to extend the domain of such judicial knowledge or notice to institutions or organizations which, though more or less intimately connected with the Order of Masonry in general, are still in some degree independent in character and have their locus and sphere of operation in places beyond and distant from the immediate area to which the jurisdiction of this court extends. The question of what matters may be the proper subject of judicial notice or knowledge on the part of both original and appellate tribunals was made the subject of exhaustive consideration by this court in the case of Varcoe v. Lee, 180 Cal. 338, 181 P. 223, wherein the rule upon this subject, set forth in 15 R. C. L. 1057, was quoted with approval, wherein it was set forth in substance that, "While the power of judicial notice is to be exercised with caution, courts should take notice of whatever is or ought to be generally known, within the limits of their jurisdiction," and, further, that "a matter to be within judicial cognizance must be known 'within the limits of the jurisdiction of the court.'" Applying this principle to the facts as presented upon this appeal, we have become satisfied that the question as to whether or not certain lodges which are independent as to the detail of their local organization, but which in a general way belong to one branch of a widespread order of Masonry, are or are not charitable as to the main objects and purposes of their organization and conduct, but which exist at places remote from the area over which this court exercises jurisdiction, is a question as to which this court cannot, as matter of law, assume to take judicial notice, but which are essentially matters of fact to be made the subject of judicial inquiry and of the proffer of appropriate proofs before the trial court.

[2] This conclusion brings us to the inquiry as to what disposition should be made of the application of the appellants for permission to present such proof in this court and upon the hearing of this appeal. We have heretofore held that section 956a of the Code of Civil Procedure is not intended to have application to cases wherein the production of original evidence was sought to be permitted in this court and the purpose of the production of such evidence would be to lead us to a reversal of the cause upon appeal. Where, however, it sufficiently appears that the production of such evidence was from any cause prevented when the matter in question was still pending before the trial court for its proper determination, and where it further appears, as it does in this case from the colloquy quoted at an earlier stage in this opinion, that the respondents not only concede the propriety of permitting the introduction of such evidence before the proper tribunal, but also expressly waive all objection to the return of said cause to the trial court to the end that such evidence as the appellants seek to produce in this court may be there, if available, presented before the trial court, it would appear to be clear that in the interest of justice the judgment herein should be reversed, without cost to either party to this appeal, and that the cause should be remanded to the trial court, with instructions to reopen the same and to take such further proceedings therein as are in conformity with the views expressed in this opinion. It is therefore so ordered.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

PEOPLE v. WICKERSHAM. (Cr. 1751.)★

District Court of Appeal, Second District, Division 2, California. April 25, 1929.

Rehearing Denied May 9, 1929. Hearing Denied by Supreme Court May 23, 1929.

1. Larceny 🔑28(1)—Indictment for grand theft, charging that defendant stole, took, and carried away certain personal property, charged public offense, in absence of demurrer.

Indictment for grand theft, charging that defendant unlawfully and feloniously stole, took, and carried away a certain number of shares of corporate stock, a deed of trust, and a certain amount of money, the property of another, charged defendant with public offense, in absence of demurrer.

2. Larceny 🔑14(1)—Evidence that defendant obtained property by false representations, and converted property to own use, authorized finding of grand larceny (Pen. Code, § 484, as amended by St. 1927, p. 1046).

Evidence that defendant unlawfully obtained possession of personal property by representations that he was interested in mine, which he had incorporated and in which he would profitably invest for owners of securities and money obtained, but that defendant had neither mine nor corporation, and had surreptitiously secured property for his own benefit and converted it to personal uses, was sufficient to justify finding that defendant committed grand larceny, under Pen. Code, § 484, as amended by St. 1927, p. 1046, providing that person feloniously stealing, taking, carrying, or driving away personal property of another, or who shall fraudulently appropriate property intrusted to him, or fraudulently obtain possession of property of another, shall be guilty of theft.

3. Larceny 🔑55—Evidence of unsupported exaggerated inducements to gain another's property, and admissions that property was not so used, authorized finding that defendant fraudulently procured property (Pen. Code, § 484, as amended by St. 1927, p. 1046).

Evidence of exaggerated inducements utilized by defendant to gain possession of money and securities of others, coupled with absolute lack of foundation for expectation of their fulfillment and defendant's admission that he did not use funds or property in manner promised, warranted conclusion that there was preconceived and consummated a violation of Pen. Code, § 484, as amended by St. 1927, p. 1046, denouncing theft, and justified finding that defendant knowingly and designedly, by false and fraudulent representations, secured property and appropriated same for own use.

4. Larceny 🔑14(1)—Where property was obtained by fraud, no legal title passed.

Where defendant obtained possession of property by fraud, owners parted with property against their will and without their consent, and hence title did not pass, fraud taking place of force.

5. Larceny 🔑40(4)—Where indictment charging defendant with taking, stealing, and carrying away certain property was sufficient, defendant could not object to proof of other species of theft to sustain charge.

Where indictment charging that defendant did "take, steal, and carry away" certain property was sufficient, defendant had all information contemplated by law as to nature of charge, under Pen. Code, § 484, as amended by St. 1927, p. 1046, and could not object to proof of any species of theft named in section 484 as insufficient to sustain charge, on ground that indictment did not advise him whether he was accused of stealing, embezzling, or obtaining by false pretenses property of another.

6. Criminal law 🔑823(5)—Instruction defining fraud, not taking into account felonious intent and knowledge of false representations, though erroneous, standing alone, was not prejudicial error, where court further instructed on such elements (Pen. Code § 484, as amended by St. 1927, p. 1046; Civ. Code, § 1572).

In prosecution for grand theft, under Pen. Code, § 484, as amended by St. 1927, p. 1046, instruction defining actual fraud, as term is used in Civ. Code, § 1572, not taking into account felonious intent and knowledge of falsity of representations made, which are necessary to definition of fraud as element in grand theft by fraudulent misrepresentations, though erroneous, standing alone, was not prejudicial error, where court further instructed on need of proof of knowledge and falsity of representations.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Sam Wickersham was convicted of grand theft, and he appeals. Affirmed.

Marcus L. Roberts and Paul W. Schenck, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, J. Appellant was charged, by indictment consisting of three counts, with grand theft; it being alleged that he unlawfully and feloniously stole, took, and carried away (1) 32,000 shares of corporate stock, (2) a deed of trust, and (3) $2,500 in money, the property of another. He was convicted upon all charges, a motion for a new trial was presented, which was denied, and he appeals from the judgments and order denying said motion.

[1] The evidence tended to show that the defendant unlawfully obtained possession of the personal property mentioned by representations that he was interested in a valuable mine, which he had incorporated, and in which he would profitably invest for the owners of the securities and money. It subsequently developed that Wickersham had neither a mine nor a corporation, but that he had surreptitiously secured about $70,000 worth

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★Rehearing denied. Hearing denied by Supreme Court.

of property of the complaining witnesses for his own benefit, and converted it to his personal uses and purposes. It is first contended that appellant was deprived of his constitutional rights by the failure of the indictment to inform him as to the manner in which the people intended to show that he was guilty of grand theft; that is, whether they would attempt to prove that he stole, took, and carried away the property of another, or obtained it by false pretenses, or embezzled it. No demurrer was interposed, and the indictment certainly charges the defendant with a public offense. Appellant relies upon article 6 of the amendments to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation. That this article is intended to be restrictive of the powers of the federal government is pointed out in People v. Wilson, 26 Cal. App. 336, 146 P. 1048.

[2] As far as the evidence is concerned, it is clearly sufficient to justify the jury in believing and deciding that Wickersham committed grand larceny in any of the ways mentioned in section 484 of the Penal Code, as amended by St. 1927, p. 1046, except its last specification. Said section reads as follows:

"Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been intrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft. * * *"

[3, 4] Much space is devoted in the briefs to an exhaustive outline and discussion of the evidence, but for the purposes of a decision of this proposition we do not deem it necessary or expedient to delineate details. The extremely exaggerated inducements utilized to gain possession of the money and securities from their owners, one of whom was ill in a hospital, coupled with an absolute lack of foundation for expectation of their fulfillment, and the defendant's admissions that he did not use any of the funds or property in the manner promised by him, warranted the conclusion that there had been a preconceived and consummated violation of the law which denounces theft. The jury were justified in finding that the defendant knowingly and designedly, by false and fraudulent representations and pretenses, secured money and personal property, and that he took and carried away and fraudulently appropriated it to his own use, after it was intrusted to him. That such acts constitute stealing has heretofore been decided. People v. Edwards, 72 Cal. App. 102, 236 P. 944. Having obtained possession of the property by fraud, the owners parted with it against their will and without their consent. The fraud used took the place of force, and legal title did not pass.

[5] It is argued that, the indictment having charged that he did "take, steal, and carry away" certain property, proof of one of the other species of theft named in section 484 is insufficient to sustain that charge. Precisely this objection was made in People v. Plum (Cal. App.) 263 P. 862, and People v. Lalor (Cal. App.) 272 P. 794. In each of these the ruling was adverse to the contention here advanced. It is argued that appellant was not advised when arraigned, and was unable to determine throughout the trial, as to whether he had been accused of stealing the property of another, embezzling it, or obtaining possession by false pretenses, or by trick and device, and that he was deprived of all opportunity to prepare for trial, or to defend himself, or to offer instructions to the jury, because the theory of the prosecution was not disclosed. The indictment being sufficient, appellant had all of the information contemplated by the law as to the nature of the charge.

[6] It is contended that the court did not clearly or properly instruct the jury as to the element of fraud necessarily contained in theft as charged in certain counts of the indictment. The court defined actual fraud as the term is used in section 1572 of the Civil Code. It is clear that this instruction, standing alone, would be erroneous. The last two subdivisions do not take into account the felonious intent and knowledge of the falsity of the representations made, which are necessary to the definition of fraud as an element in the species of grand theft here involved. The same is true of another instruction, that "deception, deliberately practiced for the purpose of gaining an unfair advantage of another, is fraud. Goods obtained by such practices are obtained by fraud. One deprived of his property by such means is defrauded." However, what is held in People v. Bowman, 24 Cal. App. 781, 142 P. 495, concerning the instruction just quoted, is applicable to both of these instructions; that is, that, even though erroneous, the defendant was not prejudiced. It is true that the law might properly have been expounded more favorably to the defendant. A principle of law, though substantial and settled, is nevertheless often susceptible of statement in such form as to incline in some degree toward the theory of the prosecution or defense in a given case. In this instance, other instructions given by the court informed the jury sufficiently, we think, of the need of proof of knowledge and falsity

of the representations made and of the design to deceive. An instruction might have been so framed as to have stressed these essentials, and thus have insured fuller appreciation of them by the jury. In a number of instructions the need of proof of knowledge and design is mentioned, and a fair construction of them all, we think, requires the conclusion that the jury were sufficiently informed in that regard. Perhaps the most clear statement of the matter is to be found in the following instruction which was given:

"If a person knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money or property, the offense is theft, but to constitute this offense, four things concur: (1) There must be an intent to defraud; (2) there must be actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose, viz. they must be the cause which induced the owner to part with his property."

The judgments and order appealed from are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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98 Cal. App. 306

O'NEIL v. ROSS et al. (Civ. 6644.)★

District Court of Appeal, First District, Division 2, California. April 16, 1929.

Rehearing Denied May 16, 1929. Hearing Denied by Supreme Court June 14, 1929.

1. Wills 🔑58(1)—One may contract to devise or bequeath property in certain way.

One may make a valid and binding contract to devise and bequeath certain property in a certain specified way.

2. Trusts 🔑35(3)—One obtaining legacy or devise in consideration of agreement to do certain things cannot repudiate promise while keeping benefits, but equity will impose trust.

One obtaining a legacy or devise in consideration of agreement to do certain things cannot keep benefits conferred on him by such promise and at the same time repudiate and refuse to carry out the promise, but equity will impose a trust on property bequeathed or devised.

3. Trusts 🔑35(3)—Wife signing addendum to husband's will was obliged to perform agreement therein to accept and carry out provision for her in full of community rights.

Testator's wife, signing addendum to will whereby she consented to provision therein for her in full of all community rights and agreed to carry out and fulfill it, was obliged to carry out such agreement according to its true intent and lawful meaning after her husband's death.

4. Wills 🔑66—Wife's consent to provision for her in lieu of community rights, did not irrevocably bind him to leave identical will, nor give ultimate beneficiaries vested rights during his lifetime.

Addendum to will, whereby testator's wife consented to, and agreed to, carry out provision made for her in full of all claim to community property, did not irrevocably bind testator to leave such identical will, nor give ultimate beneficiaries thereunder any vested rights in provisions for them during his lifetime.

5. Wills 🔑775—Whether codicils revoked provisions for devise of half of share devised to widow to testator's daughters, who predeceased him, held immaterial; provisions for them having lapsed.

Provisions of will for testator's two daughters having failed or lapsed on their deaths during his lifetime, their estates have no interest in subject-matter of action by administratrix thereof to determine her ownership of half of so much of widow's estate as came to it by husband's will, and question whether codicils revoked paragraph stating testator's understanding that widow should devise half of third of estate devised to her to such daughters need not be considered in determining rights of their estates.

6. Wills 🔑692, 693(1)—Widow's power to devise half of share devised to her in fee to testator's daughters held special or particular and mandatory, in view of her agreement to fulfill testamentary provisions.

Power of testator's widow, under will, to devise half of third of estate devised to her in fee to testator's daughters, *held* special or particular and mandatory, not general and discretionary, even if words were only precatory, in view of addendum, signed by her, whereby she consented to, and agreed to, carry out provision for her in full of all claims to community property.

7. Wills 🔑692, 693(7)—Interest of named appointees of donee of special power is contingent use or executory devise until appointment.

The interest of named persons, who are ultimately to benefit by appointment in exercise of special testamentary power, is a contingent use or executory devise until the legal estate is vested in them by appointment.

8. Powers 🔑35—Special mandatory power is obligatory and enforceable in equity as trust.

A special and mandatory power is obligatory on the donee thereof, and is raised in equity as a trust or power in trust, execution of which may be enforced in equity in the same way as a trust.

9. Powers 🔑39—In default of execution of power, gift to beneficiary is implied, especially where directed by testator.

In default of execution of power by donee, a gift will be implied to beneficiary of intended appointment, especially where original testator has directed a gift over to appointee in case donee fails to exercise power.

★Rehearing denied. Hearing denied by Supreme Court.

10. Powers 🔑36(1)—Power of appointment among children as class is not validly executed by appointment to grandchildren or deceased child's executor.

A power of appointment among children as a class is not validly executed by appointment among grandchildren or to the executor of a deceased child.

11. Wills 🔑523—Devise to named children is devise to them individually, and only those living at dates of will and testator's death take.

A devise to children specifically named is a devise to them as individuals, not as a fluctuating class, and only those alive at date of will take, if they survive testator, while shares of those predeceasing him lapse, in absence of prohibitory statute.

12. Wills 🔑849—Administratrix of estates of daughters predeceasing testator cannot represent surviving child of one of them with respect to his mother's share (Civ. Code, §§ 1310, 1343).

Testamentary disposition to testator's two daughters having failed on their deaths before him, under Civ. Code, § 1343, administratrix of their estates cannot represent surviving son of one of such daughters with respect to his share, if any, under section 1310; since he would take his mother's share, not through her estate, but directly from testator's estate.

13. Powers 🔑41—Appointees of power take from original testator.

The appointees of a power take from the original testator, and not from the appointer.

14. Wills 🔑692, 693(4)—Provision of will for wife's devise of half of her share to testator's daughters did not obligate her to make such will, notwithstanding daughters' deaths before testator.

Paragraph of will, stating testator's understanding that his wife would devise half of share of estate devised to her to testator's daughters by a former marriage, did not obligate wife to make such devise, notwithstanding daughters' deaths during testator's lifetime, as expression of her sense of contractual obligation, so as to prevent lapse of devise to daughters; agreement having become impossible of performance.

15. Appeal and error 🔑839(1)—Equity 🔑39(1)—Appellate court, as well as trial court sitting as court of equity, must determine all controversies necessary to complete determination within limits of its jurisdiction.

It is the duty of the Court of Appeal, as well as of the trial court sitting as court of equity, to determine all controversies with respect to subject-matter necessary to complete determination thereof within limits of its jurisdiction of subject-matter and person.

16. Judgment 🔑243—Whether widow's surviving son took half of her share, which she had agreed to devise to testator's daughters, who predeceased testator, held not determinable in suit to which surviving son of one daughter was not party (Civ. Code § 1310).

Surviving son of daughter, who predeceased testator, not being represented by administratrix of his mother's estate or executors of testator's estate in former's suit against estates of testator and his widow, court has no jurisdiction to determine right of latter's surviving son to half of share, which she agreed to devise to testator's daughters, on ground that she became vested therewith on their deaths before testator in absence of gift over, as such determination would deprive daughter's surviving son of claim to his mother's share, under Civ. Code § 1310, without representation or hearing.

17. Courts 🔑472(4)—Appellate court's jurisdiction to determine whether any provisions of will have been impliedly revoked is advisory on probate court and confined to matters incidentally necessary to determine question properly before court.

Jurisdiction of Court of Appeal to determine whether any provisions of will have been revoked by implication is advisory on the probate court and confined to matters incidentally necessary to determine a question properly before the court.

18. Courts 🔑472(4)—Probate court has jurisdiction of person of surviving son of daughter predeceasing testator to determine whether he or widow's surviving son is entitled to share of former's mother (Civ. Code, § 1310).

Probate court, having jurisdiction of will and estates of testator and his widow, has jurisdiction of person of surviving son of one of two daughters predeceasing testator to determine whether he is entitled to his mother's share, under Civ. Code, § 1310, or whether it passes to widow's surviving son for want of gift over in case of failure of appointment by widow.

19. Courts 🔑472(4)—Appellate court has jurisdiction to determine whether lapsed share of one of two daughters predeceasing testator vests in widow's estate, and amount of advances deductible from share of widow's surviving son and retained in residuary estate passing to other daughter's surviving child represented by testator's executors.

Surviving son of one of two daughters predeceasing testator, being represented by executors of testator's will in respect to his interest as testator's residuary legatee or heir, Court of Appeal has jurisdiction to determine whether lapsed share of the other daughter is vested in widow's estate or remains in testator's estate, and amount of advances to be deducted under will from share of widow's surviving son and retained in residuum of testator's estate.

20. Wills 🔑167—Testator could revoke provisions for daughters predeceasing him and provision for deducting advances to son of widow agreeing to accept provisions for her.

Widow not having purchased property, represented by provisions of husband's will for deduction of advances to her son from his share and devise of half of her share to testator's daughters, who predeceased him, by agreement to accept provisions of will for her in lieu of community property rights, testator could subsequently revoke provisions for his daughters' benefit and those requiring deduction of advances to widow's son.

21. Trusts ⚷35(3)—Contract whereby wife consented to provisions of husband's will for her created no trust in husband or wife respecting property she agreed to devise to husband's daughters.

Contract whereby testator's wife consented to and agreed to carry out provisions of will for her in lieu of community property rights was at most an agreement to make and carry out will, partaking only of nature of will which was ambulatory as to ultimate beneficiaries, and created no trust in testator or wife during his lifetime in respect to property to be devised by her to testator's daughters, who predeceased him.

22. Trusts ⚷140(1)—Execution of will and addendum, whereby testator's wife consented to provisions for her, vested no inheritable property interest in her or persons to whom will provided for devise of her share.

Execution of will and addendum, whereby testator's wife consented to provisions for her in lieu of community property rights, vested no inheritable property interest in wife, nor in her son or testator's two daughters, who predeceased him, under provisions for devise of half of her share to her son and such daughters at her death.

23. Wills ⚷64—Testator could rescind contract, whereby wife consented to provisions of will directing devise of half of her share to testator's daughters, so as to permit her to take such share without limitations, if considered as bilateral contract for benefit of third parties (Civ. Code, § 1559).

Contract, whereby testator's wife consented and agreed to carry out provisions of will for her in lieu of community property rights, vested no property interest in testator's daughters, to whom will provided that she should devise half of her share, and could be rescinded by testator under Civ. Code § 1559, if considered as bilateral contract for benefit of third parties, so as to permit wife to take share of devise to her without limitations; wife's will devising all of property as her own in fee constituting consent to rescission, if necessary.

24. Trusts ⚷35(3)—Wife, to whom testator devised third of estate in fee, with understanding that she should devise half thereof to his daughters, became equitable trustee at his death.

On death of testator, devising third of estate in fee to his wife, with expressed understanding that she should devise half thereof to his daughters, she became in equity a trustee with duty of devising unexpended remainder of her share in accordance with true intent and lawful meaning of such understanding.

25. Trusts ⚷35(3)—Equity will enforce widow's agreement to devise half of her share of estate to testator's daughters by decreeing proper intended beneficiaries to be equitable owners of property intended for them.

Equity will enforce widow's agreement to devise half of share of estate, devised to her, to testator's daughters by decreeing proper intended beneficiaries of such power of appointment to be equitable owners of property intended for them.

26. Trusts ⚷287—Court's sole object in exercising testamentary power in trust is to carry out testator's intent.

The sole object of the court in exercising a power in trust contained in a will is to carry out the intention of testator.

27. Trusts ⚷287—Court need not consider whether provision of will for wife's devise of half of share devised to her in fee to testator's daughters is precatory only, where she agreed to carry out provisions of will.

Where widow agreed, by signing addendum to will, to carry out provisions thereof in lieu of community property rights, court need not determine whether provision of paragraph, expressing testator's understanding that she should devise half of share devised to her to testator's daughters, is precatory only and cannot cut down fee devised to her in preceding paragraph; presumption being that different will would have been made had she not agreed.

28. Wills ⚷601(5)—Devise to wife in fee held not inconsistent with subsequent provision for devise of half of her share to testator's daughters, in view of her agreement to carry out provisions of will.

Devise of fee in one-third of estate to testator's wife *held* not inconsistent with paragraph expressing testator's understanding that she should devise half of such share to testator's daughters, contrary to rule that devise in fee cannot be cut down by devise of remainder in another part of will, in view of her contract, by signature of addendum to will, to carry out provisions thereof.

29. Wills ⚷601(5)—Devise of fee to widow, on understanding that she should devise half to testator's daughters, without gift over on daughters' deaths before testator, was devise of fee subject to divestiture by appointment.

Devise of fee to testator's widow, on expressed understanding that she should devise half of her share to testator's daughters, without directing gift over in case of failure of power of appointment because of daughters' deaths before testator, was devise of fee title, subject to be divested by intended appointment, so that fee was not divested, but remained in widow to extent that such power failed because of impossibility of performance.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Lilliam B. O'Neil, as administratrix of the estates of Johanna O'Neil and Nellie Johnson, deceased, against William A. Ross, John I. Peterson, and others. Judgment for plaintiff, and defendants Peterson and others appeal. Modified, and affirmed as modified.

Daniel A. Ryan, of San Francisco, for appellants John I. Peterson and others.

Marion Vecki, of San Francisco, for appellants Anna L. Peterson and others.

James M. Thomas, of San Francisco (George F. Snyder, and A. Walter Allen, both of San Francisco, of counsel), for appellant Jennie Wright.

Corbet & Selby, of San Francisco, for respondents Lilliam B. O'Neil and others.

Louis V. Crowley, of San Francisco, for respondent Henry Johnson.

James P. Sweeney, of San Francisco, for defendants William A. Ross and others.

Corbet & Selby, of San Francisco, for executors of estate of Cyrus F. O'Neil.

KOFORD, P. J. The plaintiff is administratrix of the estates of the two decedents named above, who were children of Martin Johnson, deceased. The action is against the estate of their stepmother, Mary Johnson, who at the time of her death was the widow of said Martin Johnson, deceased. The other parties defendant are heirs and legatees under the will of Mary Johnson and the executors in the estate of Martin Johnson, deceased. This is an action in equity to have it determined that plaintiff is the owner of one-half of so much of the estate of Mary Johnson, deceased, as came to her estate by the will of her husband, said Martin Johnson, deceased. Plaintiff recovered judgment, and the defendants, claiming under the will of Mary Johnson, appeal.

The evidence at the trial was almost entirely documentary. It gives the history of the property in question, and shows the manner of its passing from Martin Johnson to his widow, Mary Johnson, which gives rise to this action and the contention of the parties hereto.

Martin Johnson's will was executed May 20, 1914. At that time his wife, Mary Johnson, was living, and also his three children by a former marriage—Johanna, Nellie, and Henry. By his will Martin Johnson gave two-thirds of his estate to his three children, share and share alike—that is, two-ninths to each, and one-third of his estate to his wife. The important provisions of the will in this respect are the following:

"First: I hereby declare that nearly all of the property and estate of which I am now seized or possessed or in which I may be interested is my separate property, and that only a small portion thereof is the community property of my beloved wife and myself, and for the purpose of maintaining my entire estate as one entity I have discussed the foregoing condition of my property relating to separate property and community property with my wife and she agrees with me and is satisfied that the same shall be considered and treated as separate property.

"Second: I hereby give, devise, and bequeath to my said beloved wife, Mary Johnson, in full of all community rights or interest, a one-third (⅓) interest in all the property and estate of which I may die seized or possessed, in consideration of my dearly beloved wife waiving all community property right or claim to my estate for her community interest under the law or community property rights therein."

Third: Two-ninths to his daughter Johanna.

Fourth: Two-ninths to his daughter Nellie.

Fifth: Two-ninths to his son Henry, less advances.

"Sixth: It is my understanding with my beloved wife, Mary Johnson, that of the one-third (⅓) of my estate devised and bequeathed to her remaining at the time of her death she is to devise and bequeath one-half (½) of it to my beloved daughters, Johanna Johnson and Nellie Johnson, in equal shares, and as I have always reposed great confidence in my said wife and know she will comply with my wish, I leave said disposition of that property bequeathed to her for her compliance without further direction; and that the said remaining one-half (½) of said one-third (⅓) of my estate so devised and bequeathed to her remaining at the time of her death be by her devised and bequeathed to her son, John A. Peterson, but there shall be deducted from said bequest and devise to him all sums by me advanced to said John A. Peterson as appears on the books of M. Johnson & Co. at the time of my death, with interest thereon at the rate of six (6) per cent per annum from the respective times when the same was so advanced by me to him."

At the end of the will was an addendum, duly signed by Mary Johnson on the date of the execution of the will. She was present at the time of the execution of the will, and Martin Johnson's attorney read said addendum over to her and explained to her her rights in the community property of her husband and herself and her right to an interest in his property that was not community property, and the nature of both interests, after which, and in his presence, Mary Johnson signed said addendum. "I, Mary Johnson, wife of Martin Johnson, hereby declare that I have read the foregoing will of Martin Johnson and I am satisfied with all of its provisions, and hereby consent to the provision therein *made for and relating to me therein and agree to carry out and fulfill the same* (italics ours), and consent that all of the estate of my husband, Martin Johnson, is and that the same be treated and considered in the distribution and disposition thereof as his separate property, and I hereby waive all claim to any part thereof as the community property of my said husband and myself, and accept the bequests and devises made to me in said will in full of all claim to community property or community rights. I further declare that I do this with a full knowledge of my property rights which have been explained to me: That I am entitled, in the event of surviving my said husband, to a family allowance and one-half (½) of the community property and to share as an heir in the remaining portion of the estate of my said husband."

Martin Johnson's two daughters, represented by plaintiff herein, predeceased him. They died in November, 1918. His daughter Johanna left surviving a husband and a son Robert Cyrus O'Neil.

In January, 1919, Martin Johnson executed the first codicil to his will. In this codicil he said: "First: By reason of the death of my dearly beloved daughters, Johanna M. O'Neil (formerly Johanna M. Johnson) and Nellie Johnson, the redistribution of my estate as in said will mentioned is required and the devise and bequest to my said daughters and my son, Henry Johnson, is hereby revoked." Martin Johnson by said codicil proceeds to dispose of "all the rest, residue and remainder of my estate, being the two-thirds (⅔) thereof," in trust for his grandson, Robert Cyrus O'Neil, and his son, Henry Johnson, with deductions for advances and spendthrift provisions for the latter. No mention or disposition is made in the first codicil of the one-third of the estate left the wife by the terms of the will, neither is it mentioned in any of the succeeding codicils.

The third codicil revoked the trust and spendthrift provisions for his son Henry and gave the one-third outright to him "for the reason that he has shown himself to be able, willing, desirous and capable of caring for and managing his property, *and believing he should share equally with my grandson in my estate.*"

The remaining codicils may be omitted. Martin Johnson died June 14, 1921. His estate has not been closed, and none of it has been distributed except certain land in Monterey county which went to his son, Henry Johnson, as a part of his one-third share. The inventory and appraisement in his estate showed that he left real and personal property appraised at $206,838.62. Mary Johnson died March 12, 1922, and her estate is also still open and not distributed. One month before she died she executed a will by which, excepting some cash legacies to some of the defendants and appellants, she willed all her estate to her son John Peterson and wife, without deduction for advances and without mention of her deceased stepdaughters. Thus her son John received not only the one-half of the property which he was to have received according to the original plan, but also the advances and the one-half part which, according to that plan, was to have gone to the two daughters of Martin Johnson, but who predeceased both of their parents.

Thus the question is presented: Could Mary Johnson thus devise all of the property to her own son? The judgment appealed from decided that she could not—that upon her death the equitable title to one-half the property, less advances, vested in John Peterson and the other one-half in the estates of the deceased daughters of Martin Johnson.

Upon the documentary evidence introduced, the court found that on the 20th day of May, 1914, Martin Johnson was the owner of valuable properties, being largely his separate property, and on said date he made and entered into a certain contract in writing with his said wife, Mary Johnson; that the following is a copy of said contract, viz.: Here follows a complete copy of the last will and testament of Martin Johnson without codicils, immediately followed by a full copy of the addendum to said will signed by Mary Johnson. The findings then continue: That in and by said contract it was agreed by and between said Martin Johnson and his wife, Mary Johnson, as follows: (a) That most of his property was separate property; that only a small portion thereof was community property, but that all of said property was to be considered and treated as separate property; (b) that Martin Johnson would will to Mary Johnson a one-third interest of all his estate in consideration for which Mary Johnson agreed to surrender her community rights; that she would have the use and benefit of said property as long as she lived; and that at the time of her death she agreed to devise and bequeath whatever of said property was remaining as follows: One-half thereof to Johanna Johnson and Nellie Johnson, daughters of Martin Johnson. "And she purchased the right to devise and bequeath the other one-half thereof to John A. Peterson, her son by a former marriage, deducting from the one-half thereof going to John A. Peterson all sums of money advanced to said Peterson by said Martin Johnson up to the time of his death, as the same appeared on the books of M. Johnson & Co., together with interest thereon at the rate of six per cent per annum from the times the said several amounts were so advanced by Martin Johnson. The said Mary Johnson was thereby given the right and power to transmit to her son, John A. Peterson, a substantial part of Martin Johnson's estate."

From the foregoing findings it appears that the court not only found that Mary Johnson agreed to waive her community claims and to carry out the provisions of the will of her husband, but also that her husband, Martin Johnson, agreed in said contract to make the identical will therein set forth, at least in so far as any rights or benefits are therein and thereby conferred upon his wife, Mary Johnson, and her son.

[1] It is well settled by the decisions in this state that one may make a valid and binding contract to devise or bequeath certain property in a certain specified way. Morrison v. Land, 169 Cal. 580, at 584, 147 P. 259; DeLaurencel v. De Boom, 48 Cal. 581; Curdy v. Berton, 79 Cal. 420, 21 P. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157; Chase v. Stevens, 34 Cal. App. 99, 166 P. 1035.

[2, 3] The findings of the court went further, perhaps, than the evidence demanded, in that it is found that by said contract Martin Johnson agreed that he *would* dispose of his property by will in that manner. It would be sufficient for the purposes of this case, had the findings merely determined that at the date of the transaction the contract was unilateral only. The contract is found to be entirely in writing, and we do not find in it any written words over the signature of Martin Johnson by which he bound himself irrevocably to make that identical will with respect to the provisions under consideration here. It seems more reasonable to interpret the transaction to mean that Mary Johnson agreed to do certain things *if* Martin Johnson made the will and left it until the time of his death. Most of the authorities on contracts to make a will show that one of the parties to the contract has performed. In such cases equitable principles are invoked. One who has obtained a legacy or devise in consideration of an agreement to do certain things is not permitted to keep the benefits conferred upon him by such promise and at the same time repudiate and refuse to carry out the promise. Equity will impose a trust upon such property. After the death of Martin Johnson, his widow was obliged to carry out her agreement according to its true intent and lawful meaning. O'Donnell v. Murphy, 17 Cal. App. 625 at 629, 120 P. 1076.

[4] To hold that, by said transaction between Martin Johnson and wife, the former thereby irrevocably bound himself to leave the said identical last will and testament at the time of his death, would be going further than we are willing to go. That would mean that Martin Johnson had no right thereafter to make a different will or to revoke the one he made no matter what might happen making such a course desirable. Equity and justice would be well satisfied by holding that, if Martin Johnson had revoked or changed the said will during his lifetime after the said arrangement with his wife, it would simply have had the effect of releasing his wife from her promises and have given her the right to claim her full community interest and make whatever other claim she wished during the administration of her husband's estate.

The difference between these two interpretations of the contract is not vital to the present case because Martin Johnson performed his part and did in fact make and leave the said will as contemplated, at least to the extent of performing the promises moving to Mary Johnson. This is true, even though it be determined that he revoked certain parts of his will, as contended for by appellant. The claimed revocation is of such a nature as to increase rather than diminish the estate devised to his wife, it being claimed that by his codicils he showed a testamentary intention to give her outright a fee simple title in the said one-third without any requirement as to how she should devise the unexpended remainder thereof. We hold herein that, if he wished to do so, no contract obligation to his wife prevented Martin Johnson from revoking the provisions of his will, including paragraph 6, beneficial to his own two daughters or not beneficial to his wife's son, John Peterson; and that the contract created no direct obligation between himself and the said ultimate beneficiaries giving them any vested rights in such provisions during his lifetime. If there is an exception to this last statement with respect to John Peterson, it should be noted that no claim of revocation is made respecting the provisions beneficial to John Peterson. In passing we wish to say that there is at least considerable force to the argument that the codicils made by Martin Johnson evince an intention to revoke the benefits of paragraph 6, beneficial to his two daughters, but we are unable to find in the codicils anything indicating a testamentary intention to forgive or release the requirement that there be deducted from John Peterson's share advances made to him by the testator. In this opinion we do not decide whether Martin Johnson revoked paragraph 6 of his will for reasons which are hereinafter set out.

[5] Whether or not said Martin Johnson, by any of the five codicils expresses an intention to revoke the provisions of paragraph 6 of his will, which were beneficial to his two daughters, is a matter which we need not consider in determining the rights of the estates of the said two daughters, because we have concluded that the provisions for the said two daughters have lapsed by reason of their death occurring not only before the death of their stepmother, Mary Johnson, but also before the death of their father, Martin Johnson. If the provisions for the benefit of the said two daughters failed or lapsed by reason of their having predeceased both parents, it follows that their estates have no interest in the subject-matter of this action.

[6, 7] Martin Johnson's will devised and bequeathed to Mary Johnson a fee with a special power to devise and bequeath the same at her death to certain specially named and designated children. If this special power was not mandatory, the contract made it so as far as it operated. The will did not undertake in express words to give her merely a life estate. The will did not give her discretion in the matter of devising the property, and, therefore, the power is special or particular and not general and discretionary. Although the words of the will in this respect may be only precatory (Underhill on the Law of Wills, vol. II, §§ 792 and 795), they being directed to the testator's wife and agreed to in writing by the wife, they should be considered as mandatory. "The interest

of the persons named who are in the end to benefit by the appointment, if the power is special, is a contingent use or an executory devise until, by the appointment, the legal estate becomes vested in them. This equitable interest they take under the original instrument by which the power is created, and not by the appointing instrument." Underhill on the Laws of Wills, vol. II, § 798.

[8, 9] A special and mandatory power is obligatory upon the donee and is raised in equity as a trust or a power in trust, and the execution of that power may be enforced in equity in the same way as a trust. In default of the execution of the power by the donee, a gift will be implied to the beneficiary of the intended appointment, especially where the original testator has directed a gift over to the appointee in case the donee fails to exercise the power of appointment. Underhill on the Law of Wills, vol. II, § 802. From the same section we quote the following:

"A distinction is made, in the event of a total failure to exercise a power, between the case of an out and out gift to a class of persons with a power in some third person to appoint in what proportion each member of the class shall take, and a mere direction to the donee of a power to appoint by his will the property given to him among the class. In the former case, where the donee fails or neglects to execute the power, and there is no disposition of the property to strangers in default of an appointment, the gift is regarded as a vested gift to the members of the class who are living at the death of the testator, subject to being devested or diminished by the subsequent execution of the power by the donee, and upon a total default of an appointment the fund will be equally divided among all members of the class who were living at the death of the testator.

"But where there is no gift in express terms in the will to the class directly, but only a power of appointment is created directing the donee to divide by will property among the class, only those persons are objects of the power and take in default of an appointment who survive the donee when his will becomes effective at his death. In the latter case the court will imply an intention to give the property, on a default of an appointment, to those persons only among whom the donee might have distributed the property, and on the failure or the neglect of the donee to exercise the power it will be exercised accordingly among those persons. Where property is given to A. for life, with a power in him to devise the same to his children, but no express devise to the latter, nor any devise to them or strangers in default of an appointment, the court will execute the power among a class composed of A.'s children living at his death, and not among the children of A. living at the death of the donor of the power. The class will be ascertained and the power executed by the court upon a default in its execution by the donee as of the date of his death, excluding from its operation all persons who, though they would have been members of the class had they survived, have died before the donee."

In the instant case we are not concerned with the question of whether the provisions for the two daughters would have failed, if they had died before the donee and appointor but after the donor, because in this case the daughters predeceased both.

Smith v. Hardesty, 88 Md. 387, 41 A. 788, relied upon by respondent, is controlled by the principle that there the testator himself made a gift over in case of the failure of appointment, and also by the principle that, although the children of the donee and appointor died before her, yet they survived the testator and donor. It was held that, upon the failure to exercise the appointment, the title went to the children of the only intended appointee who left children, but in that case the testator himself made a direct devise to the children of all property which the donee failed to devise, so that it vested in the named appointee by the will and death of the original testator which occurred during the life of that intended appointee, and, so having vested, it descended.

[10, 11] A power of appointment among children as a class is not validly executed by appointment among grandchildren. Underhill on the Law of Wills, § 803; Sugden on Powers, vol. II, p. *253. Nor is any appointment authorized to the executor to a deceased child. Sugden on Powers, vol. II, p. *260; see, also, pages *264 and *271.

"* * * A devise to children who are specifically named is a devise to them as individuals and not as a fluctuating class. Those who are alive at the date of the will corresponding to the names, if they survive the testator, will take, but no others, and the shares of those who predecease him will lapse in the absence of a statute preventing lapse." Underhill on the Law of Wills, vol. II, p. 720, § 552. The estates of the two daughters, therefore, took nothing under the will of their father.

[12] The last quotation leads us to consider the effect of Civil Code section 1343 and section 1310. The former section provides that, if a devisee dies during the life of a testator, the testamentary disposition to him fails unless an intention appears to substitute some other in his place, except as provided in section 1310. Section 1310 provides that, if devisee is a child or relation of the testator and dies before the testator or even before the will is executed, leaving lineal descendants, then such descendants take the estate given by the will in the same manner as the devisee would have done had he survived the testator. These statutory provisions are of no benefit to the plaintiff in this case who is the administratrix of the estates

of both of the deceased daughters. The testamentary disposition to the two daughters failed. If it be true that in the instant case Robert Cyrus O'Neil, the only surviving child of Johanna O'Neil, would take his mother's share by the operation of Civil Code section 1310, then he takes it directly from the estate of Martin Johnson, deceased, and not through the estate of his mother. Estate of Parsell, 190 Cal. 454, 213 P. 40, 25 A. L. R. 1561. Therefore, the administratrix of his mother's eestate cannot represent him with respect to his share, if any, and she is not entitled to invoke the jurisdiction of a court of equity in his behalf or to bind him in this litigation with respect to his share, if any, which would come to him by force of Civil Code section 1310.

[13, 14] Respondent claims that, where a devise is made in pursuance of a valid contract for a good or valuable consideration, as for a payment of a debt or for services and the like, the devise does not lapse upon the devisee predeceasing the testator. Respondent claims in one part of her brief that Mary Johnson should have carried out her agreement literally, and, notwithstanding the death of the two daughters, should have left a will devising to them one-half of the unspent remainder of the property devised to her by her husband; that in such case Mary Johnson would have been making a devise to them, not as her own gift or bounty, but expressing her sense of obligation by reason of her contract; that, therefore, such devise by her would not lapse, but would pass to the administratrix of the estates of the two daughters. We cannot agree with this argument. It is opposed to the principle that the appointees of a power take from the original testator and not from the appointor. Alexander, Commentaries on Wills, vol. II. § 700; vol. I, § 280; Underhill on Law of Wills, § 798; Lederer v. Pearce (C. C. A.) 266 F. 497, 18 A. L. R. 1466; Estate of Bowditch, 189 Cal. 377, 208 P. 282, 23 A. L. R. 735. It would be more proper to say, therefore, that such a devise by Mary Johnson would be expressing the bounty and parental affection of Martin Johnson as his agent. Furthermore, to say that such a devise by Mary Johnson would have been given out of a sense of obligation is to assume that first it must be done under her contract and then to say that, since it must be done, it does not lapse. There are no words used nor intention shown that Mary Johnson should make any devise to deceased persons. The agreement of Mary Johnson to devise one-half of the unspent portion of the property to the two daughters, as well as any obligation to do so apart from her contract, became impossible of performance because they predeceased both parents. 31 Cyc. pages 1052 and 1053.

The foregoing would seem to dispose of every claim which the plaintiff as administratrix of the two daughters' estates is entitled to make. The trial court, however, came to a different conclusion holding that the interests of the said two daughters did not lapse, but vested in their estates, and, because it had jurisdiction of all necessary parties upon that theory, it proceeded further to determine all the legal and equitable titles to the said property. In so doing, the court decided that John A. Peterson, also known as John I. Peterson, who was the principal devisee and legatee of his mother's will, could take no more of said property than was originally intended for him at the time of the transaction between his mother and his stepfather, Martin Johnson. For several different reasons John Peterson, who is appealing from the decree of the trial court, claims that his mother was vested with a fee simple in all of the property devised and bequeathed to her by Martin Johnson. He does not complain that his wife was made a cotenant with him in the property attempted to be given him by his mother's will, neither does he complain of the cash bequests made by his mother to several of the parties defendant who are also appellants here. He, of course, complains of the decree of the trial court which decrees that he shall have only one-half of the unexpended remainder of the mother's estate derived from Martin Johnson, less advances made by Martin Johnson, together with interest on the same amounting to $9,536.58.

[15] It is the duty of this court, as well as it was the duty of the trial court sitting as a court of equity, to determine all controversies with respect to the subject-matter necessary to a complete determination of the matter, but, of course, within the limits of its jurisdiction of subject-matter and person. 10 Cal. Jur. 496, 498; Barber v. Superior Court, 43 Cal. App. 221, 184 P. 952; Swan v. Talbot, 152 Cal. 142, 94 P. 238, 17 L. R. A. (N. S.) 1006. Some of the grounds of appeal urged by appellant, John Peterson, are beyond the limits of our jurisdiction either of subject-matter or person.

[16] Having determined that the provisions of the original arrangement for the two daughters of Martin Johnson have lapsed and failed, we find John Peterson, of course, claiming that, inasmuch as the will undertook to devise his mother a fee, and there is no gift over in case of the failure of appointment, that his mother became immediately vested with that half portion which would have otherwise gone to the two deceased daughters of Martin Johnson. We may consider this with respect to that share which would have gone to Nellie Johnson who died without issue, because we have sufficient jurisdiction. With respect to that part, however, which would have gone to Johanna Johnson and who died leaving her surviving an only son, Robert Cyrus O'Neil, we find a limitation upon our jurisdiction of person. If Robert Cyrus O'Neil wishes to claim that by force of Civil Code, § 1310, he is entitled to the share which would have gone to his mother Johanna, had she survived Martin Johnson, then a controversy arises between John Peterson and the estate of his mother on the one hand, and Robert Cyrus O'Neil on the other hand claiming in his original right directly and not through his mother's estate or the administratrix thereof. In this controversy he is not represented by the plaintiff administratrix for such property would not pass through his mother's estate. Neither is Robert Cyrus O'Neil represented in that controversy by the executors of the estate of his grandfather, Martin Johnson, deceased. They no more represent him than they do John Peterson or the estate of Mary Johnson deceased, in that controversy. Estate of Parsell, 190 Cal. 456, 213 P. 40, 25 A. L. R. 1561. Therefore, should we now decide that Robert Cyrus O'Neil had no interest in this part of the subject-matter of this action, it would have the effect of taking from him his claim to property of considerable value without his having been represented or without having had his day in court.

[17, 18] It is also the claim of John Peterson upon this appeal that by some of the five codicils to the last will and testament of Martin Johnson, deceased, he expressed an intention to and did revoke those provisions of his will contained in paragraph 6 beneficial to the daughters. In other words he argues for such a revocation of certain parts of the will as would make the devise to his mother an unlimited fee instead of a mere life estate with power of appointment. With respect to this contention, our jurisdiction of person is also limited by reason of Robert Cyrus O'Neil's not being a party to this action nor represented. Our jurisdiction to determine whether any of the provisions of said will have been revoked by implication is advisory upon the probate court, and is confined to those matters that are incidentally necessary to determine a question which is properly before the court. 11 Cal. Jur. 266, 267; Adams v. Prather, 176 Cal. 33, 167 P. 534; Burton v. Burton, 79 Cal. 490, 21 P. 847; 12 Cal. Jur. 203. This may be a matter exclusively within the jurisdiction of the probate court. But if we assume jurisdiction of the subject-matter and proceeded to decide that the provisions of Martin Johnson's will which may be beneficial to Robert Cyrus O'Neil have been revoked by implication, we would also be deciding upon Robert Cyrus O'Neil's claim of property without his being a party to this suit and without his being represented. He is entitled to his day in court upon that question so far as it affects him. Of course the probate court, having jurisdiction of the will and estate of Martin Johnson, deceased, and also the probate court having jurisdiction of the estate of Mary Johnson, deceased, has jurisdiction of the person of Robert Cyrus O'Neil in determining who are entitled to take by distribution the property of either one of those estates.

[19] While we do not have jurisdiction to declare Robert Cyrus O'Neil's rights under Civil Code, § 1310, nor his rights under that section as they would be affected by a revocation of the provisions of paragraph 6 beneficial to his mother, there are other aspects of the case in which his interest as a residuary legatee or heir of Martin Johnson, deceased, are indirectly affected and in which the executors of the latter's will represent him. Among these are whether the lapsed share originally intended for Nellie Johnson is vested in Mary Johnson's estate or remains in Martin Johnson's estate and the determination which the trial court made of the amount of advances which are to be deducted from John Peterson's share and retained in the residuum of Martin Johnson's estate.

The jurisdiction of this court is to interpret and declare the rights of the parties before it within the limits of its jurisdiction. We proceed therefore to interpret the contract, declaring the rights in said contract between those who are parties to this action or represented, determining what interest, if any vested by said contract, in whom it vested and when, and also determining what provisions of said will, if any, Martin Johnson was not prohibited by said contract from revoking.

[20] The contract in its essence was that Mary Johnson waived her community property rights in consideration of Martin Johnson's giving her a one-third interest in his estate which she was at liberty to use, both income and corpus during her lifetime as she saw fit, with the *privilege* of devising one-half the remainder less advances to her own son, John Peterson, and with the *duty* and *obligation* of devising the remaining one-half of the property to the two named daughters of her husband. She was interested in what she was to receive during her lifetime and what she could do for her own son upon her death. This is the most, if anything, she purchased—the consideration moving to her. The provision requiring deduction of advances made to John Peterson, and the provision requiring a devise to the two daughters of Martin Johnson, were not considerations moving to Mary Johnson. She did not purchase them. The provisions last mentioned represented property which was in effect withheld from her and neither granted nor promised to her by Martin Johnson. These provisions represented property remaining in Martin Johnson. To say that she purchased the property represented by these said last-named provisions by her agreement to be content with the provisions in the will made for

her is contrary to the facts as disclosed by the findings, by the will, and by what is known of the wishes of persons similarly situated. If we should concede that Mary Johnson by her agreement purchased an interest in the property for the two daughters of Martin Johnson by agreeing to be content with the one-third as devised and bequeathed to her and by not demanding more, the same thing could be said with respect to all the remaining two-thirds of the estate of Martin Johnson thus released for all the remaining devisees and legatees amongst whom it is divided by Martin Johnson's will. This, of course, was foreign to their intentions. From this it follows that Martin Johnson, if he wished to do so after the execution of his will and the addendum thereto, could revoke the provisions in his will made for the benefit of his said two daughters, and that for the same reason, if he wished to do so, he could also revoke the provisions requiring deduction of advances made to John Peterson. On the other hand, he could not, if he wished to do so, revoke any provision which would injuriously affect the benefits conferred by the will upon Mary Johnson personally or upon her son John Peterson. No claim is made that he did the latter.

What we have said about the right of Martin Johnson to revoke certain provisions of his will is said while assuming that the contract at the time it was made was a bilateral and irrevocable contract upon the part of Martin Johnson. Considered as a unilateral contract it should be understood as declaring what Martin Johnson had to perform in order to make it obligatory upon his widow to carry out her promises after his death.

[21, 22] Respondent claims that the contract created an express voluntary trust which could not be revoked without the consent of the trustor, Martin Johnson, the trustee, Mary Johnson, and the beneficiaries, the two daughters of the former and the son of the latter. The agreement was at most merely an agreement to make a will on the part of the one and an agreement to carry it out on the part of the other, and, therefore, it partook only of the nature of a will which was ambulatory so far as the ultimate beneficiaries were concerned. Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88. There was no conveyance. The contract, as such, did not convey any property to Mary Johnson and she, therefore, was not a trustee during the lifetime of her husband. Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am. St. Rep. 43. Neither was it a declaration of trust on the part of Martin Johnson making himself trustee. It was not the understanding of the parties to those documents, nor is it the law, that at the instant the said will and addendum were executed there vested an inheritable property interest in Mary Johnson nor in John Peterson nor in Martin Johnson's two daughters.

[23] The contract if considered as a bilateral contract made for the benefit of third parties did not vest any property interest in the daughters at the time it was made. Considered as such a contract, it could be rescinded under the provisions of Civil Code, § 1559. If Martin Johnson wished to rescind the contract in so far as its provisions were for the benefit of his two daughters and permit the surviving wife to take one-third of his estate without any limitations, he could do so in this case, for, in so far as the consent of the other contracting party would be necessary to such rescission, it is found in the will of Mary Johnson where she undertook to devise all of the property as her own in fee. The contract, however, was not made *expressly* for the benefit of the two daughters and was not enforceable by them during Martin Johnson's life. His two daughters were only incidentally benefited by the contract with respect to their possible ultimate share in the one-third part of his estate in substantially the same way as those who were to share in the remaining two-thirds of his property.

With respect to the share of John Peterson it is immaterial whether any interest therein vested at the date of the contract, because no attempt to revoke his devise and bequest was made nor claimed by his adversaries, and because in any event his proper intended interest has vested in him as from Martin Johnson's estate. We need not, therefore, compare a wife's promise to waive certain community property rights and to carry out her husband's will as a consideration for the latter's promise to make a certain will with cases where the devisee has taken possession and made expenditures and assumed obligations upon the faith of that promise such as the case of Ballard v. Camplin, 161 Ind. 16, 67 N. E. 506, cited by respondent.

[24-26] No interest having vested in the two daughters during the lifetime of Martin Johnson, there was no trust until his death. At that time, in so far as he had devised a fee title to his widow, for purposes of enforcement, she was considered in equity a trustee with the duty of devising the unexpended remainder in accordance with the true intent and lawful meaning of the written understanding by which she obtained that fee. To the extent that she may have failed to carry out said agreement and to execute the power of appointment contained in Martin Johnson's will, equity will enforce the agreement by decreeing that the proper intended beneficiaries of that power are the equitable owners of the property intended for them. The sole object of the court in exercising the power in trust, which is contained in a will, is to carry out the intention of the testator. Underhill on the Law of Wills, § 802.

Having determined that the share intended for Nellie Johnson has lapsed and has become impossible of performance, and that the same thing is true as to Johanna Johnson O'Neil's share in case the probate court does not determine that it has vested in Robert Cyrus O'Neil, it is necessary to determine in whom the share intended for said daughters vested to the extent that said share or shares have lapsed. We consider three points in this connection. First: Whether the provisions of paragraph 6 of the will are precatory, and for that reason Mary Johnson at the death of her husband became vested with a fee title free from any condition or limitation. Second: The same contention is made, even though the provisions of paragraph 6 are held not to be precatory; it being claimed that a devise of a remainder after a devise of the fee is nugatory. Third: The two foregoing points are urged irrespective of whether the two daughtrs predeceased their father or not, but we consider them in connection with the fact that the daughters did predecease their father.

We need not consider the contention that Martin Johnson revoked the provisions of paragraph 6 of his will intending thereby to devise his widow a fee-simple title in the one-third interest of his estate any further than to state that in such case, of course, the title vested in his widow under the terms of his will at his death.

[27] 1. In passing upon the first two contentions last named, it must be borne in mind that we are interpreting a contract rather than a will. The agreement of Mary Johnson to carry out the provisions of the will make it unnecessary for us to determine whether the provisions of paragraph 6, if they stood alone, would be precatory only and could not cut down the fee devised to her in paragraph 2. She agreed to carry out and fulfill the provisions of the will relating to her, and this agreement could have no application if it did not refer to paragraph 6. She could agree to carry out her husband's wish and understanding as well as his command. As said in DeLaurencel v. De Boom, 48 Cal. 581, 585, it is to be assumed that, had she not agreed, a different will would have been made. Specifically, in this case he could have given his wife a life estate only with remainder to the children in express words. This feature distinguishes this case from those cases where no express contract was made by the devisee such as, Tillman v. Ogren, 182 App. Div. 672, 169 N. Y. S. 949; Estate of Marti, 132 Cal. 667, 61 P. 964, 64 P. 1071, and Estate of Hull, 77 Cal. App. 792, 247 P. 1093.

[28] 2. The same thing can be said about appellants' argument that a devise in fee in one part of the will cannot be cut down by a devise of the remainder. We have here a contract to perform certain things with that fee. The devise of the fee, therefore, is not inconsistent with paragraph 6 for that devise is a part of the performance of that contract. We cannot follow appellants in their argument, which amounts to a contention that we must first interpret the will by itself and that, if we find that, by reason of its precatory words, or attempted devise of a remainder following the devise of a fee, the provisions of paragraph 6 are nugatory, and Mary Johnson could keep the whole title free from any obligation to carry out paragraph 6. This is the equivalent of saying that she agreed to carry out only those provisions of the will which would be enforced by the probate court, or that she contracted to do only those things which the law would compel her to do without the said contract. Such a contention is in effect an argument that she assumed no contract obligations whatever.

[29] 3. In determining the title to the lapsed share of Nellie Johnson and the shares of Johanna Johnson O'Neil in case it has not passed to Robert Cyrus O'Neil under Civil Code § 1310, we are not guided by the contract, because it made no provision for such contingency. In this contingency the property remains as it is devised by the will according to its lawful meaning. The will did not expressly limit Mary Johnson to a life estate only. Neither did it do so by implication by making a gift over in case of the failure of the power of appointment. This case is, therefore, not governed by Hardy v. Mayhew, 158 Cal. 97, 100, 101, 110 P. 113, 115 (139 Am. St. Rep. 73), where it is said: "The distinction between the case of an intended gift of an absolute title to one with an attempted gift over of simply 'what remains unexpended' by the donee at the time of his death, where the gift over is void because in derogation of the absolute fee given the first taker, and the case of a gift of a life estate with a power of disposition for a particular purpose only, with an express gift over of what remains unused for such purpose, is recognized by all the authorities." The last-cited case and the numerous authorities reviewed therein are cases in which either the testator expressly limited the interest of the first taker to a life estate or did the same thing by expressly devising the unexpended remainder himself directly by his will, so that in no event could the first taker have more than a life estate with power to use the principal for certain purposes during his life. In the present case Martin Johnson not only devised a fee to his widow, but also failed to direct a gift over by his own will in case of failure of the power of appointment by its becoming impossible of performance. The devise to Mary Johnson was, therefore, a fee title subject to be divested by the intended appointment and to the extent that the power of appointment failed by becoming impossible; the fee was not divested, but remained in Mary Johnson. Underhill on Law of Wills, vol. II, §§ 876, 868; Alexander, Commentaries on Wills, vol. II, § 1045; Es-

tate of Marti, 132 Cal. 666, 672, 61 P. 964, 64 P. 1071. Upon the death of Martin Johnson the share intended for his deceased daughter, Nellie Johnson, vested in his widow, and also the share of Johanna Johnson O'Neil unless her son, Robert Cyrus O'Neil took it under Civil Code, § 1310. It did not remain in his own estate, because his will does not show an intention that in any event his widow should not have more than a life estate.

We conclude that, to the extent that the probate court, having jurisdiction of the administration of the estate of Martin Johnson, deceased, may determine that said testator revoked any of the said provisions of his will beneficial to his own two daughters, or even to his stepson, John Peterson, that part of the unexpended remainder of the one-third portion of his estate devised and bequeathed to his widow affected by such revocation vested upon his death in Mary Johnson in her lifetime and is distributable to her estate in fee. That to the extent that said provisions may be found by said court not to have been revoked, such one-third portion of his estate remaining unexpended, after deducting for Mary Johnson's estate the portion she took or used during the brief period of her survivorship after Martin Johnson's death, has vested as follows: The one-fourth interest intended for Nellie Johnson, now deceased, in Mary Johnson's estate; the one-fourth interest intended for Johanna Johnson O'Neil in Mary Johnson's estate, provided the probate court decides that Robert Cyrus O'Neil does not take it under Civil Code, § 1310, otherwise in said Robert Cyrus O'Neil; the one-half interest intended for John Peterson in said John Peterson, and is distributable to him directly from Martin Johnson's estate, but first deducting therefrom advances and interest to the date of Mary Johnson's death as determined by the trial court in the sum of $9,635.58, which sum remains the property of the estate of Martin Johnson, deceased.

As so modified the decree is affirmed; appellant to recover costs.

We concur: STURTEVANT, J.; NOURSE, J.

98 Cal. App. 352

BROWN v. SHORTLIDGE. (Civ. 6374.)★

District Court of Appeal, First District, Division 1, California. April 18, 1929.

Rehearing Denied May 18, 1929. Hearing Denied by Supreme Court June 17, 1929.

Physicians and surgeons 🔑18(6)—Presumption of surgeon's negligence arose from child's loss of tooth following surgeon's insertion of gag preliminary to operation to remove tonsils.

Presumption of surgeon's negligence *held* to arise from child's loss of tooth after surgeon's introduction and adjustment of gag in child's mouth after administration of anesthetic, preliminary to surgical operation for removal of tonsils.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Irene K. Brown against Edmund Shortlidge. Judgment for plaintiff, and defendant appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

Perry Evans, of San Francisco, and Harold L. Brown, of Burlingame, for respondent.

PARKER, Justice pro tem. This is an appeal by defendant, a physician and surgeon, from a judgment entered against him in an action for damages alleged to have been sustained by plaintiff as a result of carelessness and negligence of the defendant in and about the performance of a minor surgical operation. Plaintiff at the time of the operation was a child of the age of six years. Defendant, as a surgeon, had advised the necessity of the removal of the child's tonsils and adenoids, and pursuant to that advice the child was taken to a hospital for the operation. There is evidence that at the time appointed for the operation the surgeon was not present, but that shortly thereafter he came in, evidently in haste and at once began preparations for the work in hand. The child was removed to the operating room of the hospital, in which room were present the defendant, an anesthetist and two nurses. A general anesthetic was administered, and upon the child relaxing a contrivance referred to as a gag was inserted in the mouth, the purpose of which was to hold the mouth open and control the tongue during the operation. About a minute or two after the gag was inserted the surgeon noticed blood on the lips of the child patient and upon examination he discovered a tooth lying loose in the mouth, completely free. It was disclosed upon subsequent examination that the bone in which the base of the tooth was set was fractured, which bone was described as being the bone in the superior maxillary. It was for the loss of the tooth that the trial court awarded plaintiff a money judgment. In passing it is noted that no complaint is made on the question of the amount of damages.

The finding of the trial court is as follows: "Defendant did not use ordinary or reasonable care in his attention to the treatment of plaintiff in respect to the operation and the preparation of plaintiff therefor on said day, but then and there attended upon plaintiff and performed the said operation in a careless and negligent manner, in that defendant neglected and failed to apply or manipulate, or to cause to be applied or manipulated, in

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★Rehearing denied. Hearing denied by Supreme Court.

a reasonable, careful, or reasonably skillful manner, a certain gag placed by defendant in plaintiff's mouth as an instrument for facilitating said operation; and by reason of defendant's omission to use ordinary or reasonable care in the premises, one of plaintiff's upper central front teeth, commonly known as an incisor, was forced out of its place in plaintiff's mouth." There is the further finding of the trial court as follows: The defendant's treatment of and attention given to plaintiff on the occasion and at the time of said operation was not standard or approved treatment or attention given by physicians and surgeons in the vicinity of San Francisco in such operations or in the preparation of the patient therefor; and the treatment and attention then and there given to plaintiff was not the best of defendant's ability or in the exercise of ordinarily or reasonably good judgment or without carlessness or negligence. If the evidence supports these findings the judgment must be affirmed. Supplementing the general statement of facts as hereinbefore, there is ample evidence to warrant the following state of facts: Defendant was a practicing physician and surgeon of the city of San Francisco, specializing in throat affection and oral surgery, and the operation was performed in San Francisco. The child entered the operating room with the tooth in question perfectly sound and of normal placement and fixture. The tooth was a second tooth and firmly imbedded in the bone structure. A gag was inserted in the child's mouth, but prior to the insertions of the gag the patient had completely relaxed and was fully under the anesthetic. The defendant had been delayed in his arrival at the hospital, and the operation was rushed along in a hurried manner. While some part of the introduction of the gag was done or performed by the anesthetist assisting, the defendant directed the proceeding and himself introduced and adjusted the gag. After the defendant had introduced the gag he assured himself that the adjustment was proper to protect the lips and that the upper teeth were free and, as defendant states, "absolutely all right." The defendant then busied himself fixing the light and other paraphernalia incident to the operation, and when he looked down he observed the blood on the patient's lips.

The defendant testifies: "It struck me in a flash that there must be something wrong with the teeth and then I looked down and saw the tooth lying there." There was evidence before the court that the tooth must have been either knocked out or extracted. There is not a word of testimony indicating that the anesthetist or any one other than defendant, excepting jointly with the latter, ever touched the patient or the gag. Likewise there is not a word of direct testimony as to how the tooth was loosened and removed. Summing it up, we find a child patient completely under anesthetic in the hands of a skilled physician preparatory to an operation for the removal of tonsils. For no apparent reason and justified by no explanation the bone in the superior maxillary is fractured in front and a tooth is pulled or forced from the socket. The only attempt at explanation is the statement of a dental expert to the effect that in similar operations where a gag is used a surgeon would be lucky if at some time something of that kind would not occur, and in explanation of the statement he cites conditions, essentially different from the case at bar, under which such a casualty might occur. Defendant contends that, the burden of proof being on the plaintiff, it was necessary for him to affirmatively show some positive act of actionable negligence. It is his contention that the doctrine of res ipsa loquitur can have no application. The case of Vergeldt v. Hartzell (C. C. A.) 1 F.(2d) 635, is illuminating on the subject here involved. Therein it is said, quoting from Evans v. Roberts, 172 Iowa, 653, 154 N. W. 923:

"It is the appellant's contention that there is no evidence in the record to support a finding that he was negligent. With this we are unable to agree. Assuming, for the purposes of this case, the soundness of the argument that, in performing an operation, a surgeon is not held to guarantee results, and that, if he possesses the measure of skill which the law requires, a mere failure of judgment in his choice of methods and means is not actionable negligence, such concession is insufficient for the disposition of the issue of negligence in this case as a matter of law. This is not the ordinary case where a practitioner is sought to be charged with liability for alleged improper treatment of some bodily ailment or infirmity. He was employed to remove the adenoids from the plaintiff's throat, and there is neither claim nor proof that he did not successfully remove them. His negligence, if any, was in failing to take due care to avoid injury to the undiseased parts in the vicinity of which the operation was performed; and while it may be true that, had the operation upon the adenoids been unsuccessful and disappointing, no inference of negligence or want of skill would arise therefrom, it does not follow that this rule applies with the same force to an injury done by him to sound and undiseased parts of the plaintiff's person, which he was not called upon to treat and did not pretend to treat. If a surgeon, undertaking to remove a tumor from a person's scalp, lets his knife slip and cuts off his patient's ear, or if he undertakes to stitch a wound on the patient's cheek, and by an awkward move thrusts his needle into the patient's eye, or if a dentist, in his haste, leaves a decayed tooth in the jaw of his patient and removes one which is perfectly sound and serviceable, the charitable presumptions, which ordinarily protect the practitioner against legal blame where his treatment is unsuccessful, are not here available. 'It is a matter of common knowledge and observation that such things do not ordinarily attend the service of one possessing ordinary skill and experience in the delicate work of surgery. It does not need scientific knowledge or training to understand that, ordinarily speaking, such results are unnecessary and are not to be anticipated, if reasonable care be exercised by the operator.'"

In Wharton v. Warner, 75 Wash. 470, 135 P. 235, the Supreme Court of Washington says: "It is argued * * * that whether a surgical operation was unskillfully performed is a question of science" to "be determined by the opinion evidence of surgeons; and * * * that a bad result standing alone is no evidence of unskillful surgery. * * * Both propositions are sound when soundly applied. The reason is that in most cases a layman can have no knowledge whether the proper medicine was administered or the proper surgical treatment given. Whether a surgical operation was unskillfully * * * performed is a scientific question. If, however, a surgeon should lose the instrument with which he operates in the incision which he makes in his patient, it would seem as a matter of common sense that scientific opinion could throw little light on the subject." In the case of Dimock v. Miller, 202 Cal. 668, 262 P. 311, the full membership of the Supreme Court, as now constituted, speaking through Mr. Justice Langdon, says: "If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science."

In Michener v. Hutton (Cal. Sup.) 265 P. 238, it is said: "The courts of this state have long since adopted the rule as expressed in 1 Shearman & Redfield on Negligence (6th Ed.) p. 132, viz.: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.'" In the very recent case of Ragin v. Zimmerman, decided March 25, 1929, and found in 276 P. 107, the Supreme Court strongly implies that when necessary the doctrine of res ipsa loquitur will be applied in cases of the kind. In that case the question involved the use of an X-ray machine, but the reasoning is equally applicable to the use of any mechanical equipment.

The court cites with approval the following language of Phœnix Co. v. Texas Co., 81 Cal. App. 61, 252 P. 1082, with reference to the doctrine of res ipsa loquitur: "We think this doctrine may be urged with more than plausibility. Everything in the present case which in any way contributed to the accident was under the management of the defendant; * * * and that in the ordinary course of things the accident would not have happened if those having the management had used proper care." The exact meaning of the term res ipsa loquitur follows its translation, namely, "the thing itself speaks," or as is the generally accepted reading, "the thing speaks for itself." The application of the doctrine has never been confined to any set formula of fact. If a patient should visit a surgeon for the purpose of having a mole removed from the right foot and awoke from an anesthetic minus his left arm, it is certain that some satisfactory explanation would be required to stop the fact itself from broadly proclaiming the negligence of the surgeon. The difference between such a case and the case at bar is one of degree only. If the surgeon in the case at bar could stand upon some imaginary rule of law to the effect that when one submits himself to surgical treatment he may expect anything to happen, so likewise could the surgeon in the supposed case. We think the true rule is expressed in the cited cases, and the distinction made plain between cases involving the merits of a diagnosis and scientific treatment and cases *there* during the performance of surgical or other skilled operations an ulterior act or omission occurs, the judgment of which does not require scientific opinion to throw light upon the subject.

Counsel for appellant is fearful lest the affirmance of the judgment herein may set aside all of the well-known rules protecting physicians and surgeons in the practice of their profession and place upon them the burden of at all times demonstrating to a lay judge or jury the correctness of diagnosis made and treatments administered or means employed, thus making them, in all cases, insurers of a successful outcome. These fears are groundless. The affirmance will serve only to confine the rule within the limits intended, and, while preserving to the surgeon all of the protection the law intended, will also give to a helpless unconscious patient an assurance of the laws solicited in his behalf.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

98 Cal. App. 437

TENNANT et ux. v. WILDE et al.
(Civ. 5203.)

District Court of Appeal, Second District, Division 2, California. April 23, 1929.

1. Appeal and error 🔑204(3)—Objection that correspondence leading to agreement was inadmissible as tending to vary written contract, made for first time on appeal, held too late.

Objection that letters and telegrams between parties antedating agreement involved in litigation, and tending to clarify meaning of agreement and intention of those who executed it, was inadmissible as tending to vary terms of written contract, *held* too late, where made for first time on appeal, under rule that party cannot urge for first time on appeal objections which might have been obviated if made in court below.

2. Contracts 🔑10(1), 65(2)—Where there is consideration for any agreement in contract, contract as whole does not lack mutuality or consideration.

Where there is consideration for any of the agreements specified in contract, the contract as a whole cannot be said to lack mutuality or consideration, nor can any particular promise or agreement contained therein be singled out and termed inoperative because no special consideration appears to have been given or promised for it.

3. Contracts 🔑169—To ascertain intent of parties to ambiguous contract, relations between parties, work to be done, and correspondence leading to agreement may be considered (Civ. Code, §§ 1636, 1638, 1641, 1643, 1647; Code Civ. Proc. §§ 1856, 1860).

Under Civ. Code, §§ 1636, 1638, 1641, 1643, 1647, and Code Civ. Proc. §§ 1856, 1860, where written contract is ambiguous, it is proper to consider relations between parties, work to be done, and correspondence leading up to execution of agreement in order to give effect to mutual intention of parties.

4. Contracts 🔑175(3)—Evidence held to show that written contract for carpenter work was intended to make plaintiff responsible therefor, guaranteeing its maximum cost.

Written contract wherein plaintiff agreed to work as carpenter on certain building until it was fully completed according to general plans and specifications, and to guarantee that cost of all labor and material should not exceed $3,000, *held*, under the evidence, including practical construction thereof by parties, to make plaintiff responsible for the carpenter work, guaranteeing that its cost would not exceed amount specified, and it was not intended that plaintiff should merely be a journeyman carpenter.

5. Contracts 🔑170(1)—Practical construction of ambiguous contract by parties may be considered in determining its meaning.

Actions of parties to a contract subsequent to its execution and with relation thereto may be looked to as an aid to its construction when the language of the instrument itself is ambiguous.

6. Pleading 🔑36(1)—Pleader is bound by interpretation of ambiguous contract pleaded.

The pleader is bound by the interpretation of an ambiguous contract adopted by him and set forth in his pleading.

7. Contracts 🔑10(2), 54(1)—Contract to complete carpenter work at guaranteed maximum cost held not invalid for want of mutuality and consideration.

Written contract whereby plaintiff undertook to be responsible for carpenter work on defendants' building until completed according to general plans and specifications, supplemented by oral agreement as to details, and guaranteeing that cost of all labor and materials should not exceed $3,000, *held* not invalid for lack of mutuality and want of consideration on theory that it was a unilateral agreement by plaintiff not imposing any obligations on defendants because it afforded plaintiff no control over cost of material and labor and because defendant might have hired any number of workmen and purchased any amount of material at his own option.

Appeal from Superior Court, San Diego County; M. W. Conkling, Judge.

Action by Clarence S. Tennant and wife against W. C. Wilde and another. From an adverse judgment, defendants appeal. Reversed, with directions.

O. E. Mark and W. C. Wilde, both of San Diego, for appellants.

Sloane & Sloane, of San Diego, for respondents.

BURNELL, Justice pro tem. Plaintiffs, by their amended complaint and an "amended amendment" thereto sought to recover a balance alleged to be due on a promissory note executed by defendants in the original sum of $3,000; and in a second cause of action set up the written instrument which is the bone of contention in this appeal and which is as follows:

"I hereby agree to work as a carpenter in the carpenter work to be done by W. C. Wilde on the 'Court Hotel' building now at No. 1451 State Street, San Diego, California, until all of the same has been fully completed as an 18-apartment building according to general plans and specifications thereof supplemented by oral agreement as to details, and hereby agree and guarantee that the cost of all labor and material necessary therefor shall not exceed three thousand dollars. That said work shall be proceeded with as rapidly as possible at all times, using and employing all labor that can be advantageously used and employed to the end that said work may be completed at the earliest possible date.

"All work to be done first-class and everything to be done in such way as to give the entire building a good and well finished and harmonious appearance, for improved and modern apartment house purposes, and any incidental matters necessary therefor shall be considered included.

"This agreement shall bind and inure to the benefit of the respective parties hereto, their heirs, executors, administrators, and to their assigns except as herein otherwise provided.

"Dated at San Diego, California, this 28th day of November, 1922.

"C. S. Tennant.

"Accepted: W. C. Wilde."

This count alleges that plaintiff Clarence S. Tennant thereby "undertook and agreed, for the sum of $3,000 to supply materials and labor for certain work on the Court Hotel building," and that the actual cost did not exceed $2,500, and asks judgment for the difference of $500.

Defendants' answer denied any indebtedness on the note and by way of counterclaim and set-off set up the same instrument, alleging that thereby said Tennant "agreed and guaranteed that the cost of all labor and materials necessary for the full completion of the carpenter work of the building therein mentioned, according to general plans and specifications thereof, supplemented by oral agreement as to details, shall not exceed $3,000," but that the cost upon completion exceeded $4,106.85, the difference between which figure and $3,000 they claimed as a set-off.

The trial was by jury, and both parties agree that the sole question involved on this appeal is whether the trial court erred in instructing the jury with respect to the above instrument. The instruction complained of by appellants is as follows: "As an offset to this claim, the defendant has set up, first, a counterclaim for some eleven hundred odd dollars, for an alleged agreement that the cost of a certain alteration of a building would not exceed $3,000. For the reason that this so-called contract lacks mutuality,—that is to say, for the reason that if the defendant had breached the contract and had failed to employ the plaintiff there could be no recovery by the plaintiff, the court holds that this contract has no validity and that there can be no recovery by the defendant on account of this contract."

The plaintiffs introduced no evidence upon the cause of action set up by their amendment to the amended complaint wherein said instrument was pleaded, and dismissed the same just before the case went to the jury.

Upon defendants' offer of the contract in evidence in support of their counterclaim the following proceedings took place:

"Mr. Harrison G. Sloane: Plaintiffs will object to such offer and to the admission of the contract as a basis for establishing a claim of surplus here on the ground that the contract makes no such provision. There is no construction of the contract which makes the plaintiffs in this case liable for an excess in the cost of construction.

"The Court: I do not know exactly what it is they guarantee; but they absolutely guarantee the cost of labor and material necessary therefor.

"Mr. Mark: May it please the Court, and counsel, I think that is an exhibit—the contract itself is an exhibit in the pleading denominated 'Amendment to complaint,' on the part of plaintiffs. The specifications are not, but the specifications are referred to and are necessary in the construction thereof. There is the guaranty to which your Honor has referred.

"The Court: The contract, of course, offered here is incomplete, because you would have to have the specifications here to see what it was he guaranteed would cost only $3,000.

"Mr. Mark: And that we wish to proceed to offer in evidence.

"Mr. W. A. Sloane: Our contention is that the word 'guarantee' there does not create the kind of obligation they are seeking to enforce here as against this defendant.

"The Court: If it means anything, that is what it means.

"Mr. W. A. Sloane: We claim that it does not mean anything, does not create any liability. It is not a guaranty, especially under the statutory definition of 'guaranty,' by which is meant to stand good for the debts or obligations of another.

"The Court: On the face of it, its ordinary meaning, they guarantee that is all it would cost him; but it would have to be offered in connection with the specifications.

"Mr. Mark: We offer the contract, with the specifications annexed.

"The Court: Where are the specifications?

"Mr. Mark: Annexed. May it be admitted, your Honor?

"The Court: Yes."

[1] The objection was to the admission of the contract. When it was offered in connection with the specifications, this objection was not renewed. Thereafter, and without objection on the part of plaintiffs, defendants introduced into evidence a number of letters and telegrams between the parties antedating the agreement in question, and which tend to throw considerable light upon the relation of the parties, the meaning of the agreement, and the intention of those who executed it. Respondents here for the first time make the point that this correspondence tended to vary the terms of the written contract. This objection comes too late. It is an almost elementary rule that a party cannot urge, for the first time on appeal, objections which might have been obviated if made in the court below. Title Ins. & Trust Co. v. California Development Co., 171 Cal. 227, 152 P. 564; Swayne & Hoyt v. Wells-Russell & Co., 169 Cal. 204, 146 P. 686; Milwaukee Mechanics'

Ins. Co. v. Warren, 150 Cal. 346, 89 P. 93; Campbell v. Genshlea, 180 Cal. 215, 180 P. 336; Timmons v. Joplin, 157 Cal. 15, 106 P. 228. We believe, however, that, even if objection had been made to this correspondence, it would have been properly admitted as an aid to the interpretation of an ambiguous document. Code Civ. Proc., §§ 1856, 1860.

The learned trial judge gave the instruction above quoted under the theory that the agreement of November 28, 1922, lacked mutuality, as is evident from the language of the instruction itself and from a statement by the court at the close of the evidence, as follows:

"The Court: * * * There is no contract at all because it is utterly indefinite. There is nothing definite as to time. If the defendant had not sought to continue it, there would have been no measure for damages. There is nothing he could allege or prove as to how long his employment was to last; no agreement that he would employ him for any particular length of time. Call in the jury."

It is upon this point that respondents argue for an affirmance of the judgment. They urge that the contract is severable, one part being a promise by plaintiff Clarence S. Tennant to work as a carpenter and the other, his alleged guaranty that cost of labor and material should not exceed $3,000, and that it is the guaranty which lacks mutuality.

[2] On this point it may be said that, where there is consideration for any of the agreements specified in a contract the contract as a whole cannot be said to lack mutuality or consideration, nor can any particular promise or agreement contained therein be singled out and deemed inoperative because no special or particular consideration appears to have been given or promised for it. Mr. Page in his "Law of Contracts" thus states the rule:

(At pages 861 and 862) "While a consideration is a necessary element of every contract, it is not necessary that each separate promise or covenant should have a distinct consideration. If there is but one consideration offered in return for several promises, and it is accepted for them together, it will support them. This principle is often invoked in question of mutuality of obligation. If A gives value for two or more promises from B, B cannot claim that one of such promises was not supported by consideration, though the parties have not apportioned the consideration to the separate promises. * * *"

(At page 863) "The purchase price is not only consideration for a sale, but also, if so agreed upon, for a warranty, * * * or to accept payment in notes of a third person and to indemnify the purchaser against liability on his indorsement of such notes."

(At page 866) "Rendition of services is a consideration for a covenant to pay both for such services and for services already rendered for which the promissor was not legally liable."

[3] It is contended on the one hand that the contract is merely one whereby Tennant agreed to perform carpenter work on a building being constructed for appellants, and, as such carpenter, could have no control over the cost of carpenter work or labor, and could not possibly guarantee the cost of either or both, and, on the other, that the parties understood and attempted to express the fact that Tennant was to be responsible for the carpenter work, whether physically done by himself, or by others in connection with him or under his direction. There is no question as to the ambiguity of the instrument itself. It starts off with the words "I hereby agree to work as a carpenter in the carpenter work to be done by W. C. Wilde on the 'Court Hotel Building,'" then follows an agreement and guaranty as to "the cost of all labor and material necessary therefor" and the statement "that said work shall be proceeded with as rapidly as possible at all times, *using and employing all labor* that can advantageously be used and employed to the end that said work may be completed at the earliest date." (Italics ours.) This in turn is followed by the statement, "All work to be done first class * * *." The first sentence, if it stood alone, would seem to indicate that the parties had in contemplation merely the hiring of Tennant as a journeyman carpenter, but the rest of the instrument clearly implies a much different class of employment. The provision that "the work shall be proceeded with as rapidly as possible and at all times using and employing all labor that can be advantageously used and employed" certainly implied that Tennant obligated himself to employ and direct sufficient labor to achieve speedy completion, while that requiring "all work to be done first class and everything to be done in such a way as to give the entire building a good and well finished and harmonious appearance" implied something more than mere labor as a journeyman carpenter on his part. To what end the requirement that *the entire building* should be given a well-finished and harmonious appearance, if Tennant was merely employed as one of the carpenters, without power or authority to direct and supervise the work of others? It is our duty to so interpret this contract "as to give effect to the mutual intention of the parties as it existed at the time of contracting, *so far as the same is ascertainable.*" Civ. Code. § 1636. (Italics ours.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. We must also give it "such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Civ. Code, §§ 1643. After all, the

essential theory in construing any contract is to find out what the parties meant, and this must be done by an examination of the language used therein, provided the same is "clear and explicit." Civ. Code, § 1638. Where the language, as in the instrument under discussion, is neither clear nor explicit, resort may be had to "the circumstances under which it was made, and the matter to which it relates." Civ. Code, § 1647; Code Civ. Proc. §§ 1860, 1856. For this purpose it is proper to consider the relations between the parties, the work to be done and the correspondence leading up to the execution of the agreement. Williams v. Ashurst Oil Land & Development Co., 144 Cal. 619, 78 P. 28, Payne v. Neuval, 155 Cal. 46, 99 P. 476.

As was said in Balfour v. Fresno Canal Co., 109 Cal. 221, 41 P. 876:

"If, however, the language employed be fairly susceptible of either one of the two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties. 'The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself.' (Sandford v. Newark, etc., R. R. Co., 37 N. J. Law, 1, 3.) For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. (Code Civ. Proc., secs. 1860, 1861; Atlanta v. Schmeltzer, 83 Ga. 609 [10 S. E. 543]; Keller v. Webb, 125 Mass. 88, 28 Am. Rep. 209; Long v. Long, 44 Mo. App. 141; [Swett] v. Shumway, 102 Mass. 365, 3 Am. Rep. 471.)

"In our judgment, the contracts in question are so far ambiguous, in the particular under consideration, as to fall within the principles here announced; and we think that the excluded evidence was of a character admissible to explain and fix the intention of the parties in the employment of the language used. It may be that, standing alone, the contracts would receive the construction urged by defendant. * * * But, at the same time, it is likewise, we think, perfectly susceptible of the construction contended for by plaintiff, if such was the meaning intended by the parties, and that without doing violence to the ordinary sense or meaning of the language employed, or importing any new term into the contract. Nor does such construction make the contract appear so unreasonable or improbable as to preclude it. In determining the meaning of the parties in the particular clause, we will look at every part of the instrument. 'It is a true and important rule of construction that the sense and meaning of the parties to any particular instrument should be collected ex antecedentibus et consequentibus; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done.' (Broome's Legal Maxims, 442.) Applying this rule, and regarding the different provisions of the contract in the light of the circumstances surrounding the parties, as disclosed by the evidence, the construction sought to be established by plaintiff is neither unreasonable nor necessarily inconsistent with the general purpose intended to be accomplished. * * *"

See, also, Brewster v. Lathrop, 15 Cal. 21; Preble v. Abrahams, 88 Cal. 245, 26 P. 99, 22 Am. St. Rep. 301.

[4] The evidence discloses that the parties had known each other for 16 or 17 years, and the tenor of the letters received in evidence indicates the most intimate and friendly relations between them. The Tennants, who at that time lived in Hollister, had visited the Wildes in San Diego during the summer of 1922, at which time they had expressed a desire to move to San Diego. A letter written October 12, 1922, by Mr. Wilde to the Tennants contained this language: "I might add that if Clarence (Mr. Tennant) would want to be sure of something when coming, that I have just bought and am having moved a forty room, 3 story, wooden hotel building, that we want to make up into housekeeping apartments, and *I would be glad to have him undertake this if he cares to and can.* * * * There ought to be carpenter work in about two weeks. This would give him an easy start here so he could get right to work and get his bearings, and there will probably be work for a month or so on this job; I would very much like to have him here to do it. Of course, I want you to be governed by your own wishes and best interests, but since the idea was suggested in your letter it occurred to me that this might be of some consequence to you as I must have some one anyway.

Then I have bid on some government buildings here that I may get also, and if I do there will a lot of carpenter work on them that could be gone ahead with as soon as the other is finished. And all of this work is mostly inside work that the weather would not interfere with. I have a nephew who just came this morning from Alabama that I expect to use for whatever he can do, altho he is not a carpenter or skilled in anything particularly, but he ought to work well with Clarence in whatever he could do. We will make it homelike for Clarence as best we can. If you think well and favorably of this I would be pleased to hear from you as soon as you can decide so that I may make my plans accordingly, although I do not want to hurry you or have you act other than with perfect freedom and deliberation and for what you consider to be your own best interests. Very sincerely, W. C. W." To this letter Mrs. Tennant replied on October 24. This letter is couched in the most friendly terms, and in it Mrs. Tennant states that she has been "so anxious for Clarence to go down there and do Will's work," but that she thinks "he hates to make the break," and that she is "more than sorry to say that he hasn't sense enough to accept," but that perhaps later on he might desire to go to San Diego. On October 31 Mrs. Tennant again wrote to Mr. Wilde, saying, "I wonder if we are too late or if the job is still open for Clarence." This letter refers to a friend of Mr. Tennant's, a man named Shade, stating that Mr. Tennant wanted to know if Mr. Wilde had had any one yet to do his work, that Mr. Shade was a "good finisher," and that Mr. Tennant wanted to know if Mr. Wilde could use both Shade and himself. The response to this letter was a telegram sent by Mr. Wilde to Mrs. Tennant, which is as follows: "All work I wrote you about is still open excepting hotel building foundation which I have contracted for and is now being installed. If Clarence can vouch for Shade he could come too. There ought to be over months work for both. Carpenters scale is eight dollars. Am writing. Wait. W. C. Wilde." The date of this telegram was November 2, 1922, and it was followed up by a letter written by Mr. Wilde to both Mr. and Mrs. Tennant on November 4, 1922. This letter is as follows:

"Mr. and Mrs. Clarence Tennant, 90 Hawkins St., Hollister, Calif. Dear Friends: Upon receipt of Mrs. Tennant's letter of the 31st ult. I sent Western Union night letter telegram, of which copy is enclosed. After our previous correspondence resulting in your decision not to come here at this time, I, of course, abandoned the idea and based my plans on other considerations, and when I received your last letter the hotel building was landed on the lot and I had contracted for the foundation work and material. The main foundation work is now done and I am informed that it will be sufficiently set so that the building can be let down onto it about the 13th inst. Then the rough plumbing work has got to go in after that before the carpenter work could be undertaken and gone ahead with so as to make the best progress, especially if there were two men to go at it, and I do not want to have you and Mr. Shade here on my own suggestion or responsibility until the work is ready to go ahead with. That is the reason I telegraphed you as I did, so I could write and explain. I would not want you to lose any time or be delayed on my account, if I can possibly avoid it, and so am trying to figure safe. It took longer to get the hotel building on the ground than I figured it would when I wrote you on the 12th ult. Of course, if you and Mr. Shade want to come anyway at once it will be all right with me and I will let you go ahead just as fast as things can be arranged; so long as you know the situation there can be no disappointments. Otherwise I will telegraph you so you can be here when I am sure the work can immediately be gone ahead with and continued right along without your losing any time except for unforeseen things. Of course, if I had known you were going to be able to come as you now are, I would have saved the foundation work for you and let you be doing that now, but I did not know. So the next best I can do is to let you take things up as soon as the building is on the foundation. I want to be understood right, that it is my sincere desire to have you do the work now just as it was when I wrote you before, but am simply not sure that if you came at once I could put you right to work and keep you going every day, especially two men; however, as I have before stated, when you know this and if then you are willing to come and take the chances with me as to just how much we may have to wait for the completion of the foundation work and getting the building onto it, and possibly for some of the rough plumbing, then you can come as fast as you like.

"I also mentioned to you about some government buildings here that I had bid on, and that if I got these they would have to be moved and have work done on them. These bids are to be decided upon and awarded at Washington, D. C., by the War Department, and Congressman Swing of this district, who is in Washington now, is working on the matter for me at that end; he wrote me on the 27th ult. that he had just talked with the officer in charge of these bids and that from his analysis of them he intended to recommend the acceptance of the bids in the way that will result in my bids being accepted, and it then remained as to whether this officer's recommendation was followed by his superior officers in making the awards. I may hear any time now as to this matter, and when I do and if I should get the buildings I have bids on, I will have this much more on my hands for immediate attention, because they have to be moved off the ground right away.

"So you see I will soon be in a position with this hotel building, and may also be with these government buildings if I get them, when I could not only use you and Shade to very good advantage regularly for probably about three months, but, further than that, it would be a great benefit and relief to me *to have someone that I could rely upon to undertake and go ahead with this work and not have to give it such constant careful attention myself.*

"Although, as I previously wrote, it is for you to consider the matter entirely from the standpoint of your best interests and be governed accordingly, and since you know my position and wishes, if, considering everything you want to come right away it is all right with me, or if you would rather wait and have me let you know about developments as fast as they occur I will do that, or if you think it better for you to give up the idea entirely in view of the circumstances, you feel perfectly free to do that. Just let me know so I can plan accordingly, for there are people after me to figure on these things but I am holding off on everything for the present. If you want to come now, just let me know and start; if you want more information let me know; if you want me to let you know when things are definitely ready to continue with I will do that. But, in any event, let me know.

"Of course, I am not saying that they could not get other work here to take up and fill in on any spare time they might have now or any time.

"We are all well, and, needless to say very busy with what we have on our hands, and the coming of my nephew and niece from Alabama is helping us out a great deal, considering they are both young and inexperienced.

"Hoping this finds all of you in the best of good health, and that Clarence's absence will not prove to be too hard on the rest of you (if he should come), although he could go back and forth once a month easy enough, and awaiting your advice as to what your wishes are, I am, Very sincerely." (Italics ours.)

Mrs. Tennant replied to this letter within the next few days to the effect that Mr. Tennant and Mr. Shade would be ready to start Mr. Wilde's work on three days' notice. On November 20th Mr. Wilde wrote to the Tennants stating the general nature of the carpenter work in connection with the alteration of the hotel building. In this letter Mr. Wilde refers to a figure which he had received from a San Diego firm of contractors, stating: "At first I had planned on letting the labor and material complete by contract, and so I now have a figure for doing it accordingly. But I would like to have Clarence and Mr. Shade do the work if they can, and in order that they would be sure of themselves either way I would like to have them come and go over the plans and the work to see if they felt satisfied that they could undertake it and *could also keep within the contract figure that I have,* which I think is high enough, and then if they felt they could not safely assure me of that I could let it by contract and in the contract would make a condition that they be employed by the contractor. In these ways they would be as sure as possible of working after they got here, and, of course, hope they will feel equal to *undertaking it by themselves and hiring such other help as they can use to advantage or need.*" (Italics ours.)

This letter also emphasizes the necessity of speedy completion of the hotel building in order to get it ready for the winter season. He also says: "It will take them a few days *to go over things and figure them* and get their bearings so as to start work to the best advantage. * * * *This may be a change for Mr. Tennant to test himself for independent work and thereby find his way to figure for himself.*" (Italics ours.)

The figure for doing the work which Mr. Wilde refers to in this letter was submitted by the firm of Garner & Knight, the net amount being $3,000. On November 20th Mr. Tennant telegraphed to Mr. Wilde: "Are you ready for us? Shade I anxious. Answer." This telegram was evidently written before the receipt of the letter last referred to, and on the same day Mr. Tennant telegraphed to Mr. Wilde, "Will see you Sunday P. M.," Mr. Tennant, accompanied by his friend Mr. Shade, reached San Diego Sunday, November 22, 1922, and, during the course of the conversation which Mr. Wilde had on that day with Mr. Tennant and Mr. Shade, he told Mr. Tennant of the written proposal which he had received from Garner & Knight, and that he had to have some kind of a contract with reference to the construction work, and that, if Mr. Tennant and Mr. Shade wanted to make a contract with reference thereto, he would like to have them do it. Mr. Shade expressed himself as not wishing to undertake the matter on a contract basis. Mr. Tennant expressed his desire to stay, but did not want to do so unless Mr. Shade also stayed. Mr. Wilde then told Mr. Tennant that he would like to have the matter arranged so that he could let the contract to Garner & Knight and let Mr. Tennant work for that firm. Mr. Tennant, however, did not agree to this. Mr. Wilde testified that he said: "The only way in which it could be arranged if he did not want for me to let the contract to Garner & Knight and in that contract to procure his employment was to have some definite contract with him as to the cost of this work." Mr. Tennant replied to this that he would rather stay and undertake the work with himself and Mr. Shade, even though he lost on it, than to leave San Diego. Further testimony of Mr. Wilde along this line was as follows: "I told him that I felt satisfied that the figure of Garner & Knight was a safe figure, that these men were men who were experienced in doing this class of work locally, they knew the local labor and material conditions, they were men who had operated here and lived here for some time, I had known them for some time, I knew of remodeling building work that they had done, and while I had no way of knowing details of the cost involved in figuring a job of this kind, that I felt their estimate of it was a safe, reliable estimate, and I was willing to let him undertake it on their exact figure if he wanted to do so; and his employment was the result of it, and the making of the contract was the result of this correspondence and these conversations." Shortly after this conversation the contract in question was signed, and Mr. Tennant went to work and received $8 a day, Mr. Shade receiving $10 a day. Mr. Tennant kept track of the labor until it amounted to over $1,800 and then quit.

The specifications referred to in the contract between Mr. Tennant and Mr. Wilde, and which were the same specifications that accompanied the bid of Garner & Knight, are set forth at page 5 of the reporter's transcript. It is unnecessary to quote them in full, but certain of their provisions, read in connection with the contract of which they are made a part by reference, throw additional light upon the intention of the parties. They are as follows:

"Specifications of the work and materials necessary in doing the carpenter work in remodeling building at 1451 State street for W. C. Wilde:

"Carpenter work. All work under this head to be performed in the best workmanlike manner. *Contractor to furnish all labor* in tearing out partitions and cutting openings in accordance with plans, and *furnish all material and labor* in putting in new partitions, which is shown on drawings, to furnish all doors and windows and other materials necessary to carry out full details of drawings, *Contractor* to be allowed to use all doors and windows and other materials which have been torn out, that are in good condition. * * *

"Front Porch. *Contractor* to furnish all labor and material and build front porch according to plans." (Italics ours.)

The work actually cost $1,106.85 more than the $3,000 referred to in the contract. During the progress of the work the labor accounts were kept by Mr. Shade, who reported the same to Mr. Wilde, by whom they were paid out, the common labor being employed by either Mr. Shade or Mr. Tennant. The material was bought and paid for by Mr. Wilde on the orders of Mr. Tennant or Mr. Shade, the orders being made out by one of these gentlemen and given to Mr. Wilde, who would place them with the materialmen. Sometimes Mr. Wilde would select a place where the material was to be bought, and sometimes Mr. Shade and Mr. Tennant went around to the various materialmen examining the material and prices in order to get an idea as to price and quality. The bills were all rendered to Mr. Wilde.

From the foregoing testimony, which went in without objection and which was not in any way contradicted by respondents, it seems evident that what the parties had in contemplation was that Mr. Tennant should be responsible for the carpenter work upon the building, guaranteeing that its cost would not exceed the amount of the bid submitted by Garner & Knight, and that it was not in the contemplation of the parties that Mr. Tennant should merely be employed as a journeyman carpenter. This is made evident not only from the correspondence of the parties antedating the actual contract but from the construction placed upon it by the acts of the parties themselves. Not only did Mr. Tennant employ Mr. Shade as his superintendent, but he also employed the other labor in connection with the carpenter work and co-operated with Mr. Wilde in picking out and purchasing the material.

[5, 6] It is, of course, a familiar rule that the actions of parties to a contract subsequent to its execution and with relation thereto may be looked to as an aid to its construction when the language of the instrument itself is ambiguous. Indeed, it has been said in such a case that the actions of the parties afford one of the most reliable means of arriving at their intention. Ghirardelli & Co. v. Students' Express & Transfer Co., 175 Cal. 427, 166 P. 16; Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 P. 951; Grant v. Bannister, 160 Cal. 774, 118 P. 253; 6 Cal. Jur. (Contracts, § 184), and cases therein cited. The law recognizes the practical construction of a contract made by the parties thereto as the best evidence of what they intended (Boardman Co. v. Petch, 186 Cal. 476, 199 P. 1047, Union Oil Co. v. Stewart, 158 Cal. 149, 110 P. 313, Ann. Cas. 1912A, 567), and in this connection, and in addition to the acts of the parties, above referred to, it is not without significance that both parties in their verified pleadings set up almost identical constructions of the contract in issue (amendment to complaint, Cl. Tr. p. 16; answer and set-off, Cl. Tr. p. 5). In plaintiffs' pleading, first above referred to, the plaintiffs thus construe the contract: "That on or about the 28th day of November, 1922, said plaintiff, Clarence S. Tennant, made and entered into a contract in writing with said defendant, W. C. Wilde, whereby said Tennant undertook and agreed for the sum of three thousand ($3000) dollars, to supply materials and labor for certain work on the Court Hotel Building. * * *" The pleader is bound by the interpretation adopted by him and set forth in his pleading. Silvers v. Grossman, 183 Cal. 696, 192 P. 534.

[7] In support of the contention that the agreement is invalid and unenforceable for lack of mutuality and want of consideration, it is suggested that it afforded Tennant no

control whatever over the cost of material and labor, and that Wilde might have hired any number of workmen and purchased any amount of material at his own option; hence that it was in effect a unilateral agreement by Tennant, imposing no obligations upon Wilde. Under the construction we have placed upon the contract, and under the construction the parties themselves appear to have given it, this theory must fall to the ground. Considerations, similar in import to the one in question, have been frequently upheld as against the contention that they lacked mutuality and consideration. Thus, in Scott v. Stevenson Co., 130 Minn. 151, 153 N. W. 316, a manufacturer had agreed to furnish a dealer with such fur goods as the dealer should need during the following winter season; no amount being specified. It was held that the contract was not void for indefiniteness, uncertainty, or want of mutuality. It was further held that parol evidence was admissible to show the understanding of the parties and the circumstances under which the agreement was made, and that a part performance was sufficient to remove any defect of mutuality or consideration, if any such had existed. In Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773, the same defects were urged as against a construction contract. The contract in question consisted of a request by the general contractor for a written proposal and a letter replying thereto in which the subcontractor stated: "I will furnish and lay the tile in the Y. M. C. A. building as per plans and specifications for $894.00, for all vit (meaning vitreous tile) cut out, deduct at 45 cents per square foot." It was held that this offer and acceptance constituted a binding contract and that it was not material that changes in the plans of the building were contemplated which might reduce defendant's proposal to such an extent as to leave no work for him to perform. The court said: "The consideration necessary to support the contract is found in the offer of defendant to do the work and plaintiff's acceptance of the same." In Rosenthal v. Empire Brick & Supply Co., 123 App. Div. 503, 108 N. Y. S. 347, the validity of a contract was sustained whereby the seller agreed to furnish the buyer all the mason's materials required for the construction of certain houses. It was held that the buyer was bound to receive and the seller to deliver, and that the obligation was mutual. In Walker Mfg. Co. v. Swift & Co. (C. C. A.) 200 F. 529, 43 L. R. A. (N. S.) 730, the agreement was to furnish from 175,000 to 225,000 pounds of meat during a certain period of time, followed by the provision: "We take care of buyer's needs this year." It was held that the agreement imposed upon the seller the duty of furnishing the ordinary needs of the buyer in his line of business for the period of time covered by the contract, even though the amount stated therein should be exceeded, and that the objection of lack of mutuality did not apply. In Laclede Const. Co. v. Moss Tie Co., 185 Mo. 25, 84 S. W. 76, the contract consisted of a letter proposing to furnish all the railroad ties which the buyer might need, to the number of 1,000,000 or less, at a certain price, the buyer accepting the proposition by letter. It was held that this contract was mutual. In this case parol evidence of the surrounding facts and circumstances was admitted to show the purpose, meaning, and intent of the contract. A similar case is that of National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427, sustaining the validity of a contract for the sale of all the pig iron which the buyer and manufacturer should need in its business during a designated period of time. See Campfield v. Sauer (C. C. A.) 164 F. 833; Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (C. C. A.) 121 F. 298, 61 L. R. A. 402; Lima Locomotive Works v. Nat. Steel Co. (C. C. A.) 155 F. 77, 11 L. R. A. (N. S.) 713; Dailey Co. v. Clark Can Co., 128 Mich. 591, 87 N. W. 761; Cooper v. Lansing Wheel Co., 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341. In Smith v. Morse, 20 La. Ann. 220, the court upheld the validity of a contract by the terms of which an ice manufacturing company was to furnish a hotel company with all the ice it would use in the hotels maintained by it for a certain period of time. The court said, as to the want of mutuality: "This involved the legal proposition that there can be no contract where only one of the parties to it is bound; but it has no application here unless it be supposed that the contract contemplated that it was optional with Morse & Co. to dispense entirely with the use of ice in their large hotels, which is not sanctioned by any reasonable construction that can be placed upon the contract."

We think the trial court was in error in excluding the contract from the consideration of the jury, for which reason it will be necessary to reverse the judgment. Inasmuch, however, as all of the issues, other than those tendered by appellants' counterclaim and set-off, were settled by the judgment in the court below and no objection has been made to that judgment, except with respect to the exclusion from the jury of the evidence tendered in support of the set-off and counterclaim, it will not be necessary upon a retrial of the case for any issues to be considered other than those raised by the second defense and counterclaim.

The judgment is reversed, with directions to the court below to permit the introduction into evidence of the contract and specifications in question and of testimony pertinent and material to the issues tendered by defendants' second defense and counterclaim.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

PREO v. ROED et al. (Civ. 6743.)★

District Court of Appeal, First District, Division 1, California. April 24, 1929.

1. New trial 🔑½—Power to grant new trial and mode of exercising it are statutory.

Power to grant new trial and mode of exercising it are dependent on statute, provisions of which define and limit court's powers, and statute must be followed in making motion for a new trial.

2. Appeal and error 🔑607(1)—Time after notice of decision denying new trial within which party may file demand for record commences to run immediately upon court's failure to pass on motion within two months (Code Civ. Proc. §§ 660, 953a).

Ten days' time "after notice of decision" denying new trial or "other termination" of such motion within which party may file demand for record under Code Civ. Proc. § 953a, commences to run immediately upon court's failure to pass on motion within two months under section 660; written notice of decision denying motion not being essential.

3. Appeal and error 🔑607(1)—Reporter's transcript cannot be considered where appellant's request for transcript was not timely made (Code Civ. Proc. § 953a).

Where appellant's request for transcript was not made within time prescribed by Code Civ. Proc. § 953a, reviewing court cannot consider reporter's transcript in determining appeal.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action for damages for personal injuries by Murle Preo against B. A. Roed and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Fenston, Williams & Hansen and Frank Kauke, all of Fresno, for appellants.

Gallaher & Jertberg, of Fresno, for respondent.

CAMPBELL, Justice pro tem. In this action the jury found for the plaintiff and against the defendants and assessed plaintiff's damages in the sum of $7,500. From the judgment entered upon this verdict defendants have appealed.

The action grew out of a collision which took place between a truck owned and operated by defendant B. A. Roed and a motorcycle driven and ridden by plaintiff, it being alleged that defendant Roed was delivering milk of the Jersey Farm Dairy Company, under which name defendant Frank M. Helm, Inc., was doing business, and the damages awarded were for personal injuries received by plaintiff as the result of such collision.

Appellant B. A. Roed has filed no brief, and appellant Frank M. Helm, Inc., in its brief, contends that the judgment should be reversed for the reason that defendant B. A. Roed, whose truck, which was driven by his brother, L. A. Roed, and which collided with the motorcycle driven and ridden by respondent, was not an employee of defendant Frank M. Helm, Inc., but was an independent contractor. Respondent disputes this contention and urges that the evidence and inferences properly deducible therefrom sufficiently support the allegation that B. A. Roed was, at the time of the accident, in the employ and acting as the servant and agent of appellant Frank M. Helm, Inc., and further urges that the reporter's transcript on appeal—the appeal having been taken under the alternative method—cannot be considered for the reason that the notice of appellant to the clerk to prepare the transcript under the provisions of section 953a of the Code of Civil Procedure was not given within the time allowed by law, and this court is without jurisdiction to avail itself of the reporter's transcript and therefore the clerk's transcript is the only record in the case properly before the court. If this latter contention of respondent be correct, and there is nothing before the court but the judgment roll, with the complaint stating a cause of action against the defendants, the jury having found a verdict against them, and with every intendment and presumption not contradicted by or inconsistent with the record on appeal being indulged in favor of the judgment of the superior court (Finkelstein v. Cosgrove, 83 Cal. App. 201, 203, 256 P. 608), the judgment must be affirmed.

The verdict of the jury was returned and filed May 26, 1927, and the judgment upon such verdict was duly entered on the same day. On June 1, 1927, 5 days after verdict and entry of judgment, the defendants served and filed their notice of intention to move for a new trial. On August 22, 1927, 88 days after the verdict and entry of judgment, defendants served and filed their notice of appeal. On August 22, 1927, 88 days after the verdict and entry of judgment and 27 days after the expiration of the two months' time within which, under the law (Code Civ. Proc. § 660), the court could pass upon the motion for a new trial, and at which time—the motion not having been presented—it was denied by operation of law, the defendants served and filed their notice to the county clerk requesting that the transcript of the testimony offered or taken, evidence offered or received, instructions given at the request of plaintiff and offered and requested by defendants, etc., be made up and prepared.

Appellant Frank M. Helm, Inc.—the only appellant in the action filing briefs—has completely ignored the question raised by respondent as to the court's jurisdiction to avail itself of the reporter's transcript, devoting its entire argument in an effort to show

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★Rehearing granted. 278 P. 928.

that the evidence does not support the conclusion that defendant Roed at the time of the accident was its servant or agent.

[1] The defendants filed their motion for a new trial within ten days after the verdict, but did not further prosecute it and never made the motion in court, and the time for passing upon the motion by the court expired July 26, 1927, two months after the verdict of the jury, at which time the motion was denied without further order of the court (Code Civ. Proc. § 660), and defendants, under the provisions of section 953a of the Code of Civil Procedure, had to and including August 5, 1927, within which to file notice to the clerk requesting a transcript of the testimony and the record generally; such section providing: "Said notice must be filed within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof." The power to grant a new trial and the mode of exercising that power are dependent upon the statute, the provisions of which define and limit the powers of the court in granting a new trial. The right to move for a new trial is statutory, and must be pursued in the methods pointed out by the statute. Holtum v. Greif, 144 Cal. 521, 78 P. 11; Townley v. Adams, 118 Cal. 382, 50 P. 550.

[2] It has been held in this state that where a right depends upon notice of a fact or proceeding, and not upon service of notice, actual notice or knowledge shown by facts appearing in the records of the court is sufficient. Brown v. Superior Court, 175 Cal. 141, 165 P. 429. As is said in Bernschein v. Whitaker, 175 Cal. 130, 165 P. 523: "The ten days' time 'after notice of decision' denying a motion for new trial or 'other termination' of such a motion, within which a party may file demand for record under section 953a of the Code of Civil Procedure, or may serve a proposed bill of exceptions under section 650 of the Code of Civil Procedure, commences to run *immediately upon the failure of the trial court* to pass on the motion within three months [now, by 1923 amendment, two months] after the verdict of the jury or service on the moving party of notice of decision of the court (Code Civ. Proc., sec. 660). Written notice of the decision denying the motion is not essential under these particular statutory provisions. Actual notice only is required, and in the event of such a termination of the new trial proceeding, as we have stated, the law itself gives the notice."

[3] The notice to the clerk, requesting the transcript, being filed beyond the ten-day limit prescribed in the statute, the question remaining is: May the court consider the reporter's transcript in determining the appeal? This question is directly passed upon in Hume v. Lindholm, 85 Cal. App. 80, 83, 258 P. 1003, 1005, in which the court says: "Defendant's request for a transcript having been made more than ten days after said actual notice, we hold that the request for the reporter's transcript was not made within the statutory time as to the judgment, and, therefore, cannot be considered as a part of the record on which to consider said appeal from the judgment (Spear v. Monroe, 181 Cal. 728, 186 P. 149; Brown v. Superior Court, 175 Cal. 141, 165 P. 429)."

Under the authority of Hume v. Lindholm, supra, the reporter's transcript not being available for consideration by the court, on the record as presented the judgment must be and it is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 408

SAY v. CROCKER FIRST NAT. BANK of SAN FRANCISCO. (Civ. 6551.)

District Court of Appeal, First District, Division 1, California. April 22, 1929.

1. Mortgages 🔑37(2)—Grantor may give oral testimony that deed was intended as mortgage.

Grantor may give oral testimony that deed was in fact intended as mortgage.

2. Mortgages 🔑175—Attaching creditor, not showing it relied on condition of title, could not invoke statute providing that deed cannot be shown to be mortgage as against subsequent purchaser or incumbrancer for value without notice (Civ. Code, § 2925.)

Where husband and wife signed deed of wife's land to loan society, and grantee later deeded land back to husband and wife, attaching creditor of husband could not invoke Civ. Code, § 2925, providing that deed may be shown to have been intended as mortgage, except as against subsequent purchaser or incumbrancer for value without notice, where such creditor did not show that it parted with value in reliance on condition of title, or that its action was in any manner influenced by condition of title, and court properly admitted evidence that deed was intended as mortgage.

3. Evidence 🔑20(1)—It is common knowledge that institutions lending money on security require signature of both husband and wife.

It is common knowledge that banks and other institutions lending money on security require signature of both husband and wife to all documents, so that no question of community property may arise.

4. Mortgages 🔑173—Statute providing that grant intended to be defeasible is not defeated, unless instrument of defeasance is recorded, is intended to protect only persons relying on record title (Civ. Code, § 2950).

Civ. Code, § 2950, providing that grant purporting to be an absolute conveyance, but intended to be defeasible, is not defeated or affected, as against any person other than grantee or persons having actual notice, unless instrument of defeasance is recorded, is intended to protect persons dealing with real property in reliance on record title, and one not relying on record title could not claim protection of statute.

5. Mortgages ⚷38(4)—Grantor's testimony that deed was intended as mortgage held sufficient evidence that it was so intended.

Where husband and wife deeded wife's land to loan society, and loan society later deeded land back to husband and wife, in action by wife against attaching creditor of husband to quiet title, plaintiff's testimony that deed was in effect intended as mortgage was sufficient evidence that it was intended as mortgage, in absence of any evidence as to grantee's understanding of transaction.

6. Deeds ⚷194(5)—Where deed from husband to wife was recorded and placed in safe deposit box accessible to wife, there was presumption of delivery.

Where deed from husband to wife of his interest in land was placed in safe deposit box to which wife had access, there was presumption of delivery.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action to quiet title by Mary E. Say against the Crocker First National Bank of San Francisco, substituted as defendant in the place and stead of the Crocker National Bank of San Francisco. From the judgment, defendant appeals. Affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (W. E. Simpson, of Fresno, and F. C. Hutchens, of San Francisco, of counsel), for appellant.

Everts, Ewing, Wild & Everts and A. W. Carlson, all of Fresno, for respondent.

NEEDHAM, Justice pro tem. This is a suit by Mary E. Say, a married woman, and wife of W. H. Say, against the defendant, to quiet title to land in Fresno county. The defendant denied the title of the plaintiff, and alleged the superiority over plaintiff's title of an attachment lien levied against the land in an action brought by the defendant against W. H. Say, the husband of the plaintiff, Ivan McIndoo and Henry Ross. The defendant also sets up as a separate and distinct defense that a certain deed executed by W. H. Say to his wife, the plaintiff, on April 7, 1924, and recorded the same day, about six weeks before the attachment in question was levied, was made with intent and for the purpose of defrauding creditors and particularly the defendant.

At the trial of the case the plaintiff Mary E. Say was the only witness called. No witnesses whatsoever were called by the defendant and appellant. A chain of the record title to the land in question was introduced in evidence. Mrs. Say testified that the land, which is the subject of this litigation, was deeded to her by her mother, and was her separate property. She further testified as to the time of this conveyance, and the deeds were duly placed in evidence in support of her testimony. The chain of title to the land in question showed that on December 7, 1895, a deed, signed by the plaintiff and her husband, W. H. Say, of the land in dispute, to the California Savings & Loan Society, was recorded in Fresno county. This deed was in form an absolute grant, and did not on its face contain a defeasance clause, which would indicate that it was given as security for any debt, or was intended as a mortgage.

The California Savings & Loan Society deeded on November 16, 1896, this same property to one J. C. Reis. This deed was also an absolute grant in form, and contained no defeasance clause. On November 23, 1896, a deed of this property was executed by Reis to the plaintiff, Mary E. Say, and her husband, W. H. Say, and which deed the plaintiff testified was intended as a reconveyance of the property to her; she having paid the loan personally. After this time, to wit, November 23, 1896, the record title stood apparently in the name of Mary E. Say and W. H. Say, her husband, who thereafter jointly executed certain deeds of trust to banks for loans which are not here material, except as they may have given some notice to the appellant of the true nature of the title. This condition of the title continued until April 7, 1924, on which date there was recorded in Fresno county a deed from W. H. Say to the plaintiff, his wife; the consideration being love and affection, conveying all of W. H. Say's title and interest in the property to the plaintiff.

On May 24, 1924, the defendant attached the interest of W. H. Say in this property in the suit heretofore referred to against W. H. Say, Ivan McIndoo, and Henry Ross. This writ of attachment, with the return thereon, was introduced in evidence as an exhibit, and it shows that the demand against these defendants, Say, McIndoo, and Ross, was for the total sum of $56,214.79, besides interest and costs, and the return of the sheriff thereon shows that real property of each of these defendants, to wit, Say, Ross, and McIndoo, was levied upon. No attempt was made by the defendant at the trial to show when this indebtedness accrued; whether before or after November 23, 1896, the date the property in controversy was reconveyed to Mrs. Say, as testified to by her, upon the payment by her of the indebtedness to satisfy the loan which, she testified, was originally given to the California Savings & Loan Society.

[1] At the trial, over the objection of the

appellant, the plaintiff testified that the deed to the California Savings & Loan Society was not given or intended as an absolute grant of the property, but that the same was, in fact, a mortgage of the property. The right of the plaintiff to so testify—that is, give oral testimony that a deed was in fact intended as a mortgage—has been upheld many times by our courts. See Hillwig v. Boyer, 81 Cal. App. 763, 254 P. 662; 17 Cal. Jur. 735, 756. Plaintiff also testified, as before stated, as to the payment of the loan, and it appears with sufficient certainty from the record that the deed of November 23, 1896, from Reis to Mrs. Say and her husband, was in fact executed as a form of reconveyance or satisfaction of this indebtedness, in the absence of contrary testimony. As stated, the defendant called no witnesses, and therefore it does not appear in the record when W. H. Say became indebted to the defendant, or what was the nature of this indebtedness, nor was any showing given why the attachment levied in 1924 has apparently never been reduced to a judgment.

While the appellant contended that the deed of April 7, 1924, was in fraud of creditors, it offered no evidence whatever in support of this contention, and as the record now stands there was nothing upon which the trial court could base any finding of fraud or intent to defraud. With respect to the deed of April 7, 1924, from W. H. Say to his wife, the plaintiff, she testified that she found this deed in a safe deposit box some time in the summer preceding the trial. She was unable to state when she first saw the deed, nor how it came to be in the deposit box.

The appellant contends that the judgment of the trial court should be reversed and sets up the following points:

(1) That the appellant is a purchaser or incumbrancer without notice of the true character of the deed to the California Savings & Loan Society, and therefore is entitled to claim that the deed was absolute in form, and that the reconveyance vested the title in W. H. Say and his wife as tenants in common as to an undivided half interest.

(2) That, even if the deed were in fact a mortgage, there was no sufficient evidence offered by the plaintiff to establish this point.

(3) That there was no sufficient delivery of the deed from W. H. Say to his wife, Mary E. Say, dated April 7, 1924, and that the attachment vested before the deed became effective.

Appellant's first contention is based upon section 2950 of the Civil Code, which reads as follows: "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the county recorder of the county where the property is situated." And also it is claimed it finds support in section 2925 of the Civil Code, which reads as follows: "The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or incumbrancer for value and without notice) though the fact does not appear by the terms of the instrument."

[2] We are of the opinion, however, that the appellant has failed to bring itself within the rule of the foregoing sections. No evidence was produced to show that, if W. H. Say borrowed money of the said defendant bank, the action of said bank in making the loan was in any way influenced by the apparent ownership of W. H. Say in the property in question. It was not shown that the bank had in any manner parted with value in reliance upon the condition of this title, or that its action was in any manner influenced by the condition of the title. It would seem that, if such had been the fact, it was within the power of the appellant to have produced either the officers or the records of the Crocker National Bank, which would have established it as a fact, if such was the fact. Under the circumstances, we do not see how appellant can be held to be a subsequent purchaser or incumbrancer for value and without notice, as defined in section 2925 of the Civil Code, and we are constrained to hold that the action of the trial court admitting the evidence as to the nature of the transaction was, under the circumstances, free from error, and that the finding of the trial court in that regard finds support in the evidence.

[3, 4] For the same reason, the appellant here has not brought itself within the provisions of section 2950 of the Civil Code. Even giving the last-named section its fullest effect, as contended by the appellant, there is nothing in the chain of title to the property which would warrant upholding the appellant's position. The grant in question had already been, in legal effect, erased by the conveyance back to the plaintiff by J. C. Reis. It is common knowledge that banks and other institutions lending money upon security require the signature of both husband and wife to all documents, so that no question of community property law may arise, and we think it would be a harsh and unwarranted extension of the principles laid down in section 2950 of the Civil Code to hold that a transaction of the kind here noticed should be conclusive against the real owner of the property, merely because in some transaction the name of the husband appeared as an apparent owner of the property. We can conceive of cases where the evidence clearly shows that the attaching creditor parted with value upon the apparent title, and that the owners of the

property had knowledge of such condition, and do not mean to say that in such cases the rule claimed by the appellant might not apply. But in the present case the elements of estoppel are entirely lacking. We think that the plain intent of section 2950 of the Civil Code was to protect persons who dealt with real property in reliance upon the record title. Appellant has, however, entirely failed to show where its position or action was in any manner based upon the apparent record title, and having introduced no evidence whatever, and in the absence of any such evidence, the court was justified in refusing to assume a fact which it was within the power of the appellant to show, if it had existed.

[5] As to the second point of appellant—that is, there was not sufficient evidence that the deed to the California Savings & Loan Society was intended as a mortgage, because it was not shown that the grantee so understood the transaction—it does appear, however, that the articles of incorporation of the savings and loan society were on file in Fresno county. No reason is shown why the appellant could not have shown that the deed was not intended as a mortgage by one of the officers of this loan association, if it still exists, or why no other evidence to controvert the testimony of the plaintiff was not offered in evidence. We are of the opinion that, standing alone and without conflict, the testimony of the plaintiff that the deed was in fact intended as a mortgage is sufficient to sustain the judgment, in the absence of any evidence as to the grantee's understanding of the transaction.

As to the third point of the appellant, that the delivery of the deed from W. H. Say to his wife was not sufficiently shown, this becomes more or less unimportant, in view of the disposition of the two foregoing points. Once it has been established that the plaintiff was entitled to show the true nature of the conveyance to the savings and loan society, and to show that her husband in fact had no title to the property, but had signed his name merely as a precaution to the savings and loan society, then a deed from him under such circumstances would not add anything to the plaintiff's title nor could the absence of such deed detract from the title.

[6] In any event, the evidence shows with sufficient clearness that the deed was recorded, and that it was placed in a safe deposit box to which the plaintiff, Mary E. Say, had access. Under the circumstances, there is a presumption of delivery which, not having been controverted, is sufficient to sustain the findings of the trial court. The case of Ward v. Dougherty, 75 Cal. 240, 17 P. 193, 7 Am. St. Rep. 151, holds that the possession of a deed by the grantee is prima facie evidence of delivery, and under section 1055 of the Civil Code is presumed to have been delivered at its date. Also in the case of Zihn v. Zihn, 153 Cal. 405, 95 P. 868, it is held that the burden is on the party asserting the nondelivery of a deed to overcome the presumption of delivery. As the appellant failed to present any evidence, it follows that it did not assume this burden, and therefore is in no position to complain. We think it may be assumed that this deed was given to correct the record; that is, to show that the property was the separate property of Mrs. Say.

The respondent argues that the appellant is not a subsequent purchaser or incumbrancer, but at most is a mere lienholder, and cites 5 California Jurisprudence, 321, where it is stated: "A mere lienholder * * * is not a purchaser or incumbrancer for value," etc. We find it is unnecessary to pass upon this point, however, because, from what has been said, the judgment herein should be affirmed upon other grounds. However, as bearing upon this point, see Hoag v. Howard, 55 Cal. 564, Plant v. Smythe, 45 Cal. 161.

We have carefully examined the authorities cited by appellant, but we do not think it necessary to refer to them in detail; it is sufficient to say they are not applicable to the situation shown in the record in the instant case.

For the reasons stated, it is ordered that the judgment be affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 430

HEER v. MORAN. (Civ. 6741.)★

District Court of Appeal, First District, Division 1, California. April 23, 1929.

Rehearing Denied May 23, 1929. Hearing Denied by Supreme Court June 20, 1929.

1. Appeal and error ⟹1010(1)—Findings supported by substantial evidence will not be disturbed, though evidence would have permitted different findings.

Where findings find substantial support in evidence, they will not be disturbed on appeal though evidence might have supported different findings.

2. Attorney and client ⟹30—Evidence sustained finding that settlement between law partners was entered into voluntarily and without fraud.

In action to set aside settlement between partnership of attorneys and for an accounting, evidence *held* sufficient to sustain findings of trial court that settlement was entered into freely and voluntarily, without fraud, and that plaintiff was bound thereby.

3. Attorney and client ⟹30—One suing to set aside settlement between law partners had burden to establish right to accounting.

Where settlement agreement had been entered into between law partners, plaintiff in suit

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★Rehearing denied. Hearing denied by Supreme Court.

to set aside settlement and for an accounting had burden to establish his right to accounting, and on failure to sustain burden judgment should be entered for defendant.

4. Attorney and client ⚷30—Trial court was justified in denying plaintiff accounting as to fees obtained by defendant in handling income tax matters for estate, after settlement between parties as law partners, where such matters were distinct from services rendered executors before settlement.

Trial court was justified in denying right of one member of former law partnership to accounting for fees received by other member in representing estate on income tax matters after final settlement between partners, where that business was distinct from employment of defendant to assist in representing executors of estate prior to the settlement.

5. Partnership ⚷348—Whether plaintiff gave sufficient notice of rescission or made proper offer to restore property was immaterial, where right to rescission was not established.

Where plaintiff in suit to set aside partnership settlement failed to establish right to rescission, it was immaterial whether he gave sufficient notice of rescission or made proper offer to restore property received under the settlement.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by A. A. Heer against Nathan Moran. Judgment for defendant, and plaintiff appeals. Affirmed.

Marvin C. Hix, of San Francisco, for appellant.

Charles A. Shurtleff, of San Francisco, for respondent.

PARKER, Justice pro tem. This action was commenced to set aside a settlement between partners and for an accounting. The court below refused to order an accounting and gave judgment for defendant. Plaintiff presents this appeal. Plaintiff and defendant were attorneys at law. In January, 1920, they formed a partnership for the practice of law, which was to continue at the pleasure of the parties. Upon the formation of the partnership it was agreed between the parties that all profits made by them or either of them in the practice of law during the existence of said partnership should belong to said partnership and should be divided between the parties share and share alike. Annually, after the close of each calendar year of said partnership, accountings were had and accounts settled between the parties. Pursuant to said agreement of partnership, plaintiff and defendant practiced law as such partners and under the firm name of Moran and Heer until on or about May 24, 1923, at which date notice of dissolution of said partnership was given. This notice was given on the date specified, by defendant to plaintiff, and the dissolution was acquiesced in by plaintiff; but the parties continued their business relations until about September 14, 1923, and on or about that date a settlement of their partnership was made. The finding of the trial court is as follows: That on the 14th day of September, 1923, plaintiff and defendant discussed at length, and not briefly, the business and assets of the said partnership, which said discussion was for a final and definite settlement and accounting of, and that the same resulted in an accounting and settlement of the affairs of said partnership between plaintiff and defendant. That plaintiff then and there freely and understandingly subscribed and delivered to defendant an instrument in writing, as follows:

"San Francisco, September 15, 1923.

"Received of Nathan Moran the sum of Six Thousand Dollars ($6000.00) in full satisfaction of all claims and demands in respect of the partnership heretofore existing between us, and in further consideration of which I hereby assign and transfer to the said Nathan Moran all my right, title and interest in and to the property, assets and accounts of the said partnership which is hereby dissolved and terminated.

"[Signed] A. A. Heer."

The trial court found further: "Defendant did not at any time make to plaintiff any false or untruthful misrepresentations. Plaintiff did not rely upon the representations made by the defendant, nor act wholly or at all upon belief or reliance therein, and did not by reason thereof accept from defendant the said sum of $6,000 as payment in full of plaintiff's share of the then accrued and undivided profits, business, good will and assets or any of them, of the said partnership. Further it is found: Said statements and representations were not, nor were any statements or representations made by defendant false or untrue, nor were the same or any of them then or at any time known to defendant to be untrue nor were untrue. Said statements and representations were not, nor were any of them made by defendant with the intent to mislead or defraud the plaintiff nor to induce him to accept the said sum of $6,000 in full of his share of the assets and profits of said business. At the time said representations were made, plaintiff had ample means of ascertaining the truth or falsity of the same equally as good and as available as those of the defendant, and plaintiff did, between May 24, 1923, and September 14, 1923, frequently, fully and carefully investigate the business, affairs and accounts of the said partnership. And in the settlement of the affairs of said partnership the plaintiff relied upon his own in-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

vestigations, knowledge and means of knowledge."

[1, 2] The findings referred to find sufficient support in the evidence before the court. It may be true that certain evidence offered by plaintiff would have supported different findings, but that is a matter that gives us no concern. In Hotaling v. Hotaling, 187 Cal. 699, 203 P. 747, we find this apt language: "The trial judge was called upon to delicately adjust the balance so as to determine upon which side * * * the preponderance might lie, while upon this appeal our only duty is to ascertain if there was any substantial showing in behalf of the court's finding to give rational support to the conclusion reached." Further in the same case it is said: "We have but touched upon a review of the voluminous evidence, because of the fact that it is too manifest that any nice distinctions in these matters are foreclosed by the findings of the trial court" and again: "We find in this record on appeal many reasons for putting a more favorable construction upon the defendant's side of this controversy than were indulged by the trial court, but upon a review of the whole case, it is clear that the findings which support the judgment have substantial support in the evidence." In Aronson & Co. v. Pearson, 199 Cal. at page 303, 249 P. 195, it is said: "But where the evidence is sufficient to support conflicting inferences, the finding of the trial court either way thereon is conclusive on appeal. The evidence must be viewed in the light most favorable to the support of the findings and judgment." Without further citation of authority it may be said that there is no rule of appellate procedure which is more generally recognized and followed than the rule announced in the cases cited. The record before us consists of the testimony of the parties and certain documentary evidence. Excerpts from the testimony or inferences that may be drawn from the documents offered may lend color to the argument of appellant. But if we should detail here all of the evidence and analyze each alleged discrepancy we would still have the labor of setting at naught the rule announced, before we could disturb the finding. It might, however, be noted that both of the parties to this action are practicing attorneys of great experience. They had several months within which to settle their affairs and all of the business affairs of the partnership were matters of public record. Each of them was qualified to protect himself in any transaction and each knew the effect of the written agreement of settlement. Neither required independent advice nor was either reliant upon the representations of the other. With this condition existing it would not require evidence to the degree of demonstration to support the court's finding. We conclude that at the date of the written settlement everything was fairly and fully adjusted.

[3, 4] There remains, however, another contention of the appellant. Prior to the formation of the partnership the defendant Moran had been associated with other counsel in representing the executors of the Hearst estate. Though associated, he was not the attorney for the executors, but merely employed by the attorneys of record. Before the formation of the partnership between the parties hereto, the attorneys for the executors of the Hearst estate, with the consent of the said executors, arranged with defendant Moran that the latter should conduct all legal proceedings thereafter required in the course of the administration of the said estate and for such service should receive half of the attorney's fees allowed in the probate court. Under this arrangement the original attorneys for the executors still remained the attorneys of record in the probate proceeding. The defendant Moran did account for all fees received through the said Hearst estate employment up to the date of the dissolution of the partnership and likewise for all fees received thereafter excepting as will be noted as we proceed. After the Hearst estate was, to all intents, settled, and ordered distributed, and at a time subsequent to the dissolution of the partnership, there arose some questions regarding the claim of the federal government for additional income taxes accrued against Mrs. Hearst during her lifetime. This matter of unpaid federal taxes had never been handled by defendant Moran or by the attorneys with whom he had been associated in estate matters. The entire matter of federal income taxes, both before and after the death of Mrs. Hearst, had been in the hands of other counsel and had remained separate from and not connected with the administration of the estate. The trial court found upon sufficient evidence that defendant Moran at the time of the settlement of the partnership affairs had no reason to believe or know and he did not believe or know that this business was to be subsequently entrusted to him. However, that was what did happen. At a date subsequent to the dissolution of the partnership and the settlement of the affairs thereof, the executors of the Hearst estate retained Moran to represent them in these income tax matters, and from this service he has received large sums of money from the date of his retainer down to the commencement of this action, namely, in June, 1925. Plaintiff argues that such receipts were partnership assets and his right to participate therein. The trial court found that his employment was a new one and unforeseen and unanticipated and wholly individual to the defendant. We are not inclined to scrutinize the finding, but mention it merely as illustrating the situation at the time of the settlement. Any amounts that might have been received after the date of the settlement would be a matter of accounting. Plaintiff would not be entitled to enter into

these questions without first establishing his right to an accounting. It is conceded that if the settlement agreement is binding and the right of the parties determined and settled thereby, then as long as the said settlement agreement stands no accounting will be ordered. The burden of proof is on plaintiff to prove his right to an accounting, and if he fails to sustain it, judgment must be for defendant. 1 Cor. Jur., p. 642. If we should proceed with the contention of appellant here and review all of the authorities cited on the question of what business might or might not have had the origin during the term of partnership, and if we should conclude that plaintiff, on an account taken, as claimed, we would still have before us the fact that plaintiff has precluded himself by the terms of an agreement found to be fair and binding.

Without evading the issue attempted, there was much evidence to support a conclusion that the relationship between defendant Moran and the Hearst estate was merely by grace of the attorneys of record therein, who had been his former employer. It was evident that Moran was not intrusted with the sole management of the affairs of the estate, but the business was brought to him from time to time and finally the bulk of the would be entitled to a share in the business probate matter was turned over to him. At no time could it be distinctly classed as his business or the business of the partnership of Moran and Heer. The case as a whole discloses a situation where two lawyers, without great practice, were employed by a large firm of attorneys. Moran, the defendant, was apparently closer in the confidence of the employers. Heer, the plaintiff, was receiving a small salary more like that paid to a clerk. The employing firm in a way withdraws from practice, and the two former employees establish an independent firm with no fixed income or attractive prospects. Moran, through his familiarity with the business of the Hearst estate, is given, from time to time, much remunerative work and shares the proceeds with Heer to an extent greatly in excess of the former income of the latter. Then when the firm of Moran & Heer is dissolved it happens that the Hearst executors, owing to the death of one of their attorneys and the removal of the other from the state, decide that Moran, on account of his familiarity with the estate matters, would be a logical choice as their advisor in certain new matters that have arisen. On the whole we are convinced that no injustice results to plaintiff in holding him bound by his settlement, and the trial court doubtless concluded that he had secured throughout fair and honorable treatment. The final finding of the trial court is as follows: "No accounting between plaintiff and defendant of the business, profits and assets of said partnership of Moran and Heer, from its beginning or for any time, is necessary to determine the respective rights of plaintiff and defendant. That notice of dissolution of said partnership was given and accepted on or about May 24, 1923, and on September 14, 1923, a full and complete settlement and accounting was had between the parties, at which time plaintiff was possessed of full knowledge of the business of said firm and had access to its records and accounts and that plaintiff thereupon freely and voluntarily entered into and made the said settlement and gave to defendant in writing a receipt in full of plaintiff's interest in said partnership and a release of all claims and liability." This finding is sufficiently supported by the evidence.

[5] Much is said in the briefs on the question of an effectual rescission. Under the findings plaintiff established no right to rescind nor did he prove the existence of any ground of rescission. Therefore, whether he did or did not give sufficient notice of rescission, or whether or not he made proper offer of restoration, became quite immaterial. Some other minor assignments of error are urged by appellant. These have been considered, but in view of what has been stated the judgment could in no wise be affected thereby.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

98 Cal. App. 482

SANBORN v. BALLANFONTE et al. (two cases). (Civ. 6694, 6695.)★

District Court of Appeal, First District, Division 1, California. April 25, 1929.

Hearing Denied by Supreme Court June 24, 1929.

1. Mines and minerals 🔑79(1)—Lessees under oil lease requiring payment of advance royalties in installments were on notice of termination indebted to lessors in amount of unpaid advance royalties.

Where oil lease granted lessees exclusive right to drill for, produce, and market oil and gas, and in consideration thereof required lessees to pay lessors advance monthly royalty until such time as lessors' royalties from sale of oil and gas should exceed the advance royalty installments, lessees at time lessors gave notice of termination were indebted for amount of installments which had not been paid.

2. Contracts 🔑252—Executory contract may be rescinded or terminated by consent at any stage of performance.

Executory contract may be rescinded, abandoned, or terminated, either wholly or in part, by mutual consent of respective parties at any stage of their performance.

★Hearing denied by Supreme Court.

3. Contracts ⚷252—"Termination" or "cancellation" of contract, as distinguished from "rescission," means abrogation of so much of contract as remains unperformed.

"Termination" or "cancellation" of conditional contract means to abrogate so much of it as remains unperformed, doing away with existing agreement under agreed terms and consequences, and termination or cancellation is distinguished from "rescission," which means to restore the parties to their former position.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Cancellation; Rescission; Termination.]

4. Contracts ⚷252—Reservation of rights in agreement for termination of future rights under executory contract is binding.

Reservation of rights, contained in mutual agreement for termination of future rights and obligations under an executory contract, is binding upon parties thereto.

5. Mines and minerals ⚷77—Lessors' notice of termination of lease contracts, providing that payment of advance monthly royalties already due was not waived, held not to release lessees as to royalty installments which fell due before service of notice.

Where oil and gas lease provided that lessor should grant lessees exclusive right to drill for, produce, and market oil and gas, that lessees should pay royalty from sale of oil and gas, and should pay advance royalty of stipulated amount per month, notice of termination of contracts given by lessor, providing that payment of advance royalties which had fallen due prior to date of service of notice was not waived, but that no demands would be made for payment of advance royalties for the future, merely terminated right of lessees to possession and use of premises, and released them from their obligation to pay advance royalties accruing after date of service of notice, but did not release them from royalty payments already due.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Actions by Samuel Sanborn against E. Ballanfonte and another. Judgments for plaintiff, and defendants appeal. Affirmed.

F. E. Borton and James Petrini, both of Bakersfield, for appellants.

Willis S. Mitchell, of Los Angeles, T. F. Allen, of Bakersfield, Henry St. Rayner, and Wm. S. White, of Los Angeles, for respondent.

LANDIS, Justice pro tem. The above-entitled actions were consolidated for the purposes of appeal. Action No. 6694 was tried in and appealed from Los Angeles county, and action No. 6695 tried in and appealed from Kern county. The appeals are from the judgments rendered in favor of plaintiff for advance royalties payable monthly which had accrued under two executory contracts whereby plaintiff granted unto defendants, in consideration of the covenants contained in the said contracts, the exclusive right to drill for, produce, and market oil and gas from the lands described for a period of 20 years, and all extensions of plaintiff's government lease, less 30 days. There are two contracts involved in each case, and they are identical in form, but cover different lands and provide for different amounts to be paid as monthly advance royalties, and each action covers a different period of time. The following discloses the material portions of the contracts sufficient for the purpose of considering the questions involved, to wit:

"Plaintiff is first party and defendants second parties: Contracts recite that first party has been granted a permit to prospect for oil and gás and to lease under the Act of February 25th, 1920 (Public No. 146), sections 2 and 11 of T. 27 S., R. 18 E., Mt. B. & M. in Kern County, California, and that second parties are desirous of developing oil and gas on a portion of said lands. * * *

"Now, therefore, the first party for and in consideration of the payments, agreements and stipulations hereinafter specified does hereby grant to said second parties the exclusive right to drill for, produce and market oil and gas from the following described portion of said lands pursuant to the terms of said permit and the lease or leases to be hereafter granted by the U. S. Government, to-wit: (Here follows description of the land.)

"In consideration of which the second parties do hereby agree as follows: In substance, to comply with and abide by all the terms and regulations of said permit * * * and with all regulations of the Department of the Interior relating thereto; to furnish such bonds as are required by the United States Government; pay all royalties accruing to the United States Government and pay 93 per cent, of all taxes that may be levied against said lands."

It then provides as follows:

"Said second parties agree and are hereby bound unto said first party to install upon said lands a substantial and adequate drilling outfit, and to begin actual drilling operations thereon within sixty days from the date hereof, and to drill diligently and continuously thereon until an aggregate of four wells are completed and brought into production;

"In the event that second parties drill first well to a depth of 2,000 feet and oil or gas in commercial quantities is not encountered therein, second parties may, at their option, by a good and sufficient instrument in writing, cancel this contract and abandon lands covered thereby, without any further obligations to first party;

"Said second parties agree and are hereby bound unto said first party to pay to said

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

first party a royalty of seven per cent. of all of the oil and gas produced on said lands, or seven per cent. of the receipts from the sale thereof, at the option of the first party. Said royalties are to be paid on the 15th of each and every month following the month in which produced;

"This contract shall cover the entire term of first party's lease of twenty years and all extensions thereof, less thirty days;

"Said second parties agree and are hereby bound unto first party to pay to first party an advance royalty of $300 per month, same to be paid as follows: $300 upon the execution of this contract and $300 on the 25th day of each and every month thereafter until such time as first party's royalties from the sale of oil or gas begin to exceed $300 per month, after which time said royalties so advanced shall be deducted from the excess royalties of first party, over and above $300 per month, until all of said royalties so advanced have been refunded;

"Any and all advance royalties paid to first party by second parties shall not be refunded to second parties except as above specified;

"Second parties to furnish logs and data necessary in making reports to the government."

The above contract provides for monthly payments of $300 and the other contract for monthly payments of $675, and each covers different lands.

It is shown that pursuant to the provisions of said contracts defendants paid to plaintiff the monthly payments of $300 for the months of May, June, July, and August, 1923, and the monthly payments of $675 for the months of May, June, and July, 1923, and failed to pay any monthly payments thereafter falling due, and at all times failed to comply with any and all of the terms and conditions of said contracts, except the above-mentioned payments of monthly advance royalties.

In action No. 6695 (Kern county action), commenced July 3, 1924, plaintiff sought to recover under the contract providing for $300 monthly payments the sum of $3,000, covering the 10 months beginning with September, 1923, and ending with June, 1924, and under the contract providing for $675 monthly payments the sum of $7,425 covering the 11 months beginning with August, 1923, and ending with June, 1924.

In action No. 6694 (Los Angeles county action), commenced April 29, 1925, plaintiff sought to recover under the contract providing for $300 monthly payments the sum of $3,000 covering the 10 months beginning with July, 1924, and ending with March, 1925, and under the contract providing for $675 monthly payments the sum of $6,750 covering the same 10 months, and as a third cause of action sought to recover the total amount under a common count in assumpsit for money in the principal sum of $9,750, and $425.45 interest; and by supplemental complaint filed March 5, 1926, sought to recover an additional $975 covering the monthly payment falling due May 25, 1925, $300 under one contract and $675 under the other contract. Subsequent to the commencement of said actions, to wit, on June 15, 1925, plaintiff caused written notice to be served on defendants notifying them that all their rights under the two contracts involved herein "are terminated and ended from and after the date of service" of the notice and all their rights to the lands involved are terminated and ended. Then follows a recital of the reasons for the termination, involving various breaches of the terms of the contracts, and the statement:

"You are further notified that this notice is not, and shall not be construed to be a waiver of payment of any advance royalty which has fallen due by the terms of said contracts prior to the date of service on you of this notice, but it is expressly stated herein that no demands will be made by the undersigned for payment of advance royalties under the said contracts or either of them except for the payment of advance royalties which have fallen due under said contracts prior to the date of service on you of this notice.

"You are further notified that nothing in this notice shall be construed to be a waiver or abandonment by the undersigned of any claim for damages arising by reason of your breach of the said contract."

Under their amended answer defendants urged several defenses, none of which was sustained by the trial court, the last one of which appears to be the only one seriously urged on these appeals, and is as follows: "That by service of notice of June 15, 1925, and defendants' assent thereto, the defendants were released from liability under the contracts for payment of previously as well as subsequently accruing installments of rental."

It is the contention of defendants that by the service on defendants of said notice under date of June 15, 1925, plaintiff rescinded the contracts and that the legal effect of such rescission is that from the time of such rescission the contracts became in legal effect void ab initio.

Counsel for defendants concede that it is the rule, regarding ordinary leases for ordinary rental for use and occupation of the ground, that a rescission by the landlord for breach of condition terminates all future liability for rent, but has no effect upon liability for the rentals already accrued at the date of cancellation, and contend that the contracts here involved are not leases, but are in legal effect conditional contracts of sale where the installments are paid, not as rental but as the purchase price for the thing being sold, and that a rescission or cancellation relates back to the beginning of the contract and cancels installments accrued but unpaid, as well as all future installments.

In other words, defendants ignore the terms of the surrender or termination and seek to invoke a forfeiture of plaintiff's right to recover previously accruing installments on the theory that the relation between the parties was that of vendor and vendee, and not lessor and lessee; and by applying the rules applicable to an ordinary conditional and installments sale of realty.

[1] From the undisputed facts that solemn contracts in writing were entered into by and between the parties by the terms of which plaintiff grants to defendants certain rights and privileges, to wit, the exclusive right to drill for, produce and market oil and gas from certain described lands, in consideration of which defendants agree to perform certain conditions among which they agree to pay monthly to plaintiff certain sums therein set forth, that defendants did meet said monthly payments for several months and then not only failed to make any further monthly payments, but failed to perform any of the other covenants agreed to be performed, eliminating from consideration the legal effect of said notice and acquiescence, it very clearly appears that at the time the notice was served upon defendants, under the express terms of the written contracts, defendants were indebted to plaintiff in the several sums sued for, and for which judgments were rendered, and if such rights are lost to plaintiff, it must result from the legal effect of the acts of the parties involved in the serving of said notice by plaintiff and the acquiescence in the notice and the demands of the notice by defendants.

[2, 3] Obviously, therefore, the real issue is one of construction and determination of the legal effect of such acts of the parties. An executory contract may be rescinded, abandoned, or terminated, either wholly or in part, by the mutual consent of the respective parties at any stage of their performance. 6 Cal. Jur. § 230, p. 382; Tompkins v. Davidow, 27 Cal. App. 327, 149 P. 788. "Termination" or "cancellation" of a conditional contract means to abrogate so much of it as remains unperformed, doing away with an existing agreement upon the terms and with the consequences mentioned in the writing, and different from "rescission," which means to restore the parties to their former position. Young v. Flickinger, 75 Cal. App. 171, 174, 242 P. 516, Winton v. Spring, 18 Cal. 451.

[4] A reservation of rights contained in a mutual agreement of termination of future rights and obligations under an executory contract is binding upon the parties to it. Winton v. Spring, supra, 451; Young v. Flickinger, supra, 174 (242 P. 516) Tuso v. Green, 194 Cal. 582, 229 P. 327; McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; Kromér v. Heim, 75 N. Y. 574, 31 Am. St. Rep. 491.

[5] What did the parties mean by the transaction consisting of plaintiff's serving of the notice to terminate or cancel the contracts and the acquiescence of defendants in said notice and the demands contained therein?

When ascertained, that intention must prevail.

It very clearly appears that instead of said notice and acquiescence constituting a rescission of said contracts, and rendering them void ab initio, as contended by defendants, they constituted an agreement—a meeting of the minds of the parties—in complete settlement of the subject-matter of the contracts, in accordance with the express reservations, terms and conditions set forth therein, under which the rights and obligations of defendants thereafter were to be terminated, manifested what the intention of the parties was in respect thereto and expressly reserved unto plaintiff the right of payment and recovery for the advance royalties which had accrued and matured up to the time of service of the notice and released defendants from all their obligation of payment of all advance royalties accruing under the terms of the contracts subsequent to the time of the service of the notice.

In short, the agreement resulting from said notice and acquiescence did not terminate the contracts, or plaintiff's rights that were expressly reserved thereby, but merely terminated the rights of defendants to the possession and use of the premises and released them from their obligations to pay the advance royalties from and after the date of service of said notice of termination.

What we have said disposes of all points urged by defendants. Having disposed of both cases upon their merits, and having found it necessary to affirm the judgments of the trial courts, makes it unnecessary to decide plaintiff's motion for dismissal and defendants' request for diminution of record.

The judgments are, and each is, affirmed.

We concur: TYLER, P. J.; CASHIN, J.

98 Cal. App. 373

PETERS v. UNITED STUDIOS, Inc., et al.★

(Civ. 6706.)

District Court of Appeal, First District, Division 1, California. April 19, 1929.

Rehearing Denied May 18, 1929.

1. Master and servant 🔑301(4)—Legal presumption is that employee hired out under rental agreement for operation of instrumentality owned by master remains servant of general employer.

When a master hires out, under rental agreement, the services of employee for operation of instrumentality owned by the master, together with use of instrumentality, without relinquishing power to discharge servant, legal presumption is that, though hirer directs servant where to go and what to do in performance of work, the servant as operator of instrumentality remains, in absence of agreement to contrary, servant of general employer, and negligence of servant constitutes that of owner of instrumentality.

2. Master and servant 🔑301(4)—General employer may lend servant with instrumentality in such manner as to render person to whom servant is loaned special master.

General employer may lend servant together with instrumentality in such manner as to render person to whom servant is loaned the special master pro hac vice, and hence relieve general employer from liability for servant's negligence in operation of instrumentality.

3. Master and servant 🔑301(4)—General employer, to escape liability for negligence of servant loaned to another, must resign full control of servant.

General employer, in order to escape liability for negligence of servant loaned to another, together with instrumentality, must resign full control of servant for the time being.

4. Master and servant 🔑301(4)—Right to exercise control is decisive in determining liability of general employer for negligence of servant loaned to another.

Right to exercise control rather than the mere fact of its exercise is decisive in determining whether general employer is liable for negligence of servant loaned to another.

5. Automobiles 🔑245(29)—Whether employee hired out to another, together with tractor, remained employee of general employer, held for jury.

Whether employee hired out, together with tractor, to another, was special employee or remained employee of general employer so as to render it liable for his negligence in operation of tractor, *held* for jury, in view of evidence failing to conclusively prove terms of contract of hiring; hence instruction that general employer was liable as matter of law for his negligence was erroneous.

6. Automobiles 🔑246(42)—Instruction authorizing recovery against general employer for negligence of servant hired out to another held erroneous under evidence.

Instruction authorizing recovery against general employer for injuries resulting from negligent operation of tractor by employee hired out to another *held* erroneous, in view of evidence, in that it assumed liability of general employer for negligence.

7. Automobiles 🔑246(30)—Instruction authorizing recovery for injury from negligent operation of tractor held not erroneous because failing to expressly refer to absence of contributory negligence.

Instruction authorizing recovery for injuries resulting from negligent operation of tractor *held* not erroneous as to employee because failing to expressly refer to absence of contributory negligence, in view of fact that it negatived its existence by positing employee's negligence as sole proximate cause, particularly since jury were fully instructed elsewhere on subject of contributory negligence.

8. Trial 🔑243—Instructions on contributory negligence held not so conflicting as to mislead jury.

Instructions on subject of contributory negligence, one of which used words "contributed directly and proximately," another "proximately cause," and a third "contributed in any manner proximately," *held* not so conflicting as to have misled jury, though it would have been better to omit word "directly" in charging thereon.

9. Automobiles 🔑244(6)—Evidence held to sustain finding of negligence as to operator of tractor striking person.

Evidence in action to recover for injuries resulting from being struck by a tractor *held* sufficient to support finding of negligence as to operator.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Frederick Peters against United Studios, Inc., and Kenneth Daum. Judgment for plaintiffs, and defendants appeal. Affirmed as to defendant Daum, and otherwise reversed.

Loeb, Walker & Loeb and Milton H. Schwartz, all of Los Angeles, for appellants.

E. B. Drake, of Los Angeles, for respondent.

DOOLING, Justice pro tem. This is an appeal by defendants United Studios, Inc., and Kenneth Daum from a judgment following a verdict against appellants for personal injuries suffered by plaintiff and respondent Peters.

Peters, who is a moving picture actor, was struck and injured by a tractor belonging to appellant United Studios, Inc., and driven by appellant Daum. At the time of the injury Daum was in the general employ of United Studios, Inc., and had been driving the tractor for such employer for more than a year.

★Rehearing denied.

A few days before the injury to Peters, Daum had been sent with the tractor to the Christie Film Company, and, while Daum was driving the tractor in the filming of a scene for a moving picture comedy being made by the Christie Company, the tractor struck and injured Peters, who was one of the characters in the scene.

The court gave the jury the following instruction: "You are instructed that, as a matter of law and as a matter of fact, the defendant Kenneth Daum, in the driving, management and operation of the tractor that struck the plaintiff on the occasion involved here, was the agent and servant of the defendant United Studios, Incorporated, and any act of negligence, if any, on his part, was the act of negligence of said defendant corporation as well as his own."

Appellant United Studios, Inc., asserts (1) that under the evidence Daum at the time of the injury was in the special employ of Christie Film Company so as to relieve United Studios, Inc., of liability for his negligence as a matter of law; or (2) that at least under the evidence the question should have been left to the jury to determine under appropriate instructions whether the Christie Company had not for the time become Daum's special employer so as to relieve the United Studios, Inc., of such liability. This raises the nice question of general and special employer in its application to the doctrine of respondeat superior which has so often troubled trial and appellate courts.

The evidence, which is substantially without conflict, shows that Daum had been and was in the general employ of United Studios, Inc., as a tractor driver; that, from five to seven days before the occurrence of the injury to Peters, Daum was sent with the tractor by his foreman to the Christie Studios. Daum's testimony, as to what his foreman said at that time, which is the only testimony on the subject, was as follows:

"He told me that I was supposed to go over to the Christie Studios and do whatever they wanted done over there; that I was supposed to go along with the tractor, that they wanted a tractor over there and for me to go along and stay with them until they finished what they wanted."

"Well, he says, 'I have got a trip for you over to Christie's Studios.' He said, 'You are supposed to go over there and stay with Christie Studios until they get through,' and do whatever they wanted done over there, using me until they didn't need me any more, and bring it back and report the time after I got through with Christie Studios."

Daum was also told to report to George Brierly, Christie's foreman, and did so. The first day that he arrived at Christie's the Christie people attached two angle irons to the front of the tractor. Then it was put on a truck and taken to Wilmington. At Wilmington it was used in filming certain scenes of a motion picture, on one occasion being driven by Jimmie Adams, a Christie comedian, and on the other occasions by appellant Daum. In one scene Daum was dressed in Adams' clothes and made up to look like Adams, "doubling for" Jimmie Adams. In the other scenes Daum wore his own clothes and was not made up. In one scene Daum pushed a series of boxes or crates along the pier and in another successively shoved seven crates off the pier into the water with a moving picture actor on top of each crate. At one time at Wilmington the tractor was left running around in circles with no driver and without anybody within forty feet of it. Daum remained at Wilmington with the tractor about four or five days. During that time the tractor was kept each night in a warehouse furnished by the Christie Company. The scenes in which the tractor was used were directed by one Watson, a Christie director. Watson told Daum what to do, but did not undertake to interfere with the mechanical operation of the tractor. Watson testified that he did not arrange with the United Studios, Inc., for the tractor and driver and knew nothing about the contract between Christie's and the United Studios, Inc. He did not talk with anybody about the control which he was to exercise over Daum, but assumed to make what use he saw fit of the tractor and driver.

On the day of the injury to Peters the tractor was brought from Wilmington to the Christie Studios to be used in a scene made to represent a portion of the pier at Wilmington. Daum was to drive the tractor through a doorway and across the stage at a time when Jimmie Adams had fallen down and Adams was to get up and run out of its way. Daum drove the tractor in this manner four or five times and on the last time it struck an obstruction and veered into Peters. In this scene Daum wore no make-up.

Oil and gas were furnished by Christie and Daum kept track of his time and turned it in to the United Studios, Inc., after he took the truck back to them and was paid his regular wages by United Studios, Inc. After the injury to Peters the Christie Company had no further use for the tractor and after the angle irons had been removed, Daum returned with the tractor to the United Studios, Inc.

Other than Daum's testimony as to what he was told to do by his foreman before taking the tractor to Christie's the record is silent as to the contract or arrangement between the United Studios, Inc., and the Christie Company.

There are certain well-settled rules of law applicable to this class of case.

[1] 1. "When a master hires out, under a rental agreement, the services of an employee for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the

hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant must be held to be that of the owner and not that of the hirer of the instrumentality." Billig v. Southern Pacific Co., 189 Cal. 477, 485, 209 P. 241, 244; 1 Labatt, Master and Servant (2d Ed.) 176.

[2] 2. However, the general employer may lend his servant together with an instrumentality in such a manner as to render the person to whom the servant is loaned the special master pro hac vice, and hence relieve the general employer from liability for the servant's negligence in the operation of the instrumentality. Burns v. Jackson, 59 Cal. App. 662, 211 P. 821; Linstead v. C. & O. Ry. Co., 276 U. S. 28, 48 S. Ct. 241, 72 L. Ed. 453.

[3] 3. But "to escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person; and it is necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary cooperation where the work furnished is part of a larger operation." Moss v. Chronicle Pub. Co., 201 Cal. 610, 616, 258 P. 88, 91 (55 A. L. R. 1258); Standard Oil Co. v. Anderson, 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480.

[4] 4. "It is the right to exercise control, rather than the mere fact of its exercise, which is decisive." Umsted v. Scofield Eng. Const. Co. (Cal. Sup.) 263 P. 799, 801; Bartolomeo v. Charles Bennett Cont. Co., 245 N. Y. 66, 156 N. E. 98; 39 C. J. 1274, 1275.

[5] Applying these rules to the evidence above summarized, our problem is this: Under that evidence was the trial court correct in holding that there was no evidence sufficient to overcome the presumption that Daum remained the employee of his general employer, United Studios, Inc., at all times while operating the tractor? And the correct solution of this question depends in turn upon the answer to the further question: Did the United Studios, Inc., surrender wholly and entirely to the Christie Company the right to exercise control over Daum in the operation of the tractor? Because if the United Studios, Inc., retained any right of control over Daum, whether they actually exercised any control at the time of the injury or not becomes immaterial. The question is not "Who was Daum obeying?" but "Who was Daum bound to obey?" Billig v. Southern Pacific Co., supra, page 484 of 189 Cal. (209 P. 241).

Before attempting an answer to these questions it may be well to examine briefly the fundamental basis of the legal presumption that a servant lent or hired with an instrumentality remains the servant of the owner of the instrumentality. The prototype of this class of cases is the case of a driver lent or hired with a horse and carriage. The courts early came to see that the driver, even though borrowed or hired by another, was still performing the services for which he was hired by the owner of the horse and carriage, i. e., driving them. Even though transporting another in the carriage, still in the operation of driving his master's horse and managing his master's carriage he was still doing just what his master had hired him to do. His business for his master was to drive that horse and carriage. The change from a horse-drawn to a self-propelled vehicle creates no change in the basic relation. Daum in driving the tractor, i. e., in its mechanical operation, was doing just what he was employed by the United Studios, Inc., to do. Stewart v. Cal. Imp. Co., 131 Cal. 125, 131, 63 P. 177, 724, 52 L. R. A. 205. It follows that in order to relieve itself from liability under the doctrine of respondeat superior the United Studios, Inc., must affirmatively show that by its agreement with the Christie Company it had for the time surrendered to the latter company all right to control Daum in the operation of its tractor. As the New York Court of Appeals said in a recent case where a steam shovel with its operators had been hired by another:

"The Powers-Kennedy Company, after the shovel had been placed upon the work, directed the engineer of the shovel where to make excavations. It gave no directions as to the details of the work, such as firing the boiler, regulating the steam pressure, applying the levers to start and stop the machinery, maneuvering the boom and bucket, oiling the machinery, or giving care to the steam shovel to keep it in working order. It was important to the defendant, as the owner of the machine, in order that the life of the machine might be preserved, that the engineer and fireman, in respect to these and other details, perform their work with care, skill and judgment.

"When originally employed, the engineer and fireman subjected themselves to the orders of the defendant in respect to all such matters, and became liable to discharge at the defendant's hands, if its orders were disobeyed. In the absence of proof that the defendant, the general employer, surrendered control, in these respects, to the Powers-Kennedy Company, as special employer, it must be presumed that the defendant's power of control continued." Bartolomeo v. Charles Bennett Cont. Co., supra, page 99 of 156 N. E. (245 N. Y. 69).

In order to determine the effect of the evidence relied upon, we may sum it up as follows:

As supporting the claim that appellant United Studios, Inc., surrendered full control of Daum to the Christie Company, that appellant cites:

(1) Daum's foreman told him to take the tractor to the Christie studios and "do whatever they want done."

(2) The Christie Company put angle irons on the front of the tractor so that it could shove the crates around the wharf.

(3) The Christie Company furnished the oil and gas.

(4) Daum drove the tractor in the filming of certain scenes under the direction of Christie's director.

(5) At one time Daum was "made up" to look like Jimmie Adams and "doubled" for Adams in driving the tractor.

(6) The director had Adams drive the tractor in one scene.

(7) In another scene the tractor was permitted to run in circles without any driver.

(8) Daum did not report to the United Studios, Inc., at any time while driving the tractor for the Christie Company.

As supporting the position that United Studios, Inc., did not surrender full control of Daum, respondent cites:

(1) No one testified as to the exact terms of the contract or arrangement between United Studios, Inc., and the Christie Company, and Watson testified that he had no express authority or direction from any one to assume full control of Daum and the tractor.

(2) The United Studios, Inc., hired Daum and retained the right to discharge him.

(3) The United Studios, Inc., continued to pay Daum's wages and he reported his time to them at the conclusion of his work with the Christie Company.

(4) Watson, Christie's director, did not interfere with the mechanical operation of the tractor by Daum while Daum was driving it.

None of these facts are, in our judgment, conclusive either way.

The direction to Daum to do whatever the Christie Company wanted done is equivocal. It might indicate an intention to surrender complete control over Daum and the tractor to the Christie Company, or it might amount merely to a direction to Daum to co-operate with the Christie Company while retaining the general power of control over him in the United Studios, Inc. A direction to do "anything they wanted to take care of" in Umsted v. Scofield Eng. Const. Co., supra, was held not necessarily to indicate an intention by the general employer to surrender complete control of the employee; the court saying that "the jury may well have inferred that the absence of more specific and detailed instructions from Sayre was to be accounted for by the fact that Sims was a skilled electrician, who did not require supervision or control as to the details of accomplishing the task to which he was assigned." The jury might equally infer here that Daum being an experienced operator of the tractor did not require supervision or control in driving it.

The putting of angle irons on the tractor and the furnishing of gas and oil may or may not have been with the consent of United Studios, Inc., and are in any event perfectly consistent with the retention of the general power of control over Daum by the United Studios, Inc.

The fact that Daum and the tractor were used in filming scenes of a moving picture and that Daum in one of these scenes was "made up" are persuasive but not conclusive of the exercise of full control by the Christie Company through their director. The fact that Daum was "made up" is no more important than the fact that a driver or chauffeur might wear a uniform furnished by the person to whom the owner had rented a carriage or automobile. Such fact is obviously not conclusive on the question of control. 39 C. J. 1277. Neither in our opinion is the fact that Daum drove the tractor in the filming of scenes under the direction of Watson. It is true that in so doing Daum at Watson's direction must co-ordinate the movements of the tractor with the movements of the actors so as to get the desired effect in the finished film. But basically the situation was no different in this respect than in the case of Standard Oil Co. v. Anderson, supra. In that case the general employer had let a steam winch and drum with a winchman to a master stevedore to assist in loading a ship. In hoisting and lowering the cargo the winchman acted on a signal from the stevedore's foreman. The Supreme Court of the United States in sustaining a verdict against the general employer based on the negligence of the winchman said:

> "Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed co-operation rather than subordination, and is not enough to show that there has been a change of masters."

The fact that the director had Adams drive the tractor in one scene and had it running in circles without a driver in another is not determinative of the question of who had the right of control over Daum when he was driving the tractor. Watson himself testified that he had no express authority or directions from any one as to the extent of the control to be exercised over Daum and the tractor by himself. He may have gone beyond his rights in taking the control of the tractor from Daum, and while the United Studios, Inc., would have been relieved of liability for any mishap that might have occurred while Daum was not operating the tractor, that does not necessarily determine the question of their liability when Daum was operating it. The question is, "Who, at the time and place of the collision, had authoritative control?" Billig v. Southern Pacific Co., supra, page 483 of 189 Cal. (209 P. 243).

The fact that Daum did not report to the United Studios, Inc., while driving the tractor for the Christie Company is not entitled to great weight. The right to control may exist without its exercise.

We conclude that it cannot be said from these facts that the court should have held as a matter of law that Daum at the time of the injury to Peters was the special employee of the Christie Company so as to necessarily relieve appellant United Studios, Inc., of liability for his negligence.

An examination of the facts relied upon by respondent to sustain the instruction of the trial court that United Studios, Inc., was the employer of Daum at the time of the injury and responsible for his negligence as a matter of law, satisfies us that they are likewise not conclusive on that question.

The right to hire and discharge and the payment of wages by the general employer are evidentially important, but not conclusive of the fact that the general employer has retained control. Linstead v. C. & O. Ry. Co., supra.

While the failure to control the mechanical operation of the tractor is likewise evidentially important (Bartolomeo v. Charles Bennett Cont. Co., supra), yet it was said in Burns v. Jackson, 59 Cal. App. 662, at page 668, 211 P. 821, 824, that "such matters would naturally be left to the judgment of the driver, who was better qualified and in a better position than the employer to exercise such judgment." The question is, again, not what control was actually exercised, but who had the authoritative right to control.

The fact that the terms of the contract of hiring were not conclusively proved left it, in our judgment, to the jury to determine from all the evidence who at the time and place of the injury had the right to exercise exclusive direction and control of the conduct of Daum.

In the last analysis the question really depends on the construction to be given to the direction to Daum to "do whatever they want done" in the light of all the proved circumstances in the case. That was peculiarly a fact to be determined by the jury and should not have been taken from them.

We conclude, therefore, that the court erred in instructing the jury as a matter of law that appellant United Studios, Inc., was liable for the negligence of Daum.

We likewise conclude that under the evidence in this case the question of whether or not Daum remained subject to the control of United Studios, Inc., so as to render them liable for his negligence, should have been left to the jury to decide under appropriate instructions by the court. This conclusion, we believe, is in harmony with all the decisions.

In considering the decisions it must be kept in mind that they fall into three classes: (1) Those in which the court held as a matter of law that the general employer was liable; (2) those in which the court held as a matter of law that the special employer was liable; (3) those in which the court held that the question was, or should properly have been, one for the jury to determine.

In the first class falls the Billig Case, relied on by respondent. In that case the owner of a truck let truck and driver to another. The hirer superintended the loading and unloading, but exercised no control over truck or driver while on the road. For the negligence of the driver while on the road with a load the court held the owner of the truck liable as a matter of law, saying (pages 485, 486 of 189 Cal. [209 P. 244]): "While the evidence in the instant case shows that Geiger, under the implied terms of the claimed contract of hiring, possessed and exercised authority to control the conduct of Pratt in the work of loading and unloading, nevertheless, so the evidence shows, Geiger never assumed the right to direct and control Pratt in his operation of the truck while in transit, and there is no evidence showing, or tending to show, with respect to the operation of the truck, while in transit, that the defendant relinquished unto Geiger the right to control Pratt."

The difference on their facts between the Billig Case and the instant case is obvious.

Typical of the second class of cases is Linstead v. C. & O. Ry. Co., supra. There two railroad companies had a reciprocal agreement by which each lent the other an engine and crew for certain hauling over the other's tracks. While the lent engine and crew were operating over the borrowing company's tracks they were subject exclusively to the borrowing company's control, a fact that was proved unequivocally and without conflict. There the United States Supreme Court held the special employer liable as a matter of law. There was no such unequivocal proof in the instant case.

In the third class fall most of the cases cited on this appeal. Of this class of cases Labatt says that "it is scarcely permissible to lay it down as a doctrine universally accepted, that a jury is never warranted in inferring a suspension of the general employer's control, unless there is some direct and specific evidence which goes to show that it was intended by the parties to the contract that the driver should be entirely subject to the control of the hirer with respect to the management of the team. But the continuance of the general employer's control has been affirmed in cases of this class so frequently, and with relation to such a large variety of circumstances, that there would seem to be good grounds for saying that this doctrine really sums up the effect of the authorities as a whole. Whether this view be well founded or not, it will, at all events, be apparent from a perusal of the decisions collected in the subjoined note that it is extremely difficult to make good a claim or a defense based upon the theory that a person sent to take charge of a vehicle hired from his general employer was under the hirer's control in such a sense as to have become his servant for the time being." 1 Labatt, Master and Servant (2d Ed.) 176, 177. In a recent case in our Supreme Court (Umsted v. Scofield Eng. Const. Co., supra) it was held that the question whether the general employer was liable should have been submitted to the jury and that the trial court erred in charging, as a matter of law, that the special employer had become pro hac vice the responsible employer. There the decedent, who was employed by his general employer as an electrician, was hired by a construction company from the general employer on a cost-plus basis for employee and material. His wages were paid by the general employer and he was told to do "anything they wanted to take care of." On the job the construction superintendent of the construction company had directed him as to what was to be done, but not as to how to do anything. The Supreme Court said: "The jury might have inferred that the instructions given by La Barr [of the construction company] were merely directions as to the result to be accomplished, such as are required in the nature of things to be given to independent contractors in any case. By reason of the character of the work, it would have been impossible for the duly authorized agents of the construction company and the electric company to have agreed beforehand as to the precise work to be done."

This language fits our case like a glove. To this class of cases likewise belongs Burns v. Jackson, 59 Cal. App. 662, 211 P. 821. In that case the court affirmed a judgment where the question of the liability of the special employer had been left to the jury as a matter of fact. While it is true that on the first appeal in that case the court affirmed a nonsuit as to the general employer, the evidence was not set out, the court contenting itself with the statement that "the testimony shows without contradiction that at the time of the collision referred to both truck and chauffeur were under the control and management of the defendant Jackson [the special employer]." Burns v. Southern Pacific Co., 43 Cal. App. 667, 669, 185 P. 875, 876. If the testimony so showed without contradiction, of course the general employer was properly dismissed. Linstead v. C. & O. Ry. Co., supra.

Lastly, appellant relies much upon Famous Players Lasky Corp. v. Ind. Acc. Comm., 194 Cal. 134, 228 P. 5, 34 A. L. R. 765. There the general employer furnished two airplanes with fliers for use in a moving picture. The fliers were accompanied by two representatives of the general employer, who told them to "put themselves under the direction of the representatives of the petitioner herein [the special employer] as to the details of said flight"; the representatives of the general employer then tacitly consented, by their silence, while the special employer directed the pilots to fly lower than they thought safe and in making such a flight one of the fliers was killed. The Industrial Accident Commission made an award against the special employer, which was affirmed. This case is very similar to ours upon its facts, and undoubtedly justifies our conclusion that the trial court erred in instructing the jury, as a matter of law, that the United Studios, Inc., remained liable for Daum's negligence. But it does not require us to hold, as appellant contends, that under the evidence the Christie Company must be held, as a matter of law, to have acquired the entire right of control over Daum so as to relieve United Studios, Inc., from liability. It is to be observed in that connection, first, that the Supreme Court in that case was affirming a decision of the Industrial Accident Commission on the facts, and, second, that that case differed from ours in the important particular that the representatives of the general employer were present on the ground, expressly told the pilots to put themselves under the direction of the special employer, and then by their silence tacitly acquiesced in a direction by the special employer to fly lower, even when the pilots in their hearing objected that they feared it would be dangerous to do so. These facts might have justified the Supreme Court in holding that the general employer had surrendered the entire right of control, as a matter of law, had it been necessary to do so. They are essentially different from the facts here under consideration.

Respondent argues that cases under the Workmen's Compensation Act are, in any event, based upon a different principle of law, and therefore are not controlling in a case involving the question of respondeat superior. Under the New York statute the New York Court of Appeals has held that the principle applicable to the two classes of cases is identical; i. e., that the special employer can be held liable for compensation under the Workmen's Compensation Act only when he would be liable to a third person for the injured employee's negligence. Schweitzer v. Thompson & Norris Co., 229 N.

Y. 97, 127 N. E. 904. This would seem to be the logical rule, and in the first California case holding both a general and special employer liable for workmen's compensation our Supreme Court said: "The definitions of 'employer' and 'employee' in our workmen's compensation law (sections 13, 14) are broad enough to include both the general and the special employer, and as such contracts of employment, express and implied, were recognized before the constitutional amendment, we do not see why either or both might not give jurisdiction to the Industrial Accident Commission." Employers' L. A. Corp. v. Ind. Acc. Commission, 179 Cal. 432, 439, 177 P. 273, 275.

We may therefore assume that the principles involved in the two classes of cases are identical. So assuming, we are satisfied that there is nothing inconsistent with our conclusion in any of the cases.

[6, 7] Appellants complain of the following instruction given by the court: "You are instructed that it was the duty of the United Studios, Inc., through its agent and servant in charge of the tractor that struck the plaintiff, to have used ordinary care and prudence in the management and operation thereof, and if you find under the evidence that the said driver of said tractor did not use the care of an ordinarily prudent person, but, on the contrary, negligently operated the said tractor, and that said negligence, if any, was the sole proximate cause of any injuries to plaintiff, then you will find damages in favor of plaintiff and against defendants, and each of them, as defined in other instructions herein."

As to appellant United Studios, Inc., this instruction is subject to the same vice as the instruction hereinabove discussed and assumes the liability of that appellant for the negligence of Daum.

As to appellant Daum, it contains a correct statement of the basis upon which he could be held liable. Counsel complains that it does not expressly refer to the absence of contributory negligence. But it does negative its existence by positing defendant's negligence as the *sole* proximate cause. Elsewhere the jury were fully instructed upon the subject of contributory negligence and they could not have misunderstood the meaning of the word "sole" in this instruction.

[8] "Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understand it." Douglas v. Southern Pac. Co. (Cal. Sup.) 264 P. 237. This is certainly true when the instruction states the law with entire correctness. Appellants likewise complain, without any citation of authority, that conflicting instructions were given on the subject of contributory negligence. One instruction used the words "contributed directly and proximately," another "proximately cause," and a third "contributed in any manner proximately." It would seem better to omit the word "directly" in charging on proximate cause, although it was not disapproved in Olsen v. Standard Oil Co., 188 Cal. 20, 25, 26, 204 P. 393, and the verb "contribute" seems preferable to "cause" in charging on contributory negligence. But the jury cannot have been misled by, or have misunderstood, the instructions as a whole.

It is also doubtful if appellants are in a position to complain in view of the fact that the transcript does not show that these instructions were not given at appellants' request. Sutter Butte Canal Co. v. American R. & A. Co., 182 Cal. 549, 553, 554, 189 P. 277; Bognuda v. Pearson, 71 Cal. App. 105, 110, 111, 234 P. 857.

[9] Appellants finally assert that there is no evidence to support the finding of negligence. With this we cannot agree. Daum had driven the tractor through the same opening three or four times. There is evidence that he had a clearance on each side of from eighteen inches to two feet. On the last time through this opening the wheel of his tractor struck a projection and the tractor veered around and struck the plaintiff. The plaintiff testified that after striking the projection the truck came faster. From this evidence the jury was clearly warranted in finding either that Daum negligently drove too near the projection or after striking it negligently accelerated his motor or both.

In accordance with the views herein expressed the judgment is affirmed as to appellant Daum and reversed as to appellant United Studios, Inc.

We concur: TYLER, P. J.; KNIGHT, J.

98 Cal. App. 400

JEFFORDS et al. v. YOUNG et al. (Civ. 3748.)

District Court of Appeal, Third District, California. April 20, 1929.

1. Judgment 🔑405—Equity will give relief from judgment procured by extrinsic fraud, mistake, or excusable neglect not resulting from complainant's negligence or laches.

Equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake, or excusable neglect which was not the result of negligence or laches on the part of complainant.

2. Judgment 🔑436, 443(1)—Equity will not set aside judgment procured by intrinsic fraud or through complainant's gross negligence.

Equity will refuse to interfere to set aside judgment which has been procured by extrinsic fraud, or through gross negligence of complainant, and judgment procured by forged instruments or perjured testimony is the result of intrinsic fraud against which equity will not furnish relief in a collateral attack.

3. Judgment 🔑443(1)—"Extrinsic fraud" will alone justify equity in setting aside judgment.

"Extrinsic fraud," which consists of such conduct as prevents a real trial upon the issues involved, may result from failure to notify injured party of time of trial, or any other act or omission which procures his absence or the absence of material witnesses, and it alone will justify court of equity in setting aside judgment.

[Ed. Note.—For other definitions, see Words and Phrases, Second and Third Series, Extrinsic or Collateral Fraud.]

4. Judgment 🔑432—Serious illness of complainant's counsel, preventing his appearance at trial or fair presentation of case, may warrant equitable intervention to set aside judgment.

Serious illness of complainant's counsel, which prevents his appearance at the trial, or fair presentation of complainant's case, may warrant intervention of equity to set aside judgment, where situation could not have been anticipated or avoided by exercise of due diligence.

5. Quieting title 🔑39—In suit by purchasers under unrecorded deed against subsequent purchaser to quiet title, defendant could set up his title and seek affirmative relief.

In suit by purchasers under unrecorded deed against subsequent purchaser to quiet title on ground of fraud, subsequent purchaser had right to set up his own legal title in the answer, asserting his ignorance of plaintiff's equitable title, and praying for affirmative relief.

6. Judgment 🔑453—Purchasers under unrecorded deed, alleging subsequent purchaser had notice of contract and that default judgment against them quieting title in subsequent purchaser was due to their misinformation, as result of their attorney's having been incapacitated by illness, could have judgment set aside.

Purchasers of property under unrecorded deed, under complaint alleging that vendors subsequently sold property to defendant having notice of plaintiffs' contract, and that defendant in their suit to quiet title prayed for affirmative relief to have his title quieted against them, *held* entitled to intervention of equity to set aside default judgment quieting defendant's title, on showing that they were misinformed by their attorney that the case was to be continued, and that such misinformation, followed by their failure to appear, resulted from serious illness of attorney, which wholly incapacitated him for service, and as result of which he subsequently died.

7. Judgment 🔑443(2)—Judgment procured by mutual fraud or collusion of complainant's attorney with adverse parties or counsel may be vacated.

Judgment procured by means of mutual fraud or collusion of complainant's attorney with adverse parties, or their counsel, may be set aside on proper showing.

8. Judgment 🔑432—Equity will furnish relief to client damaged, so as to shock conscience, by action of attorney who has become incapacitated without client's knowledge or fault.

When attorney becomes physically or mentally incapacitated, without knowledge or fault of his client, and, as result of his acts or conduct during such period of incapacity, client is so damaged as to shock conscience, equity will furnish relief.

9. Quieting title 🔑10(2)—Holder of equitable title to realty may not sue holder of legal title to quiet title.

Suit to quiet title on part of one who owns only equitable title to real property will not lie against owner of legal title.

10. Judgment 🔑447(1)—Equity will not vacate judgment, if result would be the same on another trial.

Equity will not perform idle act of vacating judgment where it appears that another trial would result in the same judgment.

11. Quieting title 🔑17—Purchasers under unrecorded deed, in action to quiet title against subsequent purchaser as record owner, could, under defendant's prayer for relief have defendant's title quieted, subject to their equitable claim, on proof that defendant took with notice.

Purchasers of real property under unrecorded contract, though not entitled to have their title quieted as against subsequent purchaser who recorded his deed, could assert equitable claim as against subsequent purchaser's prayer to have title quieted in him, and could have his title quieted, subject to their equities, on proof that vendors induced them to refrain from recording their deed, and subsequent purchaser had knowledge of their contract.

12. Judgment 🔑407(2)—Suit to set aside judgment held not barred by adverse decision on complainants' motion to set aside judgment (Code Civ. Proc. § 473).

That complainants had unsuccessfully resorted to motion to set aside judgment for fraud, mistake, or excusable neglect under Code Civ. Proc. § 473, *held* not to bar suit in equity to have judgment set aside for the same cause.

13. Judgment ⚷453—Purchasers under unrecorded deed, against whom subsequent purchaser obtained judgment quieting title, could not have judgment set aside as against bank as escrow holder.

Purchasers under unrecorded deed, against whom default judgment was rendered quieting title in subsequent purchaser, had no right of action to set judgment aside as against bank in which contract and deed were deposited in escrow and which refused delivery of deed on payment of price.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Suit by C. D. Jeffords and others, a copartnership doing business under the name of the Jeffords-Schoenmann Company, against Thomas I. Young and others. Judgment for defendants, and plaintiffs appeal. Affirmed in part, and in part reversed and remanded, with directions.

Hedley Richmond, of Los Angeles, and M. C. Atchison, of Calexico, for appellants.

Ault & MacKinnon, of Calexico, and A. L. Hubbell, of Escondido (Harry W. Horton and Kendall B. Perkins, both of El Centro, and Edgar B. Hervey and M. W. Conkling, both of San Diego, of counsel), for respondents.

THOMPSON, J. This is an appeal from a judgment entered upon default of the plaintiffs for failure to amend their complaint after separate demurrers thereto had been sustained.

This suit was brought to set aside a final judgment against the plaintiffs quieting title to the "Young ranch," consisting of 20 acres of land in Imperial county, Cal., which judgment upon appeal was affirmed by the Supreme Court. Jeffords v. Young, 197 Cal. 224, 239 P. 1054. The complaint in this case alleges that plaintiffs executed a written contract with the defendants, Thomas I. and Lillie E. Young, on December 31, 1921, to purchase said property for $4,200, upon specified terms; that the contract and deed of conveyance were deposited in escrow with the Central Bank of Imperial Valley at Calexico, where plaintiffs subsequently paid, from time to time, the aggregate sum of $3,600, which was applied on the purchase price of the ranch; that they immediately took possession of the premises and made valuable improvements thereon; that on July 27, 1923, they tendered at said bank the further sum of $525, which was refused upon the grounds that the bank was no longer the owner's agent, and that all documents involved in the transaction had been returned to them.

The complaint further alleged that the plaintiffs were persuaded by the vendors not to record their contract for the reason that it would impair the owner's credit; that despite their contract and the receipt of a substantial proportion of the purchase price of said land, the Youngs, without the knowledge of appellants, subsequently, on August 1, 1923, sold and conveyed said premises for a valuable consideration to one W. H. Lorenz, who had knowledge of the existing contract of appellants; that the grantee immediately thereafter recorded his deed; that appellants learning of said transfer promptly filed suit against the defendants, Youngs and their grantee, Lorenz, to quiet title to said land; that the defendants Youngs filed a disclaimer and Lorenz answered, setting up his purchase of the land, his ignorance of appellants' claims, and praying for affirmative relief to the effect that his title be quieted against them. It was alleged that the cause was regularly set for trial in the superior court of Imperial county for October 25, 1923; that just prior to said date of trial, and on October 23d, Wilbur Randall, an attorney of Los Angeles, who had been employed to assist plaintiffs' regular attorney, Hedley Richmond, "telephoned to plaintiffs, that said cause was to be continued, by stipulation of counsel * * * and that he had arranged * * * for the filing of an amended complaint therein. That acting under such instructions, plaintiffs herein did not attend the trial, had on the 25th day of October, * * * and were absent from Imperial County, California, at the time of said trial. * * * That the plaintiffs * * * did believe that the trial of said cause would be continued, * * * and but for the statement of the attorney, Wilbur Randall, the plaintiffs and their said attorney Hedley Richmond, would have been present at such trial, on the 25th day of October, 1923."

It was further alleged "that said attorney Wilbur Randall, on the day of and during the trial of said cause was sick with a very high fever, caused by an attack of pneumonia and in fact died a few days after said 25th day of October, 1923, * * * from such disease," and that said lawyer at the trial of said cause was wholly incapacitated on account of his illness, to appear or properly represent the plaintiffs; that because of said erroneous information plaintiffs failed to appear at the trial in person or by their regular attorney, or to adduce evidence of their equitable title, and that the court therefore rendered and entered judgment against them, quieting title to said land in the grantee, Lorenz, dismissing the action as to the Youngs and finding that plaintiffs had no right, title, estate, or equity in or to the premises. Thereupon the plaintiffs were subsequently ousted from their possession of the premises.

The plaintiffs immediately moved the trial court to set aside the former judgment, which motion was denied, and upon appeal therefrom the judgment and order were affirmed. From the opinion of the Supreme Court in the case of Jeffords v. Young, supra, it appears that the motion to vacate the former judgment was made under the provisions of section 473 of the Code of Civil Procedure, but that no affidavits of merit were filed in support of the motion. The court says: "In the present case, * * * the clerk's transcript does indicate affirmatively that no affidavits were on file which could have been used in support of the motion. * * * The order denying that motion must, therefore, be affirmed." It is true that subsequently the plaintiffs renewed their motion to set aside that judgment and asked the trial court to grant a new trial, upon which subsequent motion affidavits of merit were filed. This motion, however, was also denied, and the plaintiffs failed to appeal therefrom. They perfected their appeal only from the former order. Regarding this motion for relief, the Supreme Court said: "Upon the showing there made the learned trial judge might well have granted the relief prayed for * * * upon the ground of excusable neglect. * * * No appeal was taken from this order and we are, therefore, without jurisdiction to review it. The only notice of appeal which appears in the record * * * is directed solely at the judgment and the order of December 14, 1923," which was unsupported by affidavits.

[1, 2] Equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake, or excusable neglect which were not the result of negligence or laches on the part of the complainant. Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 656, 221 P. 368; Estate of Ross, 180 Cal. 651, 658, 182 P. 752; Clavey v. Loney, 80 Cal. App. 20, 251 P. 232. It will, however, refuse to interfere in an action where a judgment has been procured by intrinsic fraud or gross negligence of the complainant. Clavey v. Loney, supra. A judgment procured by forged instruments or perjured testimony is the result of intrinsic fraud, against which equity will not furnish relief in a collateral attack. Pico v. Cohn, 91 Cal. 129, 133, 25 P. 970, 27 P. 537 (13 L. R. A. 336, 25 Am. St. Rep. 159).

[3, 4] Extrinsic fraud alone will justify a court of equity in setting aside a judgment. Extrinsic fraud consists of such conduct as prevents a real trial upon the issues involved. It may result from a failure to notify the injured party of the time of trial or any other act or omission which procures his absence or the absence of material witnesses. 15 Cal. Jur. 10, § 121. The serious illness of complainant's counsel, which prevents an appearance at the trial or a fair presentation of his cause, and which situation by the exercise of due diligence could not have been anticipated or avoided, may warrant the intervention of equity. 3 Freeman on Judgments (5th Ed.) 2598, § 1247.

[5, 6] In the present case it appears that the appellants held a valid contract to purchase the real property involved in this action, upon which they had paid or offered to pay substantially the entire purchase price; they were persuaded not to record their agreement. Secretly and fraudulently the owners sold and conveyed this land to another purchaser. Upon the discovery of this fraud the appellants promptly filed a suit to quiet the title to this land. The grantee answered the complaint, setting up his legal title, asserting his ignorance of the plaintiffs' equitable title, and praying for affirmative relief. This he was permitted to do. Brooks v. White, 22 Cal. App. 719, 136 P. 500. The issues of this suit were thus settled, and the case was definitely set for trial. It was alleged in the present case that without the fault of these appellants and solely because of the serious illness of their lawyer who had active charge of the case, which illness wholly incapacitated him for service, and as a result of which he subsequently died, they were furnished with erroneous information which resulted in their absence from the trial and prevented them from adducing evidence in support of their equitable title, and that therefore the judgment was rendered against them. That judgment, upon a proper showing, should have quieted title in the grantee, Lorenz, subject to the equitable claim of the plaintiffs. Equity should furnish relief from this unjust situation.

[7, 8] A judgment procured by means of actual fraud, or collusion of the complainant's own attorney with the adverse parties or counsel, may be set aside upon a proper showing. 1 Freeman on Judgments (5th Ed.) 503, § 249; 1 Black on Judgments (2d Ed.) 350, § 344; Anthony v. Karbach, 64 Neb. 509, 90 N. W. 243, 97 Am. St. Rep. 662. Ordinarily a client is chargeable with the negligence of his own attorney. Smith v. Tunstead, 56 Cal. 175; Romero v. Snyder, 167 Cal. 216, 138 P. 1002; Alferitz v. Cahen, 145 Cal. 397, 78 P. 878; 1 Freeman on Judgments (5th Ed.) 495, § 248. But manifestly, when, without the knowledge or fault of a client, his attorney becomes physically or mentally incapacitated so that his acts or conduct which are controlled thereby leads to a damaging result in pending litigation so detrimental and unjust as to shock the conscience, surely equity will furnish relief.

[9-11] The respondents contend that equity will not interfere with the judgment in the present case, for the reason that the appellants possessed merely an equitable title to

the land, and that the suit to quiet title may therefore not be maintained against the grantee who holds the legal title. It is true that a suit to quiet title on the part of one who holds only an equitable title to real property will not lie against one who owns the legal title. Chase v. Cameron, 133 Cal. 231, 65 P. 460; Kennedy v. Scally, 62 Cal. App. 367, 217 P. 96; County of Los Angeles v. Hannon, 159 Cal. 37, 48, 112 P. 878. The respondent asserts that because the suit to quiet title will not lie against the owner of the legal title, equity will not perform the idle act of vacating a judgment where it appears that another trial would result the same. This principle is also correct. Painter v. J. B. Painter Co., 133 Cal. 129, 65 P. 311; McCargar v. Bittleston L. & C. Agency, 75 Cal. App. 770, 244 P. 110; Hogan v. Horsfall (Cal. App.) 266 P. 1002. While it is true that the complaint of the appellants stated facts constituting only a suit to quiet title, the answer of the grantee Lorenz set up new matter and asked for affirmative relief, praying that the title be quieted in him. The new matter in the answer is deemed to have been denied, and, in spite of the nature of plaintiffs' original action, they have a right to interpose, against the defendants' claim of legal title, any equitable claim which they may possess, and upon a proper showing the grantee's title should be quieted subject to the valid equitable claim of the appellants. Based upon the facts alleged in the present case, a rehearing of the former case should therefore result in a different decree recognizing the claim of the appellants.

[12] Finally, it is contended that in an effort to vacate the judgment, having unsuccessfully resorted to the remedy provided by section 473 of the Code of Civil Procedure, the appellants are now barred from applying to equity for the same relief. The remedies for relief from a judgment procured by fraud, mistake, or excusable neglect, provided by section 473 of the Code of Civil Procedure, and the ordinary suit in equity, are entirely distinct and cumulative. An unsuccessful resort to the first-mentioned remedy does not bar an application to equity for relief. 15 Cal. Jur. 27, § 127; Estudillo v. Security L. & T. Co., 149 Cal. 556, 561, 87 P. 19; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Herd v. Tuohy, 133 Cal. 55, 63, 65 P. 139; 3 Freeman on Judgments (5th Ed.) 2488, § 1198. In Bacon v. Bacon, supra, at page 484 of 150 Cal. (89 P. 320) it is said with respect to these different remedies: "It [sec. 473, Code Civ. Proc.] is a cumulative remedy, and does not displace the remedy in equity. (Baker v. O'Riordan, 65 Cal. 368 [4 P. 232].) We have recently held not only that it does not displace the equitable remedy, but also that an adverse decision on such a motion does not necessarily bar a subsequent suit to vacate the judgment for the same cause." To the same effect, the author of Freeman on Judgments, supra, says: "The summary disposition of a question upon motion, resulting in a denial of the relief claimed, should not ipso facto preclude the party from obtaining the aid of chancery. * * * The denial of a motion to open a judgment should not of necessity preclude a court of equity from subsequently granting the relief denied at law. The decision of such motion is not such a res adjudicata as precludes equity from reexamining the question. The opening of a judgment in a court of law is usually ex gratia, while restraining the plaintiff from proceeding on the judgment is, in equity, more nearly a matter of right. The facilities for investigating the issues presented in the motion are usually much better in equity than at law, owing to the more summary character of the motion proceedings."

We are of the opinion that the complaint in the present action alleges facts sufficient to state a cause of action against the defendants Thomas I. Young, Lillie E. Young, and W. H. Lorenz justifying the aid of equity, and that the former application to vacate the judgment in the statutory proceeding does not bar the remedy here sought.

[13] The complaint does fail to state a cause of action against the defendants A. L. Hubbell and Central Bank of Imperial Valley, and the judgment, so far as it applies to the last-mentioned defendants, is therefore affirmed; otherwise the judgment is reversed, and the trial court is directed to overrule the demurrers of the defendants Thomas I. and Lillie E. Young and W. H. Lorenz and permit them to answer the complaint.

We concur: FINCH, P. J.; PLUMMER, J.

98 Cal. App. 507

PETROTTA v. GERSON. (Civ. 3765.)

District Court of Appeal, Third District, California. April 25, 1929.

1. Contracts 🔑163—Only when repugnant clauses cannot be reconciled does written part of contract control printed portion (Civ. Code, §§ 1651, 1652).

Only when repugnancies between printed and written portions of contract cannot be reasonably reconciled, as required by Civ. Code, §§ 1651, 1652, does written part of contract control the printed portion.

2. Sales 🔑279—Written contract provision that seller would refund initial payment and take back pump, if it did not pump to capacity, required water to be reasonably free from foreign substance.

Where printed clause of sales contract, stipulating that with a lift of 320 feet, by use of 5 horsepower motor, pump sold would raise 41 gallons of water each minute, but that seller would not be responsible for damage caused by presence in water of foreign matter, was followed by written statement that, if pump did not pump to capacity, or was otherwise not acceptable to buyer, seller would refund initial payment and take back equipment, seller merely guaranteed that pump would handle 41 gallons of water each minute, if water was free from impeding impurities, and that only if such water was reasonably free from sand or other foreign substance would seller refund initial payment and take back equipment, if pump would not pump to capacity of 41 gallons per minute.

3. Sales 🔑277—Subsequent written agreement construing guaranty as to capacity of pump could be considered in determining parties' intent.

Subsequent written agreement between parties to sale and purchase of pump, specifically referring to original sales contract, and purporting to construe guaranty as to capacity of pump, could be considered in determining intent of parties in buyer's action to rescind contract on ground of seller's breach.

4. Sales 🔑279—Provision authorizing buyer to avoid contract, if pump was otherwise not acceptable to buyer, did not authorize buyer to repudiate contract on mere whim or caprice.

Provision in contract for sale of pump that contract may be avoided by buyer, if pumping plant does not pump to capacity, "or is otherwise not acceptable to customer," must be construed in connection with entire contract, with view to ascertaining extent and nature of guaranty intended by parties, and, when so construed, would not justify rejecting pump merely because of buyer's whim or caprice, since it related to mechanical operation of pump.

Appeal from Superior Court, Los Angeles County; Elias Rosenkranz, Judge.

Action by John Petrotta against Samuel H. Gerson, doing business under the fictitious name and style of the Westco-Chippewa Pump Company, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Affirmed.

Hoye & Boehler, of Los Angeles, for appellant.

M. J. Finkenstein and Harry A. Finkenstein, both of Los Angeles, for respondent.

THOMPSON, J. This is an appeal from a judgment for the defendant in an action to rescind a contract for the purchase of a pump, for the breach of an alleged covenant on the part of the vendor that it would elevate 41 gallons of water each minute.

Pursuant to a written contract dated January 2, 1925, the respondent sold and delivered to the appellant, at Tujunga, Cal., and installed in his 320-foot well, a Westco-Chippewa pump, for the agreed price of $1,892.42, upon which there was paid the sum of $630.80. By the terms of this contract, which was prepared upon a printed form, it was stipulated in part that, with a lift or depth of 320 feet, by the use of a five horse power motor, the pump would raise 41 gallons of water each minute, except that the printed guaranty clause contained the following provision:

"The equipment described in these specifications was designed primarily to pump clear water, and the company will not be responsible for damage caused by the presence in the water of any foreign matter."

Immediately following the last-quoted paragraph, which appeared in printed form, this statement was written with pen and ink:

"The company agrees, in event pumping plant does not pump to capacity, or is otherwise not acceptable to customer, they will refund initial payment of $630.80 and take back equipment."

Mingled with the water of the well there was a considerable amount of sand, which seriously cut the leather valves in the cylinders, causing them to leak, and thus greatly reduced the quantity of water which the pump would normally raise in a given period of time. After some experimenting the pump failed to produce more than 32 gallons of water per minute. An expert witness, called on behalf of the respondent, testified that this was wholly due to the damaged valves, caused by the presence of sand in the water; that, when this sand was substantially eliminated from the water, the valves could be renewed; and that this pump, operating in a 320-foot well in fairly clear water, would elevate by means of a five horse power motor 41 gallons of water each minute. On the foregoing account, the appellant became dissatisfied with the result of the action of the pump, and complained of it to the vendor. Thereupon, in consideration of the appellant's executing and delivering to the respondent his "trade acceptance" pledge for $1,336.62, which was the balance of the purchase price of the pump,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

including the accrued interest, the vendor signed a subsequent written agreement, March 25, 1926, guaranteeing that, after the sand was eliminated from the water and the valves were renewed, the pump would deliver 41 gallons of water per minute; that, if it was discovered that the deficiency in the delivering capacity of the pump was not due to the effect of the sand, the pump would be repaired without cost to the appellant. This document read in part:

"Witnesseth—that whereas party of the second part [appellant] has this day completed his part of that certain contract of purchase entered into on January 5th, 1925, between the parties hereto, party of the first part [respondent] agrees as follows:

"(1) That if, after pump has been allowed to operate until the water pumped is clear and free of sand or other foreign matter, it does not deliver the rated capacity (41 gallons per minute), the plungers will be removed, examined, repaired, or replaced, and reinstalled.

"(2) If it is found that the failure on the part of the equipment to deliver its rated capacity (41 G. P. M.) is due to any other cause than the presence of foreign matter in the water, no charge will be made for the labor and material necessary to correct same.

"(3) If, after examination, it is found that the trouble is due to sand and/or other foreign matter, then the party of the second part agrees to pay for above-mentioned labor and material.

"(4) It is hereby guaranteed that, if well clears up and delivers clear water, the equipment will deliver its rated capacity of 41 G. P. M., if the supply in the well is adequate, and water level when pumping does not lower below 350 feet below pump head, and party of the second part will be required to make no further payments on account of the purchase contract of January 5th, 1925, until pump is delivering its capacity of 41 G. P. M."

The sand, however, was not eliminated from the water. The appellant replaced the pump with one purchased from another firm, and offered to return to the respondent the pump which is involved in this action, which was refused. On May 27, 1927, the appellant gave notice of rescission of the contract, and commenced this action to cancel the contract and trade acceptance pledge for $1,336.62, and to recover the sum of $630.80, which had been paid on account of the purchase price. The defendant answered, and filed a cross-complaint for $1,336.62, the unpaid portion of the purchase price of the pump. Judgment was rendered against the plaintiff and in favor of the defendant on his cross-complaint.

The appellant contends that the pen and ink paragraph of the original contract of January 2, 1925, which reads, "The company agrees, in event pumping plant does not pump to capacity or is otherwise not acceptable to customer, they will refund initial payment of $630.80 and take back equipment," constituted an unconditional guaranty that the pump would deliver forty-one gallons of water per minute, regardless of the presence of sand in the water; that the pen and ink paragraph above quoted superseded and controlled the preceding printed portion of the contract; that he was privileged to reject the pump, if it was not acceptable to him for any other reason; and that the findings and judgment are not supported by the evidence.

[1] This case depends entirely upon the intent of the parties with respect to the guaranty, which must be ascertained by a construction of the contract. The facts are not seriously disputed. Title 3 of the Civil Code furnishes the rules which will govern in the construction of this contract. It must be interpreted so as to give effect to the mutual intention of the parties. 6 Cal. Jur. 252, § 163. Where the language is unambiguous, the intention of the parties is to be ascertained from the writing alone. The contract is to be construed as a whole, so as to give effect to every clause and portion, if reasonably possible. Where the written and printed portions of a contract are repugnant and irreconcilable, the written portion controls. Section 1651, Civ. Code. Repugnant clauses of a contract, however, should be reconciled, if reasonably possible. Section 1652, Civ. Code. It is only when such repugnant clauses cannot be reasonably reconciled that the written part of a contract will control the printed portion. Jackson v. Snow, 62 Cal. App. 56, 61, 216 P. 60; 6 R. C. L. 848. § 239.

With the foregoing principles of construction in mind, there seems to be little difficulty in determining the intent of the parties as expressed by the contract with respect to the guaranty of the quantity of water which the pump was expected to convey in a specified period of time. The printed and written paragraphs of the guaranty appear to be reasonably susceptible of reconciliation.

[2] It seems quite evident that the respondent intended to guarantee merely that the pump would handle 41 gallons of water each minute, provided the water was free from sand or other impeding impurities. It is unreasonable to expect any pump to convey its ordinary normal quantity of water, when the water is permeated with a large amount of sand, which destroys the efficient use of the valves. The contract specifically provided that the pump "was designed primarily to pump *clear water*, and the company will not be responsible for damage caused by the presence in the water of any foreign matter." It is not unreasonable to construe the succeeding written paragraph to mean that, provided the water is reasonably clear and free from sand or other foreign substance the vendor "will refund the initial payment of $630.80, and take back the equipment," if, under such

circumstances, the "pumping plant does not pump to capacity" of 41 gallons per minute. This is a mere assurance that the normal capacity of the pump was guaranteed to be 41 gallons per minute under ordinary conditions, with the water reasonably free from sand or other foreign substance. The case of Retsloff v. Smith, 79 Cal. App. 443, 249 P. 886, which is relied upon by appellants as authority for the assertion that a written clause in a contract supersedes and destroys a printed clause, regardless of whether they may be reasonably reconciled or not, fails to support his claim. In that case neither the printed nor the written portion of the contract was impaired or destroyed. The court says: "This construction does not nullify the former provision, but harmonizes the two, and gives both provisions life and meaning." This is precisely what the recognized rules of construction require of a court, if it is reasonably possible.

[3] Moreover, it is evident from the unequivocal language of the subsequent written agreement of March 25, 1926, above quoted, that the parties to this action so construed the guaranty. The latter instrument, which specifically referred to the former contract, and which purports to construe the guaranty as to the capacity of the pump, may properly be considered in determining the intent of the parties. 6 R. C. L. 850, § 240.

[4] Nor does the clause in the written portion of the guaranty, to the effect that the contract may be avoided if the "pumping plant does not pump to capacity, or is *otherwise not acceptable* to customer," authorize the vendee to reject the pump or repudiate the contract upon mere whim or caprice. This clause should be construed in connection with the entire contract, with a view of ascertaining the extent and nature of the guaranty intended by the parties. The subject under consideration, which led to the use of the clause pursuant to which the appellant claims the right to reject the pump for no other reason than that it was "not acceptable" to him, was the guaranty of the mechanical operation of a machine to pump water from a well. This would not justify the rejecting of the plant merely because the buyer disliked its appearance, or because it was not painted to suit him, or for any other trivial reason. Under certain circumstances, such language may authorize an arbitrary option to reject a purchased article. But in the absence of language clearly indicating such arbitrary authority, and where the mere mechanical operation of a machine is involved, there must be reasonable cause for rejecting it.

In 6 Ruling Case Law, at page 954, it is said: "A distinction has been drawn between cases where the fancy, taste, sensibility or judgment of the promisor are involved, and cases where only operative fitness or mechanical utility is involved. In the latter class of cases, the subject-matter of the contract is such that the satisfaction stipulated for must be held to apply to quality, workmanship, stability, and other like considerations, rather than to personal satisfaction." In applying the principle of this distinction, there may be some confusion of authorities, but there can be no question that the present case belongs to the class which does not authorize an arbitrary rescission without reason, but rather depends upon the existence of some mechanical defect of the pump. No defect, except the lack of the capacity of the pump, has been urged by the appellant. This clause will therefore not justify the rejecting of the pump or the rescission of the contract without reason.

The case of Tiffany v. Pacific S. P. Co., 180 Cal. 700, 182 P. 428, 6 A. L. R. 1493, which is relied upon by the appellant, clearly belongs to the class of cases which confers arbitrary power to act. It was a suit for damages for breach of a contract to employ an expert workman to finish the manufacture of glazed brick. The plaintiff was entitled to retain his employment so long as he finished "a product satisfactory to the defendant." His work was not satisfactory, and he was discharged. The court said: "Quality was also important, for, if the glaze was not rightly mixed, it would scale off, or crack, after being burned, and, if the color or transparency was not satisfactory to purchasers, the brick would not be as easily sold." In an employment consisting of an occupation that required the exercise of taste or the approval of color and appearance which are difficult to standardize, it was properly held that the workman could be discharged under the provisions of the contract, without assigning specific defects of the product or incapacity on the part of the workman. That case is therefore readily distinguished from the present action.

In view of the foregoing principles of law, it becomes immaterial whether the finding that plaintiff refused to permit the defendant to repair the cylinder valves is supported by the evidence or not. We are of the opinion, however, that the findings are amply supported by the evidence.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

98 Cal. App. 480

Ex parte HAMPTON. (Cr. 1811.)

District Court of Appeal, Second District, Division 1, California. April 24, 1929.

Criminal law 🔑1189—Reversal of judgment without order respecting new trial finally determines action and entitles defendant to discharge from custody (Pen. Code, §§ 1260, 1262).

Under Pen. Code, §§ 1260, 1262, reversal of judgment on appeal from judgment alone, without making any order concerning new trial, operates as final determination of action, thereby entitling defendant to discharge from custody on writ of habeas corpus.

Application by Frank Hampton for writ of habeas corpus. Petitioner ordered discharged from custody.

Schaeffer & Weldon, of Santa Maria, for petitioner.

Clarence C. Ward, Dist. Atty., of Santa Barbara, for respondent.

CONREY, P. J. In this proceeding (wrongly entitled People v. Hampton), a writ of habeas corpus was issued out of the Supreme Court and made returnable in this court.

Upon an information which charged Hampton with the crime of murder, he was found guilty of the crime of manslaughter. On appeal from the judgment of conviction, that judgment was reversed by this court (273 P. 854). The judgment of reversal did not contain any order for a new trial, and there was no appeal from any order denying motion for new trial. But although the judgment of reversal did not order a new trial, this court did not direct that the defendant be discharged from custody. When the remittitur had been received in the superior court of Santa Barbara county, where the action was pending, that court overruled defendant's objections to further trial and retained him in custody awaiting another trial of the action. He now claims the right to be discharged from the custody of the sheriff.

Section 1260 of the Penal Code provides that in rendering judgment upon appeal the court may "reverse, affirm, or modify the judgment or order appealed from, * * * and may, if proper, order a new trial." Section 1262 of the Penal Code provides that: "If a judgment against the defendant is reversed without ordering a new trial, the appellant court must, if he is in custody, direct him to be discharged therefrom. * * *" The decisions to which we have been referred in connection with these provisions of the Penal Code do not answer the particular question presented in this proceeding. It is our opinion, however, that the legislative intention as expressed in the code provisions above noted was that, where the appeal is from the judgment alone, and where the appellate court reverses the judgment without making any order concerning the subject of new trial, such reversal shall operate as a final determination of the action, thereby entitling defendant to discharge from custody. The effect of this decision is that, if there be now existing any cause of action against petitioner Hampton, for the crime of manslaughter, in relation to the transaction out of which the former action arose, the only possible means of prosecution thereof would be by a new action.

It is ordered that the petitioner, the said Hampton, be discharged from custody.

We concur: HOUSER, J.; YORK, J.

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98 Cal. App. 499

PEOPLE v. HIRSCHLER. (Cr. 1530.)

District Court of Appeal, First District, Division 2, California. April 25, 1929.

1. Criminal law 🔑1032(5)—Objections made for first time on appeal, that robbery information omitted certain elements, and that it was uncertain, held unavailable, in view of contention it charged larceny (Pen. Code, § 1012).

In absence of demurrer, defendant's contention, made for first time on appeal, that information charging robbery was insufficient because elements of force and fear and use of dangerous and deadly weapon were omitted, and that information was uncertain for not alleging that taking was from possession or immediate presence of victims, *held* unavailable under Pen. Code, § 1012, where defendant also claimed that allegations were insufficient except as a claim of larceny, since this in itself was a public offense, and it could therefore not be said that information wholly failed to state a public offense.

2. Robbery 🔑17(1)—Information charging robbery held not objectionable for omitting elements of force and fear and use of deadly weapon nor for not alleging taking from possession or immediate presence of victims (Pen. Code § 951, as amended by St. 1927, p. 1043).

Under Pen. Code, § 951, as amended by St. 1927, p. 1043, prescribing form of pleading in criminal cases, information charging that defendants robbed certain person *held* not objectionable because omitting elements of force and fear and use of dangerous and deadly weapon nor for uncertainty in not alleging that taking was from the possession or immediate presence of victims.

3. Criminal law 🔑1119(3)—Alleged improper remark of trial court not in record could not be reviewed by appellate court.

Defendant's objection to alleged remark of trial court set forth in brief could not be considered by appellate court, where such remark was not disclosed by record, since neither party nor appellate court is entitled to go outside of record.

4. Criminal law ⚷372(6)—Evidence of other robberies held admissible to establish conspiracy to rob bootlegging establishments.

In prosecution for robbery of alleged bootlegger's place of business and persons there present, in which theory of prosecution was that defendants formed conspiracy to commit alleged offense and to rob such places and persons in general, evidence that on a different date and at a different place defendants committed a similar offense *held* properly admitted as limited to proof of issue of conspiracy, though it constituted evidence of other crimes; defendant's remedy, if prosecution did not succeed in connecting theory of conspiracy with main offense on trial, being by motion to strike out.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Paul Hirschler and another were convicted of robbery, and named defendant appeals. Affirmed.

Leo Sullivan and J. L. Royle, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and W. Augustine, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against Paul Hirschler and Edward Haight which purported to plead against both defendants the charge of robbing A. F. Bouvier and George Deline. The information alleged two counts, and further alleged that both acts were part of one transaction. The defendants pleaded not guilty, and a trial was had before the trial court sitting with a jury. The jury returned four separate verdicts, finding each defendant guilty on each count. The defendants each made a motion for a new trial. The motions were denied. The defendant Hirschler has appealed from the order and judgment and has brought up a typewritten record.

[1] The charging part of each count in the information followed the same form. That in the first count alleged that "they robbed Alfred F. Bouvier of one purse containing $44.80, more or less, lawful money of the United States, one California Diamond Jubilee 1925 one-half dollar and one United States 1872 half dime." The alleged offense was committed on the 11th day of September, 1928, and the information was filed October 16, 1928. The defendant contends: (1) That the elements of force and/or fear are lacking and no substitution for them is anywhere attempted in the pleading; (2) that an allegation of the use of dangerous and deadly weapon was omitted; and (3) that the information is entirely uncertain, as it does not allege that the taking was from the possession or immediate presence of the victims. No demurrer was interposed. The Attorney General cites section 1012 of the Penal Code and contends that the objections presented come too late. The defendant does not claim that in so far as his objections rest on uncertainty that the same can be presented at this time. However, he does claim that the allegations are insufficient except as a statement of larceny. That exception in itself is a public offense, therefore it cannot be said that the information wholly failed to state a public offense. That being so, it follows that no one of the contentions is available to the defendant at this time.

[2] In what we just stated we have considered the rules of pleading in criminal cases as they existed prior to the amendments of 1927; but the statutes adopted in 1927 enacted important amendments regarding the rules of pleading. Section 951 of the Penal Code, as amended (St. 1927, p. 1043), is as follows: "* * * The people of the State of California against A. B. In the Superior Court of the State of California, in and for the county of ——. The grand jury (or the district attorney) of the county of —— hereby accuses A. B. of a felony (or misdemeanor), to-wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about the —— day of ——, 19—, in the county of ——, State of California, he (here insert statement of act or omission, as for example, 'murdered C. D.')." The enactment of that amendment presents another reason why no one of the objections presented by this defendant is tenable.

[3] The defendant complains of a remark alleged to have been made by the trial court which he sets forth in his brief. He does not inform us as to where the alleged remark is to be found in the record. An examination of the reporter's transcript does not disclose the incident. Neither one of the parties is entitled to go outside of the record and neither is this court entitled to go outside of the record.

[4] The offense alleged in the information consisted of the robbery of an alleged bootlegger's place of business and the persons there present. It was the theory of the prosecution that the defendants formed a conspiracy to commit the alleged offense and to rob such places and persons in general; that because the business of selling intoxicating liquor is proscribed by law persons found in such places could be robbed with impunity and there would be little probability of a prosecution because each individual would hesitate to appear and give testimony. For the purpose of presenting this theory to the trial court the prosecution introduced evidence to the effect that on a different date at a different place the defendants committed a similar offense. It is conceded by the defendant that by a proper instruction the evidence so admitted was duly limited to the proof of the issue of conspiracy. Never-

theless the defendant claims that he should not have been confronted with evidence of other crimes. That contention may not be sustained. People v. Wilson, 76 Cal. App. 688, 245 P. 781. If, at the time the taking of evidence closed, the prosecution had not succeeded in connecting the theory of conspiracy with the main offense on trial, the defendant might have made a motion to strike out, but no such motion was made.

We find no error in the record.

The order and judgment are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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98 Cal. App. 489

FOREST LAKES MUT. WATER CO. et al. v. SANTA CRUZ LAND TITLE CO. et al. (Civ. 6654.)

District Court of Appeal, First District, Division 2, California. April 25, 1929.

1. Waters and water courses 🔑156(4)—Reservation in deed of water from stream was exception rather than reservation and operated to withhold right to water so excepted.

In conveying land, reservation in deed of water from certain stream was exception rather than reservation, and operated to withhold from thing granted right to water so excepted and described.

2. Waters and water courses 🔑156(4)—Right to water in certain stream was proper subject for reservation and exception from grant.

Right to water from certain stream flowing through land was proper subject for reservation and exception from grant of land.

3. Waters and water courses 🔑152(3)—Downstream riparian owners held entitled to prevent diversion of water by persons owning land upstream without riparian rights, water having been reserved in deed.

Downstream riparian owners *held* entitled to prevent diversion of water diminishing natural flow of stream into and upon their lands by owners of land upstream who had no riparian rights owing to reservation in deed to their predecessors in title.

4. Appeal and error 🔑1071(2)—In suit to enjoin diversion of water, finding that plaintiff's lands were riparian, if erroneous because small strip was conveyed without water rights, held not prejudicial.

In suit to enjoin diversion of water from stream, finding that plaintiff's lands were riparian, if erroneous in that 200-foot strip was conveyed without water rights, *held* not prejudicial, where plaintiffs would still be entitled to injunction on account of other riparian lands many times greater in area than such strip.

5. Appeal and error 🔑843(2)—In suit to enjoin diversion of water from stream, defendants' rights as to land not referred to in judgment held immaterial.

In suit to enjoin diversion of water from stream, whether defendants were owners of land containing uppermost reaches of stream with riparian rights *held* immaterial, where judgment made no adjudication about water rights of such land.

6. Waters and water courses 🔑152(6)—In suit involving water rights, neither party was required to prove title in common grantor.

In suit to enjoin taking of water from stream and its use on nonriparian lands, in which it was shown that water rights had been reserved when defendants' land was conveyed, and both parties claimed title through common grantor, it was not necessary for either party to prove title in such common grantor.

7. Waters and water courses 🔑152(3)—Conveyance of water rights to water company for purpose of administration did not sever such rights, precluding landowner from restraining diversion by nonriparian owners.

Where water rights were conveyed for purpose of administration to water company, a nonprofit corporation, company was distributing agency and trustee for landowners, and conveyance was not one which would sever and destroy riparian rights, so as to prevent landowner from suing to restrain diversion of water by owners of nonriparian land upstream.

8. Appeal and error 🔑882(18)—Judgment restraining diversion of water, if erroneous in naming water company as though it were party to action, held not prejudicial to landowner alleging company was agent.

In suit against landowner to restrain diversion of water from stream, any error in injunction and judgment in naming water company as though it were party to action was not error of which owner of land could complain, where he had alleged such company was his agent, and he claimed he was not its alter ego.

Appeal from Superior Court, Santa Cruz County; John F. Pullen, Judge.

Suit by the Forest Lakes Mutual Water Company and another against the Santa Cruz Land Title Company and others to enjoin the taking of water and its use on nonriparian lands. Judgment for plaintiffs, and defendants appeal. Affirmed.

Peck, Bunker & Peck and Clarence M. Hawkins, all of Oakland, and H. H. McPike, of San Francisco, for appellants.

R. T. Harding, of San Francisco, and Maurice Rankin, of San José, for respondents.

KOFORD, P. J. Plaintiffs obtained a permanent injunction against defendants enjoining the latter from taking water from Gold gulch, a stream in the Santa Cruz Mountains. Defendants had been conducting it over their lands and into another watershed for use upon lands not riparian to the stream. Defendants appeal upon a reporter's and clerk's transcript.

The defendants own a tract of land lying to the north of a line which runs in a general east and west direction. The plaintiffs own a tract of land lying south of that line. Most of the part of the stream involved here runs parallel to this line from west to east wholly on plaintiffs' land. But the westerly or upper end of this stream flows down from a northwesterly direction through the lands of the defendants before it reaches the land of the plaintiffs. This upper part of the stream was sometimes referred to by some as the Northwest fork of Gold gulch and in more recent years by others as Limestone brook. It is out of this fork that defendants were enjoined from taking water.

Both parties, plaintiffs and defendants, derive title to their respective lands from a common predecessor and grantor, F. A. Hihn, who owned the entire 1,300 acres on and before 1888. Plaintiffs' title to the water rights in question comes from their riparian ownership of lands upon the main part of Gold gulch which flows through their land and from a reservation and grant of the water rights in that part of the stream (the fork or upper part) which flows through defendants' land. When F. A. Hihn conveyed to defendants' predecessor Russell the defendants' tract of land, he reserved and excepted from the land conveyed the said water rights and they were subsequently conveyed to plaintiffs. Hihn, who was plaintiffs' predecessor, remained the owner of the land to the south of that conveyed to Russell, who was defendants' predecessor, and the water thus reserved and excepted flowed in its natural course into what is now plaintiffs' land. Defendants do not expressly admit that they claim title through the said common grantor F. A. Hihn, but we make the statement from the evidence in the record which well establishes that fact and which is also found to be the fact in the findings of the court.

The reservation and exception of water rights which we have referred to is contained in the deed from said Hihn to Wm. Russell, February 23, 1888. It is as follows: "The said Hihn reserving for himself, his heirs and assigns the water of the Gold gulch and of the Shingle Mill creek so called, and the right to take said water out of the beds of the said streams and to conduct it by means of pipes or flume through and over the land hereby conveyed. Also the right to mine in said Gold gulch for gold and silver." This deed also reserved to the grantor the right to construct certain roads and also gave the grantee the right to construct roads.

The evidence also included a certain deed and agreement of 1912 between Holmes Lime Company and F. A. Hihn Company. These two companies were successors in interest to the grantee and grantor, respectively, in the Hihn-Russell deed of 1888 and were predecessors in interest of defendants and plaintiffs herein, respectively. By this agreement plaintiffs' predecessors F. A. Hihn Company conveyed to Holmes Lime Company certain of the rights reserved by the said Hihn-Russell deed, expressly reserving, however, to said F. A. Hihn Company the right to the water of Gold gulch. As part of the same transaction Holmes Lime Company deeded to F. A. Hihn Company a 200-foot strip of land north of the stream in such a way as to move the boundary line between the parties about 200 feet northwardly from the stream. After this only that part of the stream which now is within defendants' land was left within the land of defendants' said predecessor. That boundary line still remains the boundary between the lands of the defendants and plaintiffs.

The appellants contend that the reservation of the water of Gold gulch was not sufficient in description nor in law to have the effect of severing the right of appellants and their predecessors to take the water from that part of the stream from which they were enjoined from taking it. At the trial it was appellants' contention and their allegation in their answer that they were taking water from Limestone brook, and that that was not a part of Gold gulch stream, but should be considered a different stream. The two parts joined end to end and formed physically one continuous stream.

On this appeal appellants now claim that the part of the stream from which they were enjoined from taking water is the Northwest fork of Gold gulch and as such is again a different stream from Gold gulch. This claim is based chiefly upon a certain call of the description in the Hihn-Russell deed. In the said deed the southern boundary line was in part Gold gulch and in part a line which, after running southeasterly down a "steep brushy spur of the mountain," ran thence to a redwood tree "marked 'W' which stands at the mouth of the northwest fork of the said Gold gulch, etc." It is appellants' contention that the reservation in the deed being in terms the water of Gold gulch, it did not reserve the water of the Northwest fork of Gold gulch.

The court took evidence upon these points and found that this part of the stream was not referred to as Limestone brook until 1912; that in 1888, when the reservation of water was originally made, it was known and commonly referred to as Gold gulch; and that this part of said stream was in fact Gold gulch. The evidence sufficiently supports the finding and was properly received. A thing may have more than one name, and when referred to by any of its names the same thing is meant and designated. The names of things often are such that evidence is required to show what thing is meant by the name.

Upon these points the deed and agreement of 1912, above referred to, between the predecessors in interest of the parties hereto contain declarations and recitals which are important evidence in establishing the fact that the reservation of the water of Gold gulch included that part of the stream from which appellants were taking water. By that transaction the southern boundary of the land of appellants' predecessor was moved away from all of Gold gulch stream except from the fork which still remained within its land. In this transaction the reservation of the water of Gold gulch, to be sensible, therefore, must have referred to the upper part or fork of the stream. Furthermore, appellants' said predecessor, while accepting a conveyance of rights with a reservation in respondents' predecessor of the water in "Gold Gulch," made to the latter a deed to the 200-foot strip in which one of the descriptive calls referred to this fork of the stream as "Limestone Brook, known to grantee as Gold Gulch." This transaction amounts to a declaration of the previous owner of appellants' land that the neighboring owners, respondents' predecessors, had reserved the water of Gold gulch, and that the part of Gold gulch called at that time, by some, Limestone brook, was included within the term Gold gulch. By the said transaction of 1912 respondents' predecessors in interest gave up and conveyed to appellants' predecessors the right previously reserved, to take the water out of the stream and conduct it over the Russell lands, but expressly reserved the water of the stream. From this it resulted that the former's right came to be the right to that water which the upper owner must not take, but let flow down the stream to the lower owner, who could there take it. The latter had no right to take the water, because he had never obtained that right, it having been expressly excepted from his deed.

[1-3] Appellants' attack upon the legal sufficiency of the original reservation of water in 1888 is the claim that it was only a personal agreement, by which the grantor reserved to himself alone certain water for his own use, as in the case of Peterson v. McDonald, 13 Cal. App. 644, 110 P. 465. We find no similarity between the facts of that case and this one. Here in 1888 Hihn reserved for himself, his heirs and assigns, in terms, the water of Gold gulch and also the right to conduct it over the lands conveyed. The reservation of the water was an exception rather than a reservation, and operated to withhold from the thing granted the right to the water so excepted and described. 9 Cal. Jur. 323; Van Slyke v. Arrowhead, etc., Power Co., 155 Cal. 675, 102 P. 816. It was a proper subject for reservation and exception from the grant. San Rafael Ranch Co. v. Ralph Rogers Co., 154 Cal. 76, 96 P. 1092; Walker v. Lillingston, 137 Cal. 401, 70 P. 282; Painter v. Pasadena L. & W. Co., 91 Cal. 81, 27 P. 539; Miller & Lux, Inc., v. J. G. James Co., 179 Cal. 690, 178 P. 716.

The transaction of 1912 between the predecessors of the parties to this action also shows that the original reservation of water was not considered to be a personal covenant for personal use. In that agreement all the various reservations and exceptions contained in the Hihn-Russell deed are recited and set forth in full in the following form:

"Whereas, the reservations, conditions and provisions of said deeds from F. A. Hihn to William Russell are as follows:

"The rights, reserved to F. A. Hihn and *now vested in his successor in interest are.*" Here follows the description of each of said rights, including "the right of the water of Gold Gulch."

From a consideration of the evidence, including the declarations of the predecessors in interest of the appellants, we conclude that the water right in dispute had been properly reserved and described and belonged to respondents. Appellants and their predecessors have had no riparian rights upon the stream since 1888, when the reservation severed the riparian rights then appurtenant to the lands described in the complaint as now owned by appellants. As against the nonriparian appellants, therefore, the respondents, who were clearly riparian owners down stream, were entitled to prevent the diversion by appellants which diminished the natural flow of the stream into and upon respondents' land. 26 Cal. Jur. p. 126, § 330; 26 Cal. Jur. p. 538, § 787; 25 Cal. Jur. p. 1067, § 66; Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 258 P. 1095.

[4] In so far as said water right has been effectively reserved, appellants make the technical point that because respondents' 200-foot strip of land lying along the north bank of Gold gulch was conveyed in the Hihn-Russell deed minus the water rights, the said strip thereupon became nonriparian; that because said strip is a part of respondents' present lands, the finding which declares respondents' lands to be riparian is at least in part untrue. This point is of no benefit to appellants, since respondents would still be entitled to the injunction on account of the many acres of their riparian lands abutting the south bank of the stream, which is many times greater in area than this strip. The exact status of the water rights appurtenant to this 200-foot strip of land is a matter which may not require adjudication until some future time. In the meantime it is no concern of appellants, so far as this litigation goes; their lands described in the complaint being nonriparian to the stream by reason of the facts in this case.

[5] Appellants claim to be the owners of land containing the very uppermost reaches of the stream through a patent to J. H. Logan, and that therefore they have riparian rights there not severed by the reservation made by Hihn and his successors. If appellants proved title to the said land, which we cannot determine from their brief, the point is immaterial because the judgment appealed from established respondents' right to the water in that part of the stream which is "within the boundaries of defendants' (appellants') land described in the complaint." It thus goes no further upstream than the land derived by appellants through Hihn and makes no adjudi-

cation about the water rights of the Logan land.

[6] Appellants offered in evidence a United States patent to Sansevain dated 1885, but did not attempt to prove a chain of title from said patent to themselves. It seems to be their claim that this evidence made it necessary for respondents to trace their title from Sansevain. As the record clearly shows that both parties to this action claimed title through a common grantor subsequent to 1885, it was not necessary for either party to prove title in the said common grantor. Phillips v. Menotti, 167 Cal. 328, 139 P. 796, and authorities cited.

[7] Up to this point we have referred to appellants and respondents without distinguishing between the two respondents nor between the several appellants and defendants. The respondent Seminary Avenue Land Company, being the owner of the southern tract of land, commenced to subdivide it into lots and sell the same. As a part of the plan Forest Lakes Mutual Water Company, a nonprofit corporation, was organized. To this company the water rights were conveyed for the purpose of administration, the plan being to issue shares of stock in the mutual water company to each lot purchaser so that in this way each lot owner will own his share of water rights. The company was therefore a distributing agency and trustee for the owners of the land, and the court found that said water company was the owner in trust for the Seminary Avenue Land Company of the water rights. Appellants' attack upon this finding is unsupported by the printing of evidence except the deed. The evidence printed by repondent fully supports the finding. The conveyance by Seminary Avenue Land Company to Forest Lakes Mutual Water Company of the water rights was not such a conveyance as severed and destroyed the riparian rights. Appellants' argument is that the land company owned no water rights, having conveyed them, and so was not a riparian owner and that the water company had no land and so could not enforce riparian rights. The argument, of course, falls before the finding and the fact that one company is but the agent and instrumentality of the other. Estate of Thomas, 147 Cal. 236, 241, 81 P. 539; Riverside Land Co. v. Jarvis, 174 Cal. 316, 327, 163 P. 54; 26 Cal. Jur. 449. Some technical points are made concerning the issuance of stock of the Mutual Water Company and the recordation of its by-laws. These points arise from the fact that the arrangement between the two parties plaintiff is in its transition stage. This is an action in equity. The good faith of the plan of the parties plaintiff is not questioned, and no useful result will be obtained by analyzing these points. So long as the plaintiffs are content to maintain this action as joint plaintiffs, no nice distinction need be made as to exactly what rights each plaintiff owns at this particular time. Between the two their rights are complete.

[8] The parties defendant are similarly complicated. Fetherston at first shared ownership with other individual defendants and then became the sole owner. The Santa Cruz Land Title Company is his holding company, holding the land in trust for him. The Felton Water Company is his agent, trustee, and instrumentality. Fetherston owns all the issued shares of the Felton Water Company except a few qualifying shares. The stock ownership and agency of these two companies are directly alleged in the answer filed by Fetherston. Following these facts the court's judgment and injunction ran against "the Felton Water Company, Inc., the agency and instrumentality of George Fetherston." So far as Fetherston had admitted and, in fact, alleged this agency and instrumentality, he as an appellant here cannot complain of this part of the judgment. It is proper and, indeed, usual for an injunction to run not only against the party to the action but also against all his agents, employees, etc. 14 Cal. Jur. 279. The determination of the agency is, of course, binding upon Fetherston. The Felton Water Company was not a party to the suit, however, did not appear therein by any pleading and, of course, is not an appellant here. The determination of the agency, therefore, is not necessarily binding upon that corporation as an entity, although the injunction is binding on every one acting under the named parties to the suit with notice. Granting that the injunction and judgment should not have named the Felton Water Company by name as though it were a party to the action and should have run only against the named parties defendant and their agents, employees, etc., in general terms, yet the error is not one for which appellant Fetherston can complain, unless he is what he now claims not to be, the alter ego of said company. In any event it is binding on him individually. Whether that company has the right to have its name removed from the judgment and injunction is a matter that should not be decided in the absence of jurisdiction of the person of that company.

This disposes of all the points raised by appellants.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

98 Cal. App. 514

KREUZER v. STRADT. (Civ. 6480.)

District Court of Appeal, First District, Division 1, California. April 26, 1929.

Bills and notes ⚷262—Plaintiff indorsing for own benefit note owned by defendant and profiting thereby could not recover payment of judgment against him as indorser.

Where defendant did not request plaintiff to indorse note transferred as security for machinery purchased by defendant, but plaintiff indorsed note on own account and for own benefit under arrangement with seller of machinery to secure profit out of transaction, and note was not paid by makers, but judgment was taken against plaintiff, payment by plaintiff of judgment whereby he secured transfer of lot exceeding in value amount of judgment and was entitled to assignment of judgment against defendant could not be recovered on ground that it was paid for use and benefit and at request of defendant and that plaintiff indorsed as accommodation to defendant.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by William J. Kreuzer against Jean Stradt. Judgment for defendant, and plaintiff appeals. Affirmed.

Arnold W. Liechti, of San Francisco, for appellant.

Eric Lyders, of San Francisco, for respondent.

TYLER, P. J. This is an action to recover the sum of $600, which is alleged in the complaint to have been paid out by the plaintiff for the use and benefit and at the request of the defendant. This allegation was denied by the defendant in his answer, and upon trial of the issue the court found in favor of the defendant and rendered judgment accordingly, from which this appeal is taken by the plaintiff.

The ground urged by appellant in support of his appeal is that the finding of the court in favor of the defendant is against the evidence. The record discloses little, if any, dispute as to the facts giving rise to the controversy. Kreuzer, the plaintiff, and Stradt, the defendant, were fellow employees and friends. The latter, being the owner of a ranch, desired to purchase some agricultural machinery and enlisted the help of Kreuzer to this end. Stradt was also the owner of an unsecured promissory note in the sum of $500 executed by J. P. Niel, L. R. Ferris, and S. M. Williams, and his wife owned a building lot, and it was understood between Kreuzer and Stradt that this note and lot must constitute the fund for the purchase of the machinery. After some effort Kreuzer entered into negotiations with the Tarantino Produce Company, of which Anthony P. Tarantino was president, which had for disposal a tractor and some farming implements, and Stradt was willing to accept these for the note and lot. Tarantino, however, did not wish to take the lot, and suggested to Kreuzer that he find a purchaser for it. The lot some time before these negotiations had cost $562, and there was evidence in the record from which the trial court could well conclude that it was presently worth the sum of $700. Kreuzer reported to Tarantino that he was unable to find a purchaser for the lot but was willing to take it himself. No valuation had been placed upon it by Tarantino, who was not familiar with it nor its value, and took no pains to acquaint himself with these matters. He thereupon agreed with Kreuzer that the latter might have the lot, paying therefor the sum of $35, but that Kreuzer should indorse the above-mentioned note and allow the lot to stand as security for its payment. This was agreed to. The record does not disclose just how far Stradt was advised of this arrangement between Kreuzer and Tarantino, although, on the other hand, there is no direct evidence that it was concealed from him. In testifying to the transaction Stradt merely states that he gave the lot and the note in payment for the farming machinery. Thereupon a bill of sale of the machinery was made by the Tarantino Produce Company to Stradt, who, together with Kreuzer, indorsed the note to said company, and the lot was conveyed by Stradt and his wife to Mary Lamantia, sister of Tarantino, who at the same time agreed with Kreuzer in writing to reconvey it to him if and when the note should be paid. The note upon becoming due was not paid by the makers, nor is there any evidence in the record that it was ever presented for payment, or nonpayment protested, and notice given to the indorsers; but the Tarantino Produce Company commenced an action against Kreuzer and Stradt as indorsers to recover thereon. Kreuzer allowed default in that action to be taken against him, and paid the judgment, receiving from the Tarantino Produce Company an agreement in writing that the latter would proceed to take judgment against Stradt and assign it to Kreuzer, and also a conveyance from Mary Lamantia of the building lot. This payment forms the basis of the present action; it being the theory and contention of Kreuzer that in indorsing the promissory note at the request of the Tarantino Produce Company he did so purely as an accommodation to the defendant, Stradt, and to enable the transaction of the sale of the machinery to him to be carried through.

The record presents no such situation. The evidence discloses that defendant never requested plaintiff to indorse the note, but that he did so upon his own account and for his own benefit under the arrangement with Tarantino above set forth, his purpose manifestly being to secure a profit out of the transaction. Had the note been paid by its makers, plaintiff would have acquired the lot—which there is evidence to show was of the value of $700—for practically nothing, for his activities in the matter. The note not having been paid, plaintiff nevertheless profited by his acts when he satisfied the judgment recovered against him, for he obtained the lot and in addition thereto was entitled to have assigned to him a judgment against defendant for approximately $600. The facts speak for themselves.

The judgment is affirmed.

I concur: CASHIN, J.

98 Cal. App. 469

KLINKER et al. v. GUARANTEE TITLE CO. OF LONG BEACH et al. (Civ. 3731.)

District Court of Appeal, Third District, California. April 23, 1929.

1. Limitation of actions 🔑58(4)—Stockholder's statutory liability is "liability created by law" within statute of limitations (Code Civ. Proc. § 359).

For purpose of Code Civ. Proc. § 359, prescribing a limitation to actions, stockholder's statutory liability is "liability created by law."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Liability Created by Law.]

2. Pleading 🔑36(2)—Plaintiffs were bound by findings in action to cancel certificates of stock, where they pleaded them affirmatively, and pleaded fact that judgment of cancellation was rendered.

Plaintiffs were bound by findings in action for cancellation of certificates of stock, where they pleaded them affirmatively, and also pleaded fact that judgment of cancellation was rendered.

3. Limitation of actions 🔑58(4)—Action against corporation and stockholders to recover money paid corporation for invalid stock, commenced more than three years after date of payment, held barred (Code Civ. Proc. §§ 338, 359).

Action against corporation and stockholders to recover money paid corporation for stock, which was apparently regular in form, but was in fact void, *held* barred by Code Civ. Proc. §§ 338, 359, where commenced more than three years after date of payment for stock.

4. Corporations 🔑105—Void certificates of stock issued were not "choses in action" (Civ. Code, § 953).

Void certificates of stock issued by corporation were not "choses in action" under Civ. Code, § 953.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Chose in Action.]

5. Equity 🔑7—Mistake of law unattended with special circumstances furnishes no ground for interposition of court of equity.

Mere naked mistake of law unattended with any special circumstances such as misapprehension, undue influence, or misplaced confidence, furnishes no ground for interposition of court of equity.

6. Corporations 🔑106—That plaintiffs paid for stock, under belief that stock was valid, held not ground for relief in equity, where plaintiffs knew every fact connected with payment of money and issuance of stock.

That plaintiffs paid corporation for stock, under belief that stock was valid, *held* not ground for relief in equity, where plaintiffs knew every fact connected with payment of money and issuance of invalid stock, so that only mistake was a mistake of opinion which would make it a mistake of law rather than a mistake of fact.

Appeal from Superior Court, Los Angeles County; Reuben S. Schmidt, Judge.

Action to recover money paid for corporate stock by L. W. Klinker and others against the Guarantee Title Company of Long Beach and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Arthur G. Baker, of Los Angeles, and Joseph Hansen, of Santa Monica, for appellants.

Linnell & Linnell, of Long Beach, for respondents.

McDANIEL, Justice pro tem. This is an appeal from judgment after demurrer sustained to plaintiffs' complaint. The plaintiffs allege the corporate capacity of the defendant Guarantee Title Company, and of the Milton Realty Company and some fictitious corporations, and that the defendants individually named in the title are stockholders of the Guarantee Title Company of Long Beach, defendant, and were such stockholders when the cause of action of plaintiffs sued upon was contracted and incurred. Three only of the individual stockholders were actually served with summons, viz.: Orson C. Roberts, Charlotte P. Roberts, and Frank P. Cross, and they, with the defendant Guarantee Title Company of Long Beach are respondents herein. The complaint herein was filed on December 30, 1926.

It is alleged that on or about the 24th day of April, 1923, the plaintiff, L. W. Klinker, paid to the said defendant Guarantee Title Company of Long Beach the sum of $50,000 as and for the purchase price of 400 shares of capital stock of said corporation, of which 8 shares at said time were issued direct to defendant Floyd W. Calkins, 2 shares to defendant Lucy A. Calkins, 8 shares to George E. and Lucy A. Calkins, and 4 shares to defendant J. E. Burney; that thereafter, on the 9th day of January, 1924, said L. W. Klinker sold and transferred to Zeno Klinker 176 shares of said 400 shares of capital stock, and on the same day sold and transferred to Rex A. Klinker 200 shares of said 400 shares of stock; that the said sales and transfers of stock were made in good faith; and that the plaintiffs Zeno Klinker and Rex A. Klinker did pay therefor valuable considerations.

It is further alleged in the complaint that the defendant corporation "is now transacting business as a corporation, having its principal place of business in Long Beach, Los Angeles County, California, and at all times, up to on or about the 20th of April, 1924, treated said stock as valid, outstanding and fully paid-up stock of said corporation"; that on or about the 30th of March, 1925, defendant corporation filed two actions in the superior court of Los Angeles county, Cal., "in each of which the defendant Guarantee Title Company, said corporation, was plaintiff, and in one of which Zeno Klinker, one of the plaintiffs herein, was the defendant, and in the other Rex A. Klinker, another of the plaintiffs herein, was the defendant"; the action against Zeno Klinker by said corporation is cause No. 166356, and that against Rex A. Klinker is cause No. 166357.

It is further averred that the said defendant corporation as plaintiff in said actions did seek to cancel the capital stock so transferred, and sold to said Zeno Klinker and Rex A. Klinker by the plaintiff L. W. Klinker: and that on or about the 1st day of November, 1926, the said superior court in said actions did order, adjudge, and decree the stock belonging to the defendants therein canceled, and did order the stock certificates evidencing the said stock delivered up for cancellation; that the certificates were, pursuant to said judgment and order, on or about the 1st day of November, 1926, surrendered and delivered for cancellation, and were thereafter canceled: "that at the time of rendering said judgment, the said court did file its findings of fact, which said findings did expressly provide and state that the said L. W. Klinker did pay as a consideration for said stock the sum of fifty thousand dollars ($50,000.00); all of which will more fully appear from the records of said causes Numbers 166356 and 166357, which said findings are hereby referred to and by such reference made a part of this complaint as fully as if set out herein."

Paragraphs VI, VII, and VIII are as follows:

"That said L. W. Klinker did pay the said sum of fifty thousand dollars ($50,000.00) to the defendant Guarantee Title Company of Long Beach for said stock under and by virtue of a mistake of fact, to-wit, under the belief that the said stock was valid. That by reason of said decree so rendered, as aforesaid, in said causes Numbers 166356 and 166357, the said consideration for said fifty thousand dollars ($50,000.00) paid as aforesaid has wholly failed and the same has become worthless.

"That said plaintiffs discovered the said mistake after on or about the 1st day of November, 1926, the date on which said judgment was rendered, as aforesaid; that said plaintiffs were without means of knowing that said stock was worthless and invalid until the filing of said judgment and findings as aforesaid.

"That defendants have not nor has any of them paid to these plaintiffs or any of them the said sum of fifty thousand dollars ($50,000.00) nor any part thereof."

Paragraph IX alleges the demand for the repayment to the plaintiffs of the said sum of $50,000 and the refusal of the defendants and each of them to pay the same or any part thereof. Then follows an averment as to the amount of subscribed capital stock at the time that said indebtedness was contracted and incurred and the number of shares of stock held by each of the named stockholder defendants, referring to schedule annexed, showing said names and number of shares of stock, marked Exhibit A and made a part of the complaint; and alleging "that each of the said defendants were, at the time when said indebtedness was contracted and incurred, and now are, indebted to these plaintiffs in a sum equal to the proportion that the said shares owned by each of them bears to the total number of subscribed shares of capital stock, as aforesaid." Then follows prayer for judgment.

The three defendant stockholders filed a demurrer and motion and to strike out portions of the complaint. The motion to strike was never passed upon and need not be further considered. The defendant corporation also filed a demurrer to the complaint and a motion to strike out certain portions, which said motion to strike was not ruled upon and need not be further considered.

The demurrers were both general and special and were alike in all respects, except that the stockholders' demurrer in paragraph VIII thereof is upon the ground "that said action is barred against these defendants under Section 359 of the Code of Civil Procedure of the State of California"; and the same numbered paragraph in the defendant corporation's demurrer is "that said action is barred against this defendant under Section 338 of the Code of Civil Procedure of the State of California."

The common grounds of both demurrers are stated as follows:

I. That said complaint does not contain facts sufficient to constitute a cause of action against these defendants, or any of them.

II. That there is a misjoinder of parties plaintiff in said action.

III. That there is a misjoinder of parties defendant in said action.

IV. That several causes of action have been improperly united and not separately stated.

V. That it cannot be ascertained from said complaint how, nor in what manner, said plaintiff L. W. Klinker paid the defendant Guarantee Title Company of Long Beach the sum of $50,000, nor to what officers of said company said $50,000 was paid.

VI. That it cannot be ascertained from the complaint, and particularly from paragraph V thereof, how nor in what manner, nor at what times, the Guarantee Title Company, nor what officers or agents of the Guarantee Title Company, treated the stock of plaintiffs as valid, outstanding, and fully paid up.

VII. That it cannot be ascertained from said complaint, nor any part thereof, why the said plaintiffs did not discover the alleged mistake of fact previous to November 1, 1926.

On submission of the demurrers, the trial court sustained the demurrer to the complaint of the defendant stockholders without leave to amend. The order sustaining the demurrer of the defendant corporation was not so made, but the plaintiffs, as to said corporation, did not file nor offer to file any amended complaint. On March 24, 1927, judgment of dismissal was entered.

Counsel for appellants, with commendable industry and ability, has argued each and every ground of demurrer in support of his contention that the court erred in sustaining said demurrers. With like industry, counsel for respondents contends, of course, that the court's ruling is fully in accordance with correct principles of law involved herein. We recognize that the court's judgment in sustaining said demurrers was based upon the statute of limitations, and, if it appear upon the face of the complaint that the cause of action was barred because of the lapse of time between the time when the cause of action accrued and the filing of the complaint herein, the judgment should be affirmed, and the necessity for consideration of the other grounds of demurrer will be eliminated. We therefore shall consider whether the liability of the corporation on the one hand and the stockholders on the other has been extinguished by sections 338 and 359 of the Code of Civil Procedure.

[1] The action against the stockholders is upon a statutory liability. "It is now well established that, for the purpose of Section 359 of the Code of Civil Procedure, prescribing a limitation to actions, the stockholder's statutory liability is a liability created by law." 6 Cal. Jur. 1013, § 393, cited by appellants, who also collate on this point. Royal Trust Co. v. MacBean et al., 168 Cal. 643, 144 P. 139; Jones v. Goldtree, etc., 142 Cal. 383, 77 P. 939.

Appellants correctly state, in consideration of section 359, Code of Civil Procedure, and conceding that actions brought under said section must be brought within three years after the liability was created, as follows: "If this is the correct exposition and interpretation of section 359, we are forced to conclude that limitation is not extended on liability of stockholders beyond three years from the time when the liability was created, or, as has been expressed, when it was incurred or contracted."

Then they quote verbatim 6 Cal. Jur. 1013–1014, and say: "In order therefore for the plaintiffs in this action to maintain suit against the stockholders on the statutory liability, it becomes incumbent upon the plaintiffs to show that the statute did not begin to run in April, 1923 (the date on which the stock was originally purchased), but at some subsequent date, which date must be less than three years next preceding the filing of this action. The analysis heretofore set out has been for the purpose of presenting facts sufficient to distinguish between the instant case and the usual cases wherein the point of accrual of the cause of action is not indeterminate. *In the case at bar the liability of the stockholders did not arise at the time the money was paid. This is true for the reason that no liability existed for the repayment of the money delivered to the Guarantee Title Company of Long Beach by L. W. Klinker on or about the 24th day of April, 1923.*"

Upon the premises contained in the italicized portion of the foregoing, appellants base their argument, in support of which they cite Johnson v. Bank of Lake, 125 Cal. 6, 57 P. 664, 73 Am. St. Rep. 17; 6 Cal. Jur. 1020, par. 398; Yule v. Bishop, 133 Cal. 574, 62 P. 68, 65 P. 1094; Bridges v. Fisk, 53 Cal. App. 117, 200 P. 71; Kempton v. Floribel, etc., Co., 46 Cal. App. 456, 189 P. 478.

We believe that the premises are not sound. When L. W. Klinker paid $50,000 to the corporation, for which he was to receive 400 shares of capital stock, the obligation immediately arose upon the part of both the corporation and the stockholders either to issue to him value received in the shape of valid stock, or, lacking authority or ability to do so, to return to him his money.

[2] In the findings, made a part of the complaint herein, in the actions for cancellation of the certificates of stock held by Zeno Klinker and Rex A. Klinker, the permit issued by the corporation commissioner of the state of California to the Guarantee Title Company of Long Beach, with the conditions permitting the sale of its capital stock, is set forth in full; and in said findings it is shown that said L. W. Klinker and one P. H. Guy "assuming to act as the president and secretary respectively of the plaintiff corporation, executed and delivered to L. W. Klinker stock certificate No. 135 from the regular stock certificate book of plaintiff corporation to evidence the ownership by said L. W. Klinker of three hundred and seventy-six (376) shares of the authorized capital stock of plaintiff corporation."

The findings further show that this certificate No. 135 was later surrendered by L. W. Klinker, and that thereupon he, assuming to act as president, and P. H. Guy, assuming to act as secretary, issued the respective certificates of stock held by appellants herein, Zeno Klinker and Rex A. Klinker. It is shown by the findings that, at the time of the issuance of said certificates, the said appellants herein knew that the issuance of said stock was not authorized by the said or any permit issued by the corporation commissioner of the state of California; and as conclusions of law in both said cases, the court concluded that said certificates of stock are and each of them is null and void and of no force or virtue whatsoever, and do not in fact or in law evidence the ownership by any person or persons whatsoever of any of the shares of the authorized capital stock of plaintiff corporation, and that the plaintiff, said corporation, was entitled to judgment for the surrender of said certificates to it and for the cancellation thereof. Judgment was entered accordingly.

[3] The appellants are bound by these findings, for they plead them affirmatively, and plead also the fact that judgment of cancellation was rendered. It follows, therefore, that, regardless of what any one may have believed as to the validity of the issue, the stock issued, while apparently regular in form, was, in fact, void, spurious, and worthless, and that L. W. Klinker received nothing of value for his money; with the payment of the money for valid stock to the defendant corporation the liability and obligation eo instanti arose upon the part of both the corporation and the stockholders either to issue, if it could, value in the shape of valid certificates or to return the money. Therefore the statute of limitations, under the authorities cited, would act as a bar, beyond question, after the lapse of three years from the date of payment.

[4] This case is clearly distinguishable from the cases cited by appellants, in that by no possibility could any new obligation have arisen in favor of appellants herein by the decrees rendered in said actions numbered 166356 and 166357. The void certificates of stock were not even choses in action, for, notwithstanding the alleged mistake of belief as to the validity of said certificates entertained by the appellants and acquiesced in by respondent corporation until April, 1924, the said certificates of stock would not have supported an action brought to recover money or value in the event of their transfer by the holder, because they were utterly worthless and invalid.

"A thing in action is a right to recover money or other personal property by a judicial proceeding." Section 953, Civ. Code.

As argued by respondents: "A perusal of said findings will remove all doubt that the stock in question was void ab initio and was issued at the instance of L. W. Klinker, one of the plaintiffs in this case, and a part thereof sold and transferred to Rex A. Klinker, one of the plaintiffs in this case, and a part thereof sold to Zeno Klinker, one of the plaintiffs in this case."

The cases cited by counsel for appellants all rest upon valid contracts, some of which related to services to be rendered, when the statute did not begin to run against the stockholders of the corporation until the rendition of said services; as in Johnson v. Bank of Lake, supra; or upon payments of a note by an accommodation indorser as surety for a corporation, in which case a new cause of action accrued in favor of the indorser against the corporation and the stockholders at the time of payment by the indorser, and the liability of the stockholders for reimbursement would not be barred until three years after date of payment by the indorser, as in Yule v. Bishop, supra; Bridges v. Fisk, supra; or the case of a rescission of a contract of sale of an automobile, when, by reason of the vendor's failure to deliver the automobile, the vendee's right to rescission accrued, wherein it was held: "The stockholder's liability accrues at the inception of the corporation's liability, and it is from that date that the three year period within which the stockholders must be sued commences to run."

The findings show that the suits for the cancellation of stock in the superior court of Los Angeles county were not suits for rescission, but were found to be suits for cancellation. Under section 3412, Civil Code, those certificates, although invalid and intrinsically worthless, because issued contrary to the provisions of law as found by the court, were written instruments, in respect to which there was a reasonable apprehension that, if left outstanding, they might cause injury to the defendant corporation and to the stockholders thereof. They were therefore ordered surrendered and canceled.

[5, 6] The closer and more important question herein is whether or not as to the corporation defendant the action is one for relief on the ground of mistake, wherein the cause would not be barred by subdivision 4 of section 338, Code of Civil Procedure, until the lapse of three years after the discovery of the facts constituting the mistake.

It will be observed from the complaint, paragraph VI, supra, that it is alleged that the mistake relied upon is alleged to have been the payment of the said $50,000 to the defendant corporation for said stock, "under and by virtue of a mistake of fact, to-wit, under the belief that said stock was valid," and in paragraph VII it is alleged that plaintiffs discovered said mistake on or about the 1st day of November, 1926, the date on which the judgment canceling the said stock was rendered, and that plaintiffs "were without means of knowing that said stock was worthless and invalid until the filing of said judgment and findings as aforesaid."

It appears to us in view of the findings made a part of the complaint that appellants knew every fact connected with the payment of the money and the issuance of the invalid stock, including the terms of the permit of the corporation commissioner; and that the only mistake was a mistake of opinion or belief which would make it rather a mistake of law than a mistake of fact.

"A mere naked mistake of law, unattended with any such special circumstances as" misapprehension, undue influence or misplaced confidence furnishes "no ground for the interposition of a court of equity." Kenyon v. Welty, 20 Cal. 637, 641, 81 Am. Dec. 137.

"Averment of a mistake of law does not bring the case within that extreme class of mistakes of law from which equity will relieve." Kopp v. Gunther, 95 Cal. 63, 74, 30 P. 301, 303; Goodenow v. Ewer, 16 Cal. 471, 76 Am. Dec. 540; Burt v. Wilson, 28 Cal. 632, 638, 87 Am. Dec. 142.

"Mistake of law, such as the mistake of legal effects of an instrument, contents of which known to party, will not be relieved against." Martin v. Hamlin, 18 Mich. 354, 100 Am. Dec. 181.

In the light of the facts set out in the findings, the trial court may well have held as to the averment of facts concerning the alleged mistake that the complaint as pointed out by general demurrer failed to state facts sufficient to constitute a cause of action.

It seems obvious to us that no facts were stated sufficient to have tolled the statute of limitations so as to have extended the period of limitation longer than three years from the date the liability of the corporation accrued, and, if the appellants saw fit after April, 1923, to delay action to protect themselves and thus slept on their rights for more than three years, they have themselves only to blame. Furthermore, they were accorded the privilege by the trial court to amend their complaint, but they did not avail themselves thereof.

Respondents have cited a number of cases wherein the cause of action was based upon alleged fraud, and it appears under subdivision 4 of section 338 that such actions must be determined and be governed by principles of law, which by analogy should also apply to actions grounded on mistake.

They cite among other authorities Lataillade v. Orena, 91 Cal. 565, 578, 27 P. 924, 927 (25 Am. St. Rep. 219), to the effect that "a party seeking to avoid the bar of the statute on account of fraud must show that he used due diligence to detect it, and if he made any particular discovery, should state when it was made, what it was, how it was made, and why it was not made sooner; and further, that one will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains."

They also cite Burke v. Maguire, 154 Cal. 456, 98 P. 21; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; People ex rel. Post v. San Joaquin Valley Agricultural Ass'n, 151 Cal. 797, 91 P. 740; section 19, Civil Code: "Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

For the reasons stated we hold that the trial court's orders sustaining the demurrers to the complaint were correctly made.

The judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

98 Cal. App. 548

DEIST v. BECK (two cases).★
(Civ. 5321, 5912.)

District Court of Appeal, Second District, Division 2, California. April 26, 1929.

Rehearing Denied May 25, 1929. Hearing Denied by Supreme Court June 24, 1929.

1. Appeal and error 🔑931(1)—Where findings were not attacked on appeal, it must be assumed that they are correct.

Where trial court's findings were not attacked on appeal as not supported by evidence, nor as not supporting conclusions of law or otherwise, it must be assumed that they are correct, and appellant's contentions involving facts not within the findings, and which were directly opposed thereto, could not be sustained.

2. Appeal and error 🔑766—If appellant fails to print in brief or supplement sufficient of record to justify reversal, judgment will be affirmed (Code Civ. Proc. § 953c).

Where appeals were taken under alternative method, appellate court was not required to search record to discover possible grounds for reversal, but, if appellant failed to print in his brief or supplement thereto sufficient of record to justify a reversal, as required by Code Civ. Proc. § 953c, judgment will be affirmed on ground that record fails to show error.

Appeals from Superior Court, Los Angeles County; H. C. Lucas and F. C. Valentine, Judges.

Actions by Ida Deist against S. Beck. Judgments for plaintiff, and defendant appeals. Affirmed.

Allan F. Daily and Frank L. Kostlan, both of Los Angeles, for appellant.

Rupert B. Turnbull, of Los Angeles, for respondent.

BURNELL, Justice pro tem. These two cases were ordered consolidated on appeal. Respondent has failed to aid the court by filing any brief, and, on motion of appellant, the

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★Rehearing denied. Hearing denied by Supreme Court.

time for filing of such brief having long since expired, the appeals were ordered submitted on appellant's briefs.

Each case is an action seeking recovery of payments alleged to be due on the same contract for the purchase of real property, the first seeking recovery of payments claimed to be due up to February 12, 1924, and the second seeking recovery for payments alleged to be in default for the period between March 12, 1924, and May 12, 1925. An examination of the clerk's transcript discloses that the respective complaints allege that about November 12, 1921, F. H. and Ida L. Miller, husband and wife, owned the lot which was the subject of the contract, and agreed to sell the same to Beck for $3,750. The agreement which was in writing is set out in hæc verba and is in the usual form. It acknowledges receipt of a down payment of $200, and provides for payment of the balance at the rate of $40 per month, with interest at 7 per cent. per annum. It is further alleged that certain specified payments have been made by defendant, but that none have been made since February 12, 1923. It is also alleged that about June 5, 1922, the Millers assigned the contract and the property described therein to the plaintiff.

The findings in each case were in accordance with the allegations in the respective complaints, and were followed by the judgments in favor of plaintiff, from which these appeals are taken.

A number of points are attempted to be made by appellant which may be summarized as follows: (1) The contract was breached by respondent's predecessors in interest, the Millers, by conveying the property to one Springer "without subjecting the property to appellant's rights and without giving notice to Springer of said contract of sale." (2) The transfer by the Millers to respondent was ineffective as to appellant, since they were not in a position to convey title to respondent as security to protect appellant in continuing payments on the contract. (3) A subsequent conveyance by Springer to respondent was a nullity, because it contained no description of the property. (4) Any cause of action which might have existed belonged to Springer, since title had been conveyed to her by the Millers, and her conveyance to respondent was void. (5) There was a novation, a new agreement having been entered into between respondent and appellant.

[1] These contentions, however, cannot be sustained, for the reason that the *facts* involved therein are not within the findings of the court below, and on the contrary are directly opposed thereto. In the first of these cases the findings followed the allegations of the complaint, and in the second case, in addition thereto, the court found as facts: That the Millers assigned the contract to plaintiff; that by grant deed they conveyed the property to Frieda G. Springer, who was plaintiff's daughter and who thereafter deeded it directly to plaintiff; and that the conveyance by the Millers to Frieda G. Springer "was made for the purpose of convenience to Ida Deist and not otherwise and that Ida Deist has been at all times in a position to and has been and is ready, willing and able to convey the title to the said real property." It was further found that defendant was in possession of the property, and that the contract had been recorded. As to the alleged novation, the court found that no new agreement had been entered into, and that there had merely been an attempt to settle the litigation between the parties through an escrow which was never completed, which "proposed settlement was never consummated."

The findings are not attacked on these appeals. Appellant does not urge that they are not supported by the evidence, or that they do not in turn support the court's conclusions of law. He has not even incorporated them in either of his briefs or in any supplement thereto. It must be assumed, therefore, that he makes no contention but that they are supported by the evidence and are correct.

[2] The appeals are taken under the alternative method, and under the provisions of section 953c of the Code of Civil Procedure "the parties must * * * print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Filmer v. Davis (Cal. App.) 266 P. 985; Holmes v. Schmitt (Cal. App.) 267 P. 558. As we have frequently had occasion to say, this court is not required to search the typewritten record in order to discover possible grounds for reversal. "If the appellant fails to print in his brief or supplement" thereto "sufficient of the record to justify a reversal of the judgment, it will be affirmed on the ground that the record fails to show error." Keele v. Clouser (Cal. App.) 268 P. 682; Estate of Berry, 195 Cal. 354, 233 P. 330; Steineck v. Coleman, 72 Cal. App. 244, 236 P. 962.

The record on these appeals resembles to some extent that in Estate of Berry, supra, where, as here, the appeal was taken under the alternative method. The court there said: "The nature of appellants' contentions upon this appeal can best be arrived at by a process of elimination. There is no suggestion in their brief of any defect or deficiency in the pleadings, or that the court failed to find upon any issue framed thereby, or that any finding of fact is irrelevant to the issues, or that the findings fail to support the judgment, or that any error was committed at the trial, or that any conclusion of law is erroneous. We are thus brought to the conclusion that the gist of appellants' contention is that the evidence is insufficient to sustain the findings of fact, but no such contention is anywhere stated in their brief (except with respect to the so-called 'special findings'). There is no specification of such insufficiency of the evidence to support the findings of ultimate facts, and if there were, it could not be reviewed except by reference to the findings themselves, which are nowhere to be found, either in appellants' brief or in the supplement thereto. A proper course to be followed by this court under such circumstances would be to affirm the judgment without further consideration of the appeal. The appellate court is not required to assume the vexatious burden of searching the typewritten transcript for error or for deficiencies therein (Scott v. Hollywood Park Co., 176 Cal. 680 [169 P. 379]; Marcucci v. Vowinckel, 164 Cal. 693 [130 P. 430]; Eddy v. Stowe, 43 Cal. App. 789 [185 P. 1024]; Pasadena Realty Co. v. Clune, 34 Cal. App. 33 [166 P. 1025])."

The judgments are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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98 Cal. App. 517

UNITED IRON WORKS v. STANDARD BRASS CASTING CO. (Civ. 6740.)

District Court of Appeal, First District, Division 1, California. April 26, 1929.

1. Customs and usages 🔑13—Defendant contracting for castings under contract contemplating rules of Foundrymen's Association held bound to know general custom of foundrymen to replace defective castings without liability for damages.

Where contract for manufacture of castings provided that defendant reserved right to reject all defective castings, and both parties to contract were members of Foundrymen's Association, rules of which were admittedly in contemplation of both parties when making contract, defendant was bound to know of general custom of foundrymen that all defective castings would be replaced without liability on foundry for extra work or damages by reason of defective castings, even in absence of proof of defendant's knowledge of such custom.

2. Appeal and error 🔑1195(4)—Legal rules declared on appeal are binding at subsequent stages of case, and application to evidence is conclusive as to legal effect of evidence except as to new evidence.

Rules of law declared on appeal, whether correctly or incorrectly stated, are binding at subsequent stages of case, and, except as new evidence of different character is offered, as distinguished from evidence which is merely cumulative, application of rules of law to evidence is conclusive as to legal effect of such evidence.

3. Appeal and error 🔑1194(1)—Extracts from former opinion and opinion as whole must be read in light of points urged on previous appeal.

Extracts from former opinion in case, as well as opinion as a whole, must be read in light of points which were uged on previous appeal.

4. Sales 🔑340—Generally parties receiving defective goods may return goods or retain them and sue for damages.

Generally, in absence of express provision in contract, party to whom defective goods are delivered has option either to return them or to retain goods and sue for damages.

5. Sales 🔑340—Under contract permitting purchaser to return defective goods, such remedy was exclusive, and precluded purchaser from retaining goods and claiming damages.

Where contract for manufacture of castings expressly provided that purchaser could reject and return all defective castings, such remedy was exclusive and controlled legal status which otherwise would exist, and purchaser did not have right to retain defective goods and claim damages.

6. Contracts 🔑322(3)—Finding that castings were made in workmanlike manner, and that defects were not due to improper manufacture, held sustained by evidence.

In action to recover purchase price of castings, on ground that castings were defective, evidence that work was done in usual and workmanlike manner, that men engaged in work were competent, that the moulds were made in usual manner and tamped in the usual way, that defendant's representative inspected work as it progressed, that all defects were repaired after they showed up, and that cracks appearing were not caused by poor labor, and that workmen were skilled and used their best efforts, supported finding that castings were made in good and workmanlike manner, and that defects contained in some of them were not due to improper manufacture or workmanship.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by the United Iron Works against the Standard Brass Casting Company, in which defendant filed cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

Brownstone & Goodman, of San Francisco, for appellant.

Robert B. Gaylord, of San Francisco, for respondent.

CAMPBELL, J. Plaintiff sued to recover the purchase price of certain casting work, as to which no dispute exists. By cross-complaint the defendant sought to recover alleged damages for improper performance of the contract. The case has been tried twice At the first trial judgment went for defendant on its cross-complaint, but was reversed by the District Court of Appeal (United Iron Works v. Standard Brass Casting Co., 69 Cal. App. 384, 231 P. 567); a transfer of the case to the Supreme Court for hearing and decision being denied. On a retrial, submitted on the record of the first trial as contained in the bill of exceptions on the former appeal, with some additional evidence, the judgment went for plaintiff, and the defendant was denied any relief under its cross-complaint, and, from such judgment, defendant has appealed.

[1] The contract which is the basis of the action called for the manufacture by United Iron Works of fittings from materials furnished by Standard Brass Casting Company and in accordance with the specifications also furnished by it. The contract specifically provides that all castings not in accordance with specifications should be subject to rejection, and fixes the place of delivery and inspection at the plant of United Iron Works. Standard Brass Casting Company expressly reserved the right in accepting the offer of United Iron Works to reject all defective castings, while the printed rules of the Foundrymen's Association, of which both parties were members, and which admittedly were in the contemplation of both parties when the contract was made, provides: "All defective castings will be replaced and foundry shall not be responsible for any extra machine work or contingent damages caused by reason of defective castings." Even in the absence of proof of appellant's knowledge of this general custom, as a foundryman it was bound to know it. Miller v. Germain Seed Co., 193 Cal. 62, 67, 222 P. 817, 32 A. L. R. 1215.

[2] Respondent urges—and correctly so—that rules of law declared upon appeal, whether correctly or incorrectly stated, are binding at subsequent stages of the case; that except as new evidence of a different character is offered—as distinguished from evidence which is merely cumulative—the application of these rules of law to the evidence before the court is conclusive as to the legal effect of such evidence. 2 Cal. Jur. 944.

In the opinion on the former appeal the court says: "We are satisfied that the judgment must be reversed on the ground that there was no proof of damage complying with the measure prescribed by law. * * * And though it may be true, as the court found, that these defects were not patent on casual inspection, it is admitted that they could have been discovered through water tests made at appellant's plant and that the repairs could then have been made by appellant as "he" was entitled to do under the contract. * * * The written contract called for the manufacture by appellant of the fittings from materials furnished by respondent and in accordance with plans and specifications also furnished by respondent. It specifically provided that all castings not in accord with specifications should be subject to rejection and fixed the place of delivery and inspection at the appellant's plant. * * * The respondent expressly reserved the right in accepting the offer of the appellant to reject all defective castings, while the printed rules of the Foundrymen's Association, of which both parties were members, and which admittedly were in the contemplation of both parties when the contract was made, provided that 'All defective castings will be replaced and foundry shall not be responsible for any extra machine work or contingent damages caused by reason of defective castings.'"

Appellant accepted the castings and shipped them directly from the foundry of respondent in Oakland, Cal., to the New Cordelia Copper Company at Ajo, Ariz., and now claims damages on an amended cross-complaint, in which it alleges that the fittings were not manufactured in accordance with the terms of the contract and in a good and workmanlike manner, in that the same contained cracks, sand holes, and other imperfections, which defects were latent and caused by improper manufacture and workmanship, and that the reasonable cost of remedying these defects was the sum of $7,045.80. This amended cross-complaint was filed to meet the statement in the opinion on the former appeal: "The rights of both parties rest in the written contract, but there is neither allegation nor finding that the terms of the written contract were not observed to the letter by the appellant. Though the respondent might be entitled to damages to the extent of the detriment caused by the defects in the castings, such damages could be recovered only upon allegation and proof that the appellant had failed to perform the contract in accordance with its terms and in a workmanlike manner."

[3, 4] Appellant asserts that on the first appeal the court held that Standard Brass Casting Company in its cross-complaint did not proceed upon the proper theory that this was not a case of implied warranty for the fitness of a manufactured article for a certain purpose, but that the contract in suit was a contract for the performance of work and labor; that the court on the first appeal, in substance, held that Standard Brass Casting Company would be entitled to damages, provided it should both allege and prove that respondent failed to perform the contract in suit in accordance with its terms and in a workmanlike manner. While the court did say "though respondent (appellant here) might be entitled to damages to the extent of the determined cost of the defects in the castings, such damages could be recovered only upon allegation and proof that the appellant (respondent here) had failed to perform the contract in accordance with its terms and in a workmanlike manner," the extracts from the former opinion here quoted, as well as the opinion as a whole, must be read in the light of the points which were urged upon the previous appeal. Under two headings the former appellant and present respondent urged that by the language of the written contract between the parties, supplemented by the undisputed custom of the trade in conformity to which the contract was executed, the con-

tract in legal effect provided that, in the event of delivery of defective castings, the exclusive remedy of the Standard Brass Casting Company was to reject the castings, in which event the United Iron Works was obligated to recast them, and it would seem that the court in the former opinion reached this conclusion, for, in speaking of this particular clause of the contract it says: "It specifically provided that all castings not in accord with specifications should be subject to rejection and fixed the place of delivery and inspection at the appellant's plant." The general rule in California may be stated to be that in the absence of an express provision in the contract a party to whom defective goods are delivered has the option either to return them or to retain them and sue for damages.

[5] However, where the contract provides for such a breach, that remedy is exclusive and controls the legal status which otherwise would exist; if the contract provides that the remedy shall be the rejection and return of the defective articles, no right exists upon the part of the purchaser to retain the goods and claim damages. As is said in Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 P. 496: "There is no implied warranty created by section 1770 of the Civil Code as to the fitness of this elevator. We again quote it: 'One who manufactures an article, under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose.' This section is but the restatement of an elementary principle of law, and does not apply where the manufactured article is furnished under a contract demanding that it be made according to specific plans and specifications." The same rule is announced in Mannix v. Tryon, 152 Cal. 31, 91 P. 983, and in Roebling Construction Co. v. Doe Estate Co., 33 Cal. App. 397, 165 P. 547.

[6] On the question of fact as to whether United Iron Works performed its contract in a workmanlike manner, it may be stated that the court found the fittings were manufactured by plaintiff "in a good and workmanlike manner," and that, although some of the fittings contained defects, "the same were not due to improper manufacture or workmanship of plaintiff." If this finding is supported by the evidence, the judgment must be affirmed regardless of the preceding discussion of points of law. As to the character of the work, George E. Randolph, the superintendent of the United Iron Works, under whose directions the fittings were cast, testified that the work was done in a usual and workmanlike manner; that the men engaged in the work were competent; that the moulds were made in the usual manner and tamped in the usual way; and the work was done in the usual way for work of that class; that the Standard Brass Casting Company, or its representatives, inspected the work as it progressed; that some defects appeared in the castings, but that he checked these every morning and evening, and all of the defects were repaired as they showed up; that none of the fittings were repaired by the "piening" method, and that "piening" was used solely for removing exterior imperfections which did not affect the sufficiency of the castings. There was also testimony that the moulders were competent men; that they prepared the moulds in the proper manner; that all of the moulders were experienced and the moulds were removed promptly and properly. The witness F. Morrill, the foreman on the moulding job, testified that he superintended the labor and that the cracks were not caused by poor labor; that, if cracks were caused, they were caused by something else; that the workmen on the job were skilled workmen and used their best efforts, and the work was carefully done and in a workmanlike manner.

The foregoing testimony sufficiently supports the finding that the fittings were made in a good and workmanlike manner, and that the defects contained in some of them were not due to improper manufacture or workmanship, and the judgment, therefore, should be and it is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

98 Cal. App. 457

ANDERSON v. SHAFFER. (Civ. 5207.)

District Court of Appeal, Second District, Division 2, California. April 23, 1929.

1. Judgment 🔑910(3)—Limitations began to run against action on judgment after time for appeal had elapsed and judgment attained finality (Code Civ. Proc. § 336).

Five-year limitations of Code Civ. Proc. § 336 commenced to run against action on judgment after time for appeal had elapsed and judgment attained finality.

2. Husband and wife 🔑87(3)—Wife promising that, if husband did not pay his note before death, she would pay it from life insurance, was husband's surety, and her obligation was that of guarantor (Civ. Code, §§ 158, 162, 2787, 2844).

Wife signing written statement to effect that, if husband died before he paid his promissory note, she would pay note out of life insurance on her husband, stood as surety of husband, since debt was not her own and property was her separate property under Civ. Code, § 162, and her obligation was that of a guarantor under section 2787, relating to guaranty, section 2844, providing that sureties have all rights of guarantors, and section 158, relating to rights of married women to enter into engagements.

3. Guaranty 🔑78(1)—Guarantor could avail herself of every defense which principal might have asserted inherent to debt and not of personal nature.

Guarantor was entitled to avail herself of every defense which her principal might have asserted inherent to debt and not of a purely personal nature.

4. Limitation of actions 🔑167(1)—Action against guarantor was barred, where action on judgment against principal was barred by statute of limitations (Civ. Code, §§ 2787, 2808, 2809, 2844; Code Civ. Proc. § 336).

Where judgment against husband became final on September 21, 1913, assuming from failure to allege contrary that no appeal was taken, action commenced in 1925 against wife who was guarantor of husband's debt under Civ. Code, §§ 2787, 2844, was barred, since action on judgment was barred by five-year statute, Code Civ. Proc. § 336, and guarantor's liability was commensurate with that of principal under Civ. Code, § 2808, but could not exceed it under section 2809.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by Flo Anderson against Emma C. Shaffer. From a judgment dismissing her action, plaintiff appeals. Affirmed.

Arthur Crum, of Los Angeles, for appellant.

Adair & Adair, of Los Angeles, for respondent.

BURNELL, Justice pro tem. This is an appeal by plaintiff from a judgment dismissing her action, she having failed to amend her complaint after an order sustaining a demurrer thereto.

The complaint alleges the following facts: On April 1, 1912, plaintiff loaned $500 to one Shaffer, accepting as evidence of the latter's indebtedness his note for $500, dated April 1, 1910 (that date having been inserted by mutual mistake, all parties having intended the date to be written 1912), payable three months after date with interest at 7 per cent. per annum. To secure payment of this note Shaffer executed a chattel mortgage on personal property belonging to him. The note not being paid, plaintiff, on October 14, 1912, assigned it to one Snider for collection. Snider brought suit on the same day to foreclose the chattel mortgage, judgment therein was entered March 8, 1913, and on March 17, 1913, the property was sold by the sheriff, bringing the net sum of $138.55, which was credited on the judgment, leaving a balance due of $490.02, which was, on March 21, 1913, docketed as a deficiency judgment against Shaffer. No further amount has been paid on the note or deficiency judgment. On April 13, 1913, Snider assigned the said judgment to the plaintiff, the original payee named in the note.

It is further alleged: That at the time of the making and delivery of said promissory note and chattel mortgage by said F. A. J. Shaffer, and as a part of the same transaction, and in order to assure and secure the payment of said promissory note according to its terms, and for a valuable consideration, defendant made, executed, and delivered to plaintiff an instrument in writing in words and figures following, to wit:

"Los Angeles, California, April 2nd, 1912.

"This is to certify that in case of the death of my husband, F. A. J. Shaffer, before he pays a certain promissory note of April 1, 1912, and payable July 1, 1912, to Mrs. Flo Anderson, that I will then pay the said note out of the life insurance on my husband namely F. A. J. Shaffer.

"[Signed] Emma C. Shaffer."

Shaffer died about September 10, 1921, defendant being his widow, and it is further alleged that he was insured, that defendant was his beneficiary and had collected on his life insurance policy in an amount exceeding the amount due on the note, but had refused payment upon plaintiff's demand therefor.

The demurrer alleged failure to state a cause of action and the bar of sections 336, 337, and 339, Code of Civil Procedure. We think the demurrer was properly sustained.

[1-4] The note was executed April 1, 1912, and became due July 1, 1912. The indebtedness evidenced thereby became merged in the judgment entered March 21, 1913. Haub v. Leggett, 160 Cal. 491, 117 P. 556; Zirker v. Hughes, 77 Cal. 235, 19 P. 423. It is not alleged that this judgment was ever renewed or revived under the provisions of section 685, Code of Civil Procedure. Any action upon it was barred after five years (section 336, Code Civ. Proc.), which would commence to run after the time for appeal had elapsed, and the judgment attained finality (Feeney v. Hinckley, 134 Cal. 467, 66 P. 580, 86 Am. St. Rep. 290; Estate of Woods, 137 Cal. 129, 69 P. 900; Brandon v. Anglo-California Trust Co., 177 Cal. 699, 171 P. 956; Willard v. Dobbins, 191 Cal. 287, 216 P. 1008; Westphal v. Arnoux, 51 Cal. App. 532, 197 P. 395). As the time within which an appeal might be taken was, under section 939, Code of Civil Procedure, as it stood in 1913 and prior to the amendment of 1915, six months after entry of judgment, the judgment of foreclosure became final on the 21st day of September, 1913, assuming, from the failure to allege the contrary, that no appeal was taken. The five-year period of limitation, therefore, expired on September 21, 1918. The complaint herein was filed on July 15, 1925, or nearly six years and ten months after the statute had run upon the judgment.

A married woman may enter into any engagement or transaction with another person respecting property which she might if unmarried (Civ. Code, § 158). The wife in this case, therefore, occupies the same position with respect to the transaction as if she were a stranger. The debt not being her own, and the property being her separate property (Civ. Code, § 162), she stands as surety of the husband for the payment of this debt. McDonald v. Randall, 139 Cal. 246, 253, 72 P. 997. Her obligation was that of a guarantor (sections 2787, 2844, Civ. Code), and as such she was entitled to avail herself of every defense which her principal might have asserted inherent to the debt and not of a purely personal nature (County of Sonoma v. Hall, 132 Cal. 589, 593, 62 P. 257, 312, 65 P. 12, 459; Baldwin v. Gordon (La.) 12 Mart. (O. S.) 378; Jarratt v. Martin, 70 N. C. 459; Brandt on Suretyship and Guaranty, § 163), including the defense of the statute of limitations as to the principal debt. Her liability was commensurate with that of her principals (Grace v. Croninger, 56 Cal. App. 659, 206 P. 130; section 2808, Civ. Code), and could not exceed it (section 2809, Civ. Code).

It is true, as appellant urges, that this is an action upon the guarantee and not upon the original debt or upon the judgment in which it has become merged, but it is likewise true that, where the obligation of the principal has been extinguished, that of the guarantor (or surety as the case may be) is no longer enforceable. Some of the earlier decisions in this state expressed a view contrary to that just stated; thus, in Whiting v. Clark, 17 Cal. 407, decided in 1861, it was said: "This suit is brought on a guaranty by defendant of a debt of or for one Porter. The only thing set up in defense which it is necessary to notice is, the plea that no suit has been brought to charge the original debtor, and that the Statute of Limitations bars the claim as to him. But this is no defense. After legally charging the defendant, the plaintiff was not bound to sue the principal; at least, unless requested by the guarantor; and the surety had in his own hands the means of protecting himself from loss by delay, by paying the debt and then suing the principal, or by filing a bill to compel the creditor to sue. By the guaranty the defendant became the debtor of the creditor, and no other limitation could defeat the claim than that prescribed by law for the class of indebtedness evidenced by the paper." But this view was soon abandoned.

In Paige v. Carroll, 61 Cal. 211, the action was against a sheriff, and the sureties on his official bond, for the wrongful seizure of property. The cause of action as against the sheriff had become barred because not brought within two years after the seizure. The court said: "We cannot believe that the object was to allow a longer period for commencing an action against him and his sureties for such liability, than is allowed for commencing an action against him alone for it."

In County of Sonoma v. Hall, supra, the action was against a county recorder and his sureties to recover fees which it was alleged the recorder had collected and failed to turn into the county treasury. The cause of action as against the recorder accrued "on the day after the first Monday in January, 1893." The suit was commenced on March 20, 1896, and the defendants set up the bar of the statute of limitations in their answer. It was held that the cause of action against the recorder (Hall) was one upon a liability created by statute, and hence was barred after three years by section 338, subdivision 1, of the Code of Civil Procedure. Quoting from the opinion of Department 1 of the Supreme Court, confirmed by the court in bank, it was said:

"It follows, that, independent of the official bond, the cause of action was barred at the time it was commenced as to defendant Hall. If there had been no bond executed by Hall, and this action had been brought against him alone, there would be no doubt but that it was barred at the time it was commenced. Does the statute apply to the sureties on the written undertaking? Or in other words, can the sureties on the official bond plead the statute which has run against the cause of action?

"Sureties are never held beyond the strict terms of their contract, and, in general, they have the right to avail themselves of all the defenses that would be allowed by their principal. The object of requiring a bond from a public officer is, that the county or state may be secured from any injury caused by the neglect of duty or dishonest act of the official. Here the bond was security to the county, and given, among other things, for the purpose of indemnifying the county against the loss that it might suffer by the failure of Hall to pay the amount in controversy. The county had the right to look to the bond as security for the amount of all damages caused by the breach thereof, but it also owed a duty to the sureties. It should have brought the action for the breach before such action had become barred by the statute. The gist of the action is the failure of Hall to pay the moneys to the county. When he failed to do so, he committed a breach of the bond. The defendants, other than Hall, are made defendants for the purpose of securing a judgment against them, in order to collect the amount of damage caused by the breach. The bond is not the cause of action, but collateral thereto, and a means of which the county might avail itself. If the defendant Hall had, instead of giving the bond, given a mortgage upon real estate, properly conditioned, as indemnity for any breach of his official duty, the mortgage would have been an instrument in writing, but it could not be held to give a cause of action to the county after the time had run for commencing an action for the breach. Surely, the sureties cannot be in a worse position than the principal would have been if sued independent of the bond. If defendant Hall could escape liability by reason of the statute, the other defendants are certainly in no worse position. The bond did not impose upon Hall any duties other than or different from those created by the statute. It created no liability upon the sureties, so long as Hall performed his duties as required by the statute. The liability arose only when Hall neglected to make the payment. The bond was collateral security for the liability."

One reason for the rule that when the principal debt has become barred by the statute the guarantor cannot be held is thus succintly stated in Ebner v. West Hollywood Transfer Co., 45 Cal. App. 186, 187 P. 114: "That principle is that the guarantor has certain rights of subrogation against the principal and, therefore, if the creditor allows the obligation of the principal debtor to expire by limitation, he seriously injures the guarantor, who is thus deprived of his remedy against the principal, and for this reason the creditor may not, under such circumstances, enforce the guaranty."

In Stone v. Hammell, 83 Cal. 547, 23 P. 703, 8 L. R. A. 425, 17 Am. St. Rep. 272, the main facts were as follows: The plaintiff, Stone, and three others, Newell, Hamilton, and Hayman, were sureties on a note made by defendant Hammell to one Stevens for $3,000, dated July 1, 1877, and payable one year after date. Newell had paid over $2,000 on the note, and Stone paid to him (by notes) $1,000 as his pro rata contribution share. The action was by Stone to recover this $1,000 payment from Hammell, the principal on the note. In reversing a judgment in favor of Stone, the court said: "Now, in the case at bar, defendant was in no manner benefited by the notes given by plaintiff to Newell, nor was any debt or liability of defendant thereby extinguished; because at the time the notes were given there was no legal liability from the defendant to Newell, for the reason that any cause of action which the latter might have had against the defendant for moneys which he had paid to Byron Stevens had long been barred by the statute of limitations. The last payment made by Newell on the note to Stevens, as averred and found, was on January 10, 1881; and as his cause of action for the payments which he had made was not 'founded on a written instrument,' it was barred in two years—that is, on January 10, 1883. (Chipman v. Morrill, 20 Cal. 136). But plaintiff did not give his notes to Newell until March 1, 1884. At that time defendant was under no legal obligation to any one which plaintiff could discharge by giving said notes. The original note given to Stevens had itself been long since outlawed. Therefore by giving said notes plaintiff acquired no cause of action against the defendant herein."

The same rule has been followed in other jurisdictions. Thus, in State v. Conway, 18 Ohio, 234, where the action was against a sheriff and the sureties on his bond, the cause of action as against the sheriff had become barred by the statute of limitations before the suit was commenced. It was claimed that as to the sureties, however, the bond being an instrument in writing, a different period of limitation applied, within which the action had been brought. It was held that "the actual cause of action is not the execution of the bond—that is more in the nature of a collateral security; but the cause of action is the misfeasance, the false return. Without proof of the false return, there could be no recovery. The action is, in effect, although not so in form, an action against an officer for misfeasance in office. So far as actions of this character are concerned, the limitation acts upon the cause, not the form of action."

So here it may be pointed out that without proof of the original debt there could be no recovery. Again the learned chief justice, speaking for the court in the last-cited case, said: "If I am correct in these views, then it follows that had Alden [the sheriff] alone been sued upon this bond, and the breach assigned as it now is, he might have availed himself of the one year limitation provided in the statute. And surely his securities are in no worse situation than he himself would have been. If he could escape liability, they certainly can."

The doctrine announced in State v. Conway, supra, was reaffirmed by the Supreme Court of Ohio a few years later in State v. Blake, 2 Ohio St. 147. We quote from the opinion:

"This suit is brought upon the official bond of Beam as auditor of Knox county. The breaches alleged consist of a great number of misfeasances and nonfeasances in the discharge of his official duties, which it is charged have resulted in injury to the county. To some of these breaches the defendants pleaded the statute limiting actions against officers for these causes to one year. This plea being demurred to by the plaintiff, presents the single question whether it constitutes a sufficient bar to the action. It is not doubted, that this precise question was made and decided affirmatively in the case of the State for the Use of Mount Pleasant Bank v. Conway, 18 Ohio, 234; but the correctness of that holding is denied. We have again carefully examined the subject, aided by the able and thorough discussion of counsel, and a majority of this court are of opinion, that the law was correctly settled by our predecessors. In coming to this conclusion, we might with propriety stop; * * * I shall only notice such further considerations as the course of the present argument has made necessary; and in doing so, it is at once conceded, that the action is in debt, founded upon a specialty, and contains an agreement in writing that Beam should well and truly perform all the duties devolved upon him as auditor of Knox county; and that a failure to do so would be a breach of the bond, for which both principal and sureties would be liable to make reparation to any one injured thereby; and if the statute contained nothing further limiting such liability than the third clause of the first section of the 'act for the limitation of actions,' the liability would be governed by that clause, and would continue for fifteen years. At the same time, it cannot be denied that such a bond is only a collateral security for the faithful performance of the official duties of the officer (Walton v. The United States, 9 Wheat. 651 [6 L. Ed. 182]), and that the defendants are only liable as his sureties; and as such, entitled to all the rights arising from that relation, and growing out of the contract into which they have entered.

"From the first part of this proposition, it necessarily follows, that the collateral obligation can exist no longer than the liability it was created to secure; while upon the last, the universally acknowledged doctrine is, that 'it is of the essence of the contract of suretyship, that there be a subsisting valid obligation of a principal debtor. Without a principal there can be no accessory; and by the extinction of the liability of the former, the latter becomes extinct.' Russell v. Failor, 1 Ohio St. 329 [59 Am. Dec. 631]; Burge on Sur. 3; Theo. on Prin. and Sur. 2.

"Whatever, therefore, amounts to a good defense to the original liability of the principal, is a good defense for the sureties when sued upon the collateral undertaking. Couch v. Waring, 9 Conn. 261.

"Otherwise, the principal would be indirectly deprived of the benefit of a valid defense against the creditor, by being compelled, in effect, to respond through his sureties; or the sureties would be deprived of their right to reimbursement from the principal and thus one or the other be compelled to lose the rights which the law had secured to them.

"For every nonfeasance or misfeasance in office, the officer is liable to the party injured; and this is the liability which the principal has incurred, to which the official bond is accessory, and to which the sureties have undertaken to respond; the object and purpose of the law being, to secure to the party injured, the responsibility of others than the officer; the more certainly to afford him satisfaction for his injury. Does this liability continue against the officer beyond one year? If not against him, it certainly cannot against his sureties."

In Bernd v. Lynes, 71 Conn. 733, 43 A. 189, the defendant was administratrix of the estate of one Lacey. The action was on a written guaranty of the payment of a promissory note which had been indorsed on said note by the decedent in his lifetime. It read: "For value received, I hereby guaranty the payment of the within note until paid." The court said:

"The defendant insisted that the plaintiff's right to recover on the said guaranty was barred by the statute of limitations; and this is the only question in the case. It is admitted that the cause of action against the maker of the note is barred. Counsel for the plaintiff, in their brief, clearly and candidly state the question. They say: 'It may be conceded that, had the guaranty not contained the words "until paid," the statute of limitations would operate as a bar to the present action.' Stated in a little different words, the question is this: Does the cause of action against the guarantor continue after the statute of limitations has run against the principal debtor? The answer to this question depends upon the character of the contract of guaranty or suretyship; and the force of the words 'until paid' to enlarge that contract. What the character of that contract is was discussed by this court in the very recent case of Eising v. Andrews, 66 Conn. 65, 33 Atl. 585 [50 Am. St. Rep. 75]. What we said in that case is applicable in this: 'The rule is that a cause of action cannot exist against a surety, as such, unless a cause of action exists against the principal. Ordinarily, the liability of such a surety is measured precisely by the liability of the principal.' Brandt, Sur. Sec. 125; Seaver v. Young, 16 Vt. 658; Boone Co. v. Jones, 54 Iowa, 709, 2 N. W. 987, and 7 N. W. 155 [37 Am. Rep. 229]; Patterson's Appeal, 48 Pa. St. 345; McCabe v. Raney, 32 Ind. 309. The obligation of a surety is an obligation accessory to that of a principal debtor, and it is of the essence of this obligation that there should be a valid obligation of some principal. Thus, when one agrees to become responsible for another, the former incurs no obligation as surety if no valid claim ever arises against the principal. Chit. Cont. (11th Ed.) 788. If the principal is not holden, neither is the surety; for there can be no accessory if there is no principal. De Col, Guar. & Sur. (Am. Ed.) 39; Add. Cont. Sec. 1111. The existence of a principal debtor is a condition precedent to the operation of the contract of a surety. Hazard v. Irwin, 18 Pick. [Mass.] 95; Swift v. Beers, 3 Denio [N. Y.] 70; Mt. Stephen v. Lakeman, L. R. 7 Q. B. 202; Mallet v. Bateman, L. R. 1 C. P. 163. This is only in accordance with the general law of contracts which prevents a contract from becoming operative unless and until all conditions precedent are fulfilled. Brandt, Sur., sec. 214; [Farmers' & Mechanics'] Bank v. Kingsley, 2 Doug. (Mich.) 379. So, too, in general, whatever discharges the principal debtor discharges the surety. The liability of a surety, as such, on a claim which is good as against the principal, ceases as soon as the claim is extinguished against the principal. The nature of the undertaking of a surety is such that there can be no obligation on his part unless there is an obligation on the part of the principal. 'It is correctly laid down in Chitty on Contracts that the contract of a surety is a collateral engagement for another, as distinguished from an original and direct agreement for the party's own act; and, as is stated in Theobold on Principal and Surety; * * * it is a corollary from the very definition of a contract of suretyship that, the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such a principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal. * * * It would be most unjust and incongruous to hold the surety liable where the principal is not bound.' Storrs, J., in Ferry v. Burchard, 21 Conn. 603. The same general doctrine is held in many other cases in this state. Willey v. Paulk, 6 Conn. 74; De Forest v. Strong, 8 Conn. 522; Bull v. Allen, 19 Conn. 101; Glazier v. Douglass, 32 Conn. 393; Candee v. Skinner, 40 Conn. 464. The special claim in this case is that the words 'until paid' operated to enlarge the ordinary contract of suretyship, so as to take this case out of the general rule. We do not think the words as here used can be given that effect. This case is the ordinary one of suretyship, and, when the cause of action has become barred by virtue of the statute of limitations, the cause of action against the guarantor also became barred."

Other cases announcing and affirming the same principle are: Ryus v. Gruble, 31 Kan. 767, 3 P. 518; Commissioners v. Van Slyck, 52 Kan. 622, 35 P. 299; Davis v. Clark, 58 Kan. 454, 49 P. 665; Ware v. State, 74 Ind. 185; Spokane County v. Prescott, 19 Wash. 418, 53 P. 661, 67 Am. St. Rep. 733.

Had defendant in the case at bar actually paid the judgment after the expiration of the five-year period prescribed in section 336, Code of Civil Procedure, she could not have successfully maintained an action against the principal debtors for reimbursement, since such payment would have been a purely voluntary payment. Machado v. Fernandez, 74 Cal. 362, 16 P. 19. In Schlitz v. Thomas, 61 Cal. App. 635, 216 P. 51, the plaintiff had guaranteed payment of a note executed by a corporation. The note and guarantee were both executed on December 1, 1912. The note was due one day after date. July 1, 1918, plaintiff paid the amount of the note to the bank named therein as payee, and on June 23, 1919, began suit to recover the amount of such payment from the stockholders of the corporation which had executed the note. Appealing from a judgment in plaintiffs' favor, the defendants contended "that the liability of the corporation to pay the $4,000 note had been extinguished by the statute of limitations before the alleged payment thereof by plaintiffs and that therefore the payment was voluntary and gave plaintiffs no cause of action against the defendants. This contention must be sustained. To entitle a guarantor or surety to reimbursement, contribution, or subrogation on account of payments made in behalf of his principal it must appear that such payments were made under compulsion, that is, under a legal obligation, and not as a mere volunteer."

The liability of the principal having thus been extinguished by the passing of the statutory period, defendant as guarantor was under no obligation to pay the debt, and the complaint therefore failed to state a cause of action against her, and the demurrer thereto was properly sustained.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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98 Cal. App. 415

VAN WYKE v. BURROWS et al. (Civ. 5161.)

District Court of Appeal, Second District, Division 2, California. April 22, 1929.

1. Licenses 🔑39—Evidence held to show that one suing for commission on sale of bank stock was acting as broker (Corporate Securities Act, § 2, subd. 9, and § 5 as amended by St. 1923, pp. 89, 90, §§ 1, 2).

In action or commission on sale of bank stock, evidence *held* to show that plaintiff was acting in capacity of broker within Corporate Securities Act, § 2, subd. 9, as amended by St. 1923, p. 89, § 1, defining such term, and section 5, as amended by St. 1923, p. 90, § 2, requiring certificate of authority to act as such.

2. Licenses 🔑18½—Sale of controlling bank stock held within statute requiring certificate of authority to act as broker in selling corporate securities (Corporate Securities Act, § 5, as amended by St. 1923, p. 90, § 2).

Sale of controlling stock of bank *held* within Corporate Securities Act, § 5, as amended by St. 1923, p. 90, § 2, requiring certificate of authority from Securities Commission to act as agent or broker in selling such securities.

3. Licenses 🔑18½—Bank stock held within statute requiring certificate of authority to act as broker in selling corporate securities (Corporate Securities Act, § 5, as amended by St. 1923, p. 90, § 2).

Bank stock *held* not exempt from operation of Corporate Securities Act, § 5, as amended by St. 1923, p. 90, § 2), requiring certificate of authority from Securities Commission to act as agent or broker in selling such securities; provision excepting banking corporations issuing securities against their own assets referring to bank notes or other certificates of credit, not corporate stock of bank.

4. Licenses 🔑39—Contracts made or performed without license required by revenue laws are generally valid, but contracts violating laws for public protection are invalid, if license was not procured before performance.

Contracts made or performed without license required by laws enacted for raising of revenues are generally valid, but contracts in violation of laws for protection of public are invalid, if license had not been procured when performance was had.

5. Licenses 🔑39—Agreement to pay commission on sale of securities by broker without certificate of authority is void (Corporate Securities Act, § 5, as amended by St. 1923, p. 90, § 2).

Corporate Securities Act having been enacted for protection of public, agreement for payment of commission on sale of securities by broker without certificate of authority required by section 5, as amended by St. 1923, p. 90, § 2, is void.

6. Trial 🔑163—Court could grant motion for nonsuit, where broker suing for commission testified that he had no license to sell bank stock, without objecting to question, though fact was not pleaded nor mentioned in motion (Corporate Securities Act, § 5, as amended by St. 1923, p. 90, § 2).

Where broker, suing for commission on sale of bank stock, answered question whether he had license required by Corporate Securities Act, § 5, as amended by St. 1923, p. 90, § 2, in negative, without objecting thereto, trial judge had power to grant motion for nonsuit, through such specific ground was not mentioned therein nor covered by pleadings.

7. Appeal and error 🔑1138—Appellate court will not overrule granting of nonsuit without specification of grounds and remand case, when certain that plaintiff cannot make out case.

The Court of Appeal will not overrule the trial court's action in granting a nonsuit without specification of grounds of motion therefor and remand the case, when it is certain that no case could ever be made out for plaintiff.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by W. A. Van Wyke against A. S. Burrows and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Fred Mansur, of Los Angeles, for appellant.
Harry L. Person and George D. Rodgers, both of Los Angeles, for respondents.

STEPHENS, Justice pro tem. Plaintiff, the appellant herein, entered into an agreement with A. S. and C. B. Burrows, both of whom are defendants and respondents herein, whereby he was to endeavor to sell the latter's bank stock and was to receive $10 for each share sold. Plaintiff made certain efforts to secure a purchaser, and in a more or less indirect way these efforts interested parties who actually purchased the stock, whereupon he claimed the commission, which defendants refused to pay, claiming that they had no knowledge that the purchaser came to them through the efforts of plaintiff, and that they sold the stock without making provision for the payment of any commission. This action for the commission resulted, and, at the conclusion of plaintiff's case, he offered to dismiss the action against certain defendants, whereupon the court stated: "I do not believe there is any case made against any one." Counsel for defendants then replied, "I intended to make a motion for a nonsuit as soon as the plaintiff got through," to which the court responded, "The motion will be granted." Judgment of nonsuit was thereafter entered, and plaintiff appeals on the ground that the motion should have been denied on the evidence.

Respondents contend that the judgment should stand, urging that the evidence is insufficient to sustain a finding that appellant actually produced a purchaser ready, willing, and able to buy the stock and who in fact did purchase it. We shall not examine the evidence upon this point, as we think the action of the court in ordering a judgment of nonsuit must be sustained independent thereof.

While appellant was on the witness stand, the following questions were asked and answers given: "Q. Did you hold a broker's license from the corporation commissioner of the state of California? A. I have never held but one license in the state of California, and that is a real estate broker's; I had a salesman's license first." Respondents claim that this testimony was a sufficient basis for the court's ruling on the motion for nonsuit, claiming, of course, that the contract for commission was void because the broker was not licensed under the Corporate Securities Act (St. 1917, p. 673). In answer to this, appellant makes two statements as to the law, contending that either one is a sufficient reason why the testimony should have been entirely disregarded by the court. These statements are that "respondents cannot now for the first time raise the provisions of the Corporate Securities Act as a bar to recovery without having pleaded it and raised it as an affirmative defense," and that "appellant is not within the jurisdiction of the Corporate Securities Act." We shall examine these points in the inverse order of their statement.

[1] Subdivision 9 of section 2 of the Corporate Securities Act as amended in 1923 (Stats. 1923, c. 50, p. 89) reads as follows: "The word 'broker,' as used in this act, includes every person or company, other than an agent, * * * offering for sale, negotiating for the sale of, or otherwise dealing in any 'security' or 'securities' issued by others, * * * or of offering them for sale to the public." Section 5 of the same act as amended in 1923 (Stats. 1923, p. 90) reads as

follows: "No person or company shall act as an agent or broker until such person or company shall have first applied for and secured from the commissioner a certificate, then in effect, authorizing such person or company so to do. * * *"

That appellant was acting in the capacity of broker is certain. He went to A. S. Burrows of his own volition and talked with him about selling the stock. He testified: "And I asked him why didn't he sell his bank? Well, he turned to me and says, 'Why don't you sell it?' I told him I had lost touch with banks; had not dealt in any bank stock for a number of years, but I would keep it in mind." On a later occasion these same gentlemen met, and appellant asked Mr. Burrows if he still desired to dispose of the control of the stock, and the reply was in the affirmative. Mr. Burrows then furnished appellant with a statement of the bank's condition.

"Q. [Propounded to appellant]: Then it was understood that if you did negotiate a purchase of the bank you were to receive ten dollars per share for it? A. Ten dollars per share on all stock that was actually transferred. * * *

"Q. Then he made the condition for the sale of the stock that all stockholders should have the same privilege of selling? A. Yes, it should be optional with them whether they should dispose of their stock or keep it, all or any part of it."

[2] Appellant argues that, since this was to be one transaction in which the control of the bank was to be sold, the transaction does not come under the statute for the regulation of stock sales. We are unable to follow him therein. He also contends that the case of Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, is controlling. Again we are unable to agree with him. That case was one where an owner of real estate promised to reward a person not a licensed realtor if he would send some one to him with whom he could negotiate a sale of his property. The person did send a prospect to the owner, and, after negotiating with him, the latter sold him the property. It was held that the reward had been earned and could be collected, since the person was not acting as an agent to negotiate sales of real property. The analogy would have been a reasonable one had the contract herein been to send Burrows some one with whom he could negotiate; but the agreement, as we have seen, went far beyond that, and was no more nor less than a contract to pay commission for the sale of stock.

[3-5] Appellant also contends that bank stock is issued against the assets of the bank, and is exempt from the operation of the statute because it is provided therein that it applies to companies "excepting * * * all corporations organized under the laws of this state for the purpose of conducting the business of banking * * * when such corporations are issuing securities of their own issue against their own assets." It seems too obvious for argument that this means bank notes or other certificates of credit and not the corporate stock of the bank. It appears to us that the contract or agreement which we have here under consideration falls squarely within the terms of the Corporate Securities Act. This being true, does it follow that the agreement for the payment of a commission is void? We think it does so follow.

Laws requiring licenses are generally divided into two classes. Laws enacted for the raising of revenue fall under one class, and contracts made or performed without the license are, generally speaking, valid. Laws for the protection of the public fall under the other class, and contracts in violation of the latter class are invalid if the license had not been procured when performance was had. The Real Estate License Law and the Corporate Securities Law come under the latter classification. Wood v. Krepps, 168 Cal. 382, 143 P. 691, L. R. A. 1915B, 851; Levinson v. Boas, 150 Cal. 185, 88 P. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661; Beebe v. Kistler, 52 Cal. App. 494, 199 P. 537; Houston v. Williams, 53 Cal. App. 267, 200 P. 55; Radich v. Cernokus, 65 Cal. App. 452, 224 P. 124. We conclude that appellant is within the jurisdiction of the act.

[6] We shall next consider appellant's second statment, only we shall phrase it differently: In the consideration of this appeal, have we the right to consider the fact that appellant had no broker's license? It is true the amended complaint does not contain an allegation that plaintiff had a broker's license while attempting to sell the bank stock. We note too that the defendants demurred to the two counts of the amended complaint on the ground that in neither were facts alleged which were sufficient to state a cause of action, and that this demurrer was overruled. Upon the opening of the case, defendants objected to the taking of any evidence for the reason stated in the demurrer, and the court reserved ruling. Since no ruling was ever made, and the evidence received under the reservation remained in the case, it will be taken that the court intended the objection to be considered as overruled.

There are cases holding that there can be no presumption that a person has committed a crime or misdemeanor, and for that reason, where the complaint fails to allege compliance with a statute providing a penalty, as the one we here have under consideration, there is no presumption that a license had not been obtained. Harris v. Bucher, 25 Cal. App. 380, 143 P. 796, and cases therein cited. The answer also is silent upon the question of license, and since the rules of pleading in this state require that affirmative defenses shall be set up in the answer (Greiss v. State Investment, etc., Co., 98 Cal. 241, 33 P. 195), we must conclude that the pleadings alone do not present any issue upon the subject of a broker's license. Notwithstanding this situation as to the pleadings, appellant was asked directly by counsel for respondents whether or not he had such a license, and without objection thereto he responded in the negative. Here we find the moving party in a lawsuit raising no objection to the opposite party eliciting the information that the very basis of his action was in direct contravention of a penal statute which was enacted for the protection of the people of the state. It seems to us that the power of the trial judge would be weak indeed if he could not immediately say that no recovery could be had under such circumstances and that therefore it would be purposeless to proceed with the case, notwithstanding the fact that this specific ground was not mentioned in the motion for nonsuit.

The point is well covered in Estate of Higgins, 156 Cal. 257, where, at page 260, 104 P. 6, 8, the following is found: "Great stress is laid by the appellants upon the point that the court erred in refusing to submit to the jury the issue of undue influence. The ruling was, in effect, equivalent to an order granting a nonsuit as to one of the causes of action. The cases in which a judgment of nonsuit may be entered are set forth in section 581 of the Code of Civil Procedure, and the court has authority to grant such judgment only in the cases specified by law. (Hanna v. De Garmo, 140 Cal. 172, 73 P. 830.) There is no provision in our statutes authorizing the court (except under circumstances not appearing here) to grant a nonsuit without any motion to that end by the defendant. It would seem, therefore, that the court below should not, in the absence of any request by the proponent, have taken the issue of undue influence from the jury. But, under the facts disclosed by the bill of exceptions, this error or irregularity was not such as to justify a reversal. The evidence on the issue of undue influence was so conclusive in favor of the proponent that the court would have been bound to set aside a verdict in favor of appellants. When this condition appears the court is 'justified in refusing to submit the case to a jury.' (Estate of Morey, 147 Cal. 495, 82 P. 57.) A plaintiff is ordinarily entitled to a motion specifying the grounds upon which a nonsuit is asked in order that he may, by amendment or further proof, have an opportunity to supply any defect suggested. Where such defect is one which might have been cured, if called to the attention of the plaintiff, it would obviously be unjust to permit a defendant to urge it for the first time in the appellate court. (People [ex rel. Dickenson] v. Banvard, 27 Cal. 474; Miller v. Luco, 80 Cal. 261, 22 P. 195; Palmer & Rey v. Marysville, etc., Co., 90 Cal. 168, 27 P. 21; Durfee v. Seale, 139 Cal. 603, 73 P. 435.) But this consideration has no application to a case where the evidence has been fully presented, and the plaintiff has totally failed to make out a case which would support findings in his favor. Where there is no reason to believe that any additional evidence in support of the complaint could be produced, it is difficult to see what substantial benefit would be derived from a formal motion for nonsuit, based on the insufficiency of the evidence. Such is the situation here. The defect in contestants' case is incurable, and the court will not order a reversal for the mere purpose of having submitted to the jury an issue which could not be decided in favor of contestants. 'Granting,' as was said in Estate of Morey [supra], 'that the course pursued in this case was irregular, it does not follow that it is fatal to the judgment, even on appeal.'"

It cannot successfully be here contended that the license matter was not an issue in the case, for the parties by their actions consented to make it an issue, notwithstanding it was not covered by the pleadings. Illinois T. & Savings Bank v. Pac. Ry. Co., 115 Cal. 285, 297, 47 P. 60. The principle is clearly stated in Ortega v. Cordero, 88 Cal. 221, at page 226, 26 P. 80, 81, where the court, in distinguishing cases, says: "The class of cases cited by counsel for respondent, such as White v. San Rafael, etc., R. R. Co., 50 Cal. 417; Tevis v. Hicks, 41 Cal. 123; Smith v. Penny, 44 Cal. 161, and Horton v. Dominguez, 68 Cal. 642 [10 P. 186], has no proper application to the facts of this case. In that class of cases it appears of record that the parties have actually tried issues outside of the pleadings without objection, and by tacit consent, as if the issues had been made by the pleadings, and under such circumstances that if one party had objected the other might have supplied or cured the defect by amendment of his pleading, or otherwise mitigated the effect of the objection. The principle upon which these decisions rest is that of equitable estoppel; it being held that a party who acquiesces and participates in the trial of an issue without objection, as if it arose from the pleadings, when he might have objected on the ground that the issue was not made by the pleadings in the trial court, where the objection might have been met by amendment of the pleadings or otherwise, so that it would have operated less injuriously on the other party than if first made on appeal, has thereby waived the objection and misled the other party to understand that the issue was properly made, and therefore should not be heard to make it on appeal." In the instant case, it is clear that an objection to the question regarding the broker's license would have put the defendant upon notice that his answer contained no allegation that the plaintiff had no license, and he could have amended to meet the situation.

[7] We conclude that the contract for the sale of the bank stock was within the terms of the Corporate Securities Act, which act is not primarily an act for the raising of revenue, but is one primarily for the protection

of the public; that, during the time appellant was trying to sell the stock and at the time the stock was actually sold, he had no license as required by the act; that the possession of a license became an issue in the case when, without objection, inquiry was made and answer given concerning the possession of a license; that, notwithstanding the technical irregularity of the court's action in granting a nonsuit without a specification of the grounds of the motion, this court will not overrule such action and send the case back to the trial court, when it is certain that no case could ever be made out for the plaintiff in the case. As appellant's case against all other defendants must fall if the contract with Messrs. Burrows falls, it follows that the action of the court in granting a nonsuit against all defendants should be sustained.

The judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

98 Cal. App. 367

EDSON et al. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR SISKIYOU COUNTY et al. (Civ. 3797.)

District Court of Appeal, Third District, California. April 18, 1929.

1. Officers 🔑74—Accusation not showing person sought to be removed from office was acting officer at filing of accusation is insufficient (Pen. Code, §§ 758, 769).

Under Pen. Code, § 758, providing for accusation against public officers for misconduct in office, and section 769, imposing penalty by removal from office, accusation which does not show on its face that person proceeded against is duly elected, qualified, and acting officer, in office from which it is sought to remove him, at date of filing of accusation, does not state cause of action.

2. Municipal corporations 🔑174—Accusation against city trustees for misconduct in office, not charging that trustees are and were such at filing of accusation, held insufficient (Pen. Code, §§ 758, 769).

Accusation against members of board of city trustees, charging them with willful and corrupt misconduct, and alleging that trustees named were and are designated as trustees duly elected and qualified at all times mentioned therein, but not charging that trustees are, and were at time of presenting and filing accusation, members of board of trustees, *held* insufficient to charge offense, under Pen. Code, §§ 758, 769.

3. Prohibition 🔑10(2)—Prohibition is proper remedy, where trial court overrules demurrer to accusation for removal of officer not stating cause of action.

Prohibition is proper remedy, where trial court overrules demurrer to an accusation which does not state facts sufficient to constitute cause of action.

4. Officers 🔑74—No appeal lies from trial court judgment in proceedings against public officers for willful misconduct in office (Pen. Code, §§ 758, 772).

In proceedings under Pen. Code, § 758, or section 772, against public officers for willful or corrupt misconduct in office, judgment of trial court is final, and no appeal lies therefrom.

5. Prohibition 🔑3(1)—Applicants for prohibition to restrain further proceedings on accusation charging them with willful misconduct in office did not have adequate legal remedy, and could bring prohibition (Pen. Code, § 758).

In application for writ of prohibition to restrain court from proceeding with proceedings based on accusation under Pen. Code, § 758, charging applicants with willful misconduct in office, applicants did not have plain, speedy, and adequate remedy, and prohibition was proper.

6. Officers 🔑74—Accusation to remove public officers for misconduct in office should charge directly, not by way of recital, and allege acts claimed to be basis for misconduct (Pen. Code, §§ 758, 769).

Where accusation is brought under Pen. Code, §§ 758, 769, to remove public officers from office for willful misconduct, charge against officers should be direct, and not by way of recital, and should show what orders, if any, were adopted by officers, and should charge acts claimed to be basis for misconduct.

7. Municipal corporations 🔑174—Accusation charging public officers with collecting money by order of board of trustees and individuals thereof held demurrable for failure to state who individuals were (Pen. Code, §§ 758, 769).

Accusation, under Pen. Code, §§ 758, 769, to remove public officers from office for willful misconduct, alleging that sums of money were collected and paid by order of city board of trustees and individuals thereof, was demurrable on ground of uncertainty as to who individuals were.

8. Officers 🔑74—Accusation to remove public officer for misconduct need not be drawn with particularity of indictment, but must allege all facts necessary to state case (Pen. Code, §§ 758, 772).

Accusation, under Pen. Code, §§ 758, 772, to remove public officers for willful misconduct in office, need not be drawn with all particularity required in drafting indictments and informations, but all essential facts necessary to constitute cause of action must be set forth.

Prohibition by A. G. Edson and others against the Superior Court of the State of California in and for the County of Siskiyou and another. Writ granted.

Jesse W. Carter, of Redding, and Annette Abbott Adams, of San Francisco, for petitioners.

Charles E. Johnson, of Yreka, for respondents.

PLUMMER, J. This cause is before us upon the application of the above-named petitioners, praying for a writ of this court restraining and prohibiting the superior court of the state of California, in and for the county of Siskiyou, and H. S. Gans, as the judge presiding in said court, in the matter of this cause, from proceeding further in any proceedings based upon a certain accusation filed in said court on the 8th day of December, 1928. Upon the filing of the petition herein an alternative writ was issued, directing the respondents to show cause, if any, why the writ of prohibition prayed for should not be granted.

The record before us shows that on the 8th day of December, 1928, the grand jury of the county of Siskiyou presented and filed in said court an accusation against the above-named petitioners charging them with misconduct in office and asking for their removal. The accusation, so far as pertinent here, is in the words and figures following:

"A. G. Edson, Frank Piluso, Charles Hoffman, and Ephriam Ackley, as councilmen and members of the board of city trustees of the town of Mt. Shasta City, Siskiyou county, California, duly elected, acting and qualified as such city trustees, and acting as such at all times herein mentioned, are hereby accused by the grand jury of the county of Siskiyou, state of California, by this accusation, of willful and corrupt misconduct in the discharge of their duties as said councilmen of the city board of trustees of the town of Mt. Shasta City, in and for the said county of Siskiyou, state of California, said willful and corrupt misconduct as such board of city trustees consisting of the following acts, specified as follows, to wit: That A. G. Edson, Frank Piluso, Charles Hoffman, and Ephriam Ackley, qualified and acting as members of the city board of trustees of the city of Mt. Shasta, at Mt. Shasta City, in said Siskiyou county, California, on or about the 1st day of June, 1928, and 1st day of July, 1928, unlawfully, willfully, corruptly, and under color of official right, did order collected and did collect and have collected and obtained of and from certain persons operating slot machines and houses of prostitution within the city limits of Mt. Shasta City certain fines, fees and licenses, to wit: The sum of five dollars ($5.00) per month for the operation of illegal slot machines, and the sum of twenty-five ($25.00) dollars per month for each house of prostitution, said sums being collected and paid by order of said city board of trustees, above mentioned, and individuals thereof, to the police judge of the city of Mt. Shasta City, which said sums were paid on or about the 1st day of June and the 1st day of July, 1928, and the said members of the said city board of trustees, above mentioned, knowing the same to be illegal and without authority of law."

To this accusation the respondents appeared and demurred, assigning a number of reasons why said accusation was and is insufficient, only two of which we need to consider: First, that said accusation does not state facts sufficient to constitute an accusation for willful and corrupt, or any, misconduct in office, against the defendants, or any of them, or misconduct in the discharge of their duties as members of or as the board of trustees of the town of Mt. Shasta; second, that said accusation does not allege, and it does not appear therefrom, that the defendants, or any of them, now are, or were at the time the said accusation was presented, city trustees of said town of Mt. Shasta. By the charging part of the accusation, which we have set forth, it appears that the petitioners were and are designated as the board of trustees of the town of Mt. Shasta, duly elected, qualified, and acting as such at all the times herein mentioned, and that the times mentioned were and are the 1st day of June, 1928, and the 1st day of July, 1928. There is nothing in the accusation charging that the petitioners are, and were at the time of presenting and filing the accusation, members of the board of trustees of the town of Mt. Shasta, or that any of the petitioners were such members.

[1, 2] This proceeding is based upon section 758 of the Penal Code, which reads: "An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed." Section 769 of the Penal Code provides that "upon a conviction, the court must, at such time as it may appoint, pronounce judgment that the defendant be removed from office," etc. The only penalty provided for is that of removal from office, which, of course, necessitates the fact of the person against whom the accusation is presented, being in office at that date. If the accusation presented does not upon its face show that the person proceeded against is the duly qualified and acting officer at the date it is sought to remove him from office, it is fatally defective in not laying a foundation upon which a judgment of removal can be based. That an accusation which does not show that the person proceeded against is the duly elected, qualified, and acting officer of the office from which it is sought to remove him, at the date of the filing of the accusation, does not state a cause of action, is sustained by the following authorities: In re Stow, 98 Cal. 587, 33 P. 490; Smith v. Ling, 68 Cal. 324, 9 P. 171; Thurston v. Clark, 107 Cal. 285, 40 P. 435; Woods v. Varnum, 85 Cal. 639, 24 P. 843.

The very case upon which the respondents rely is an authority against the sufficiency of the accusation in this cause. We quote from the case of Woods v. Varnum: "As to the point that there is no statement of the time when appellant became tax collector, or when his present term commenced, the averment is that the appellant 'is, and at all times herein mentioned was, the duly elected, qualified, and acting tax collector of said San Diego county.' This was a sufficient averment on that point. Of course, the proceeding lies only against one in office, and not against one whose term has expired; but the accusation sufficiently shows appellant to be in office." Had the accusation in this case read that the persons named "are, and at all times hereinafter mentioned were, the duly elected, qualified and acting trustees," etc., it would have conformed to the case of Woods v. Varnum, supra, and laid the basis for a judgment of removal in the event of the accusation being sustained. The cases which we have cited are conclusive upon these points.

[3] It appears to be well settled that prohibition is a proper remedy, where a trial court overrules a demurrer to an accusation which does not state facts sufficient to constitute a cause of action. In Rose v. Superior Court, 80 Cal. App. 739, 252 P. 765, it is said in substance that prohibition is a proper remedy, where the accusation does not state facts sufficient to constitute a cause of action for removal, or confer upon the superior court jurisdiction to proceed, and is established by a long line of decisions. That prohibition will lie under such circumstances is also supported by the cases of Siebe v. Superior Court, 114 Cal. 551, 46 P. 456; Coffey v. Superior Court, 147 Cal. 525, 82 P. 75; Hunt v. Superior Court, 178 Cal. 470, 173 P. 1097. Some of these cases proceed to consider petitions for writs of prohibition, without discussing other decisions holding prohibition to be a proper remedy.

[4, 5] In answer to the foregoing, the respondents insist that "a writ of prohibition lies only when and because the court or tribunal to which the writ is addressed is acting, or is about to act, in excess of its jurisdiction, and there is no plain, speedy and adequate remedy in the course of law," and then add: "It is well established that a judgment is not void if the court has jurisdiction of the parties and the subject-matter, irrespective of whether the complaint states a cause of action or not, so long as it apprises the defendant of the nature of plaintiff's demand" (citing in support of this statement the case of Reid v. Superior Court, 44 Cal. App. 349, 186 P. 634). The opinion in the Reid Case, supra, quotes from Brush v. Smith, 141 Cal. 466, 75 P. 55, where it is said: "If the court below should hold the complaint sufficient, when as a matter of law it failed to state facts sufficient to constitute a cause of action, such ruling would be erroneous, but nevertheless the court had jurisdiction. It had jurisdiction to determine the question and to determine it wrong as well as right." The same language is quoted from the opinion in the case of Christerson v. French, 180 Cal. 523, 182 P. 27. The case of Brush v. Smith, supra, was a collateral attack upon the judgment in a civil case. The case of Christerson was an appeal from an order setting aside a judgment entered by default. These cases, while correctly stating the law based upon the facts presented, are not pertinent here, where the petitioners have no plain, speedy and adequate remedy. We do not need to cite the authorities, for it is now the unquestioned law that no appeal lies where the proceedings are based upon either section 758 or 772 of the Penal Code. The judgment of the trial court is final, where the proceedings are based upon either section.

[6-8] As the writ must issue, it does not seem necessary to comment upon other portions of the accusation, except to state that if new proceedings are instituted, the charge against the petitioners should be direct and not by way of recital; that it should show what orders, if any, were adopted by the board of trustees; that if the board of trustees, or the members thereof, as argued by respondents, "went to the violators and demanded fees for the purpose of allowing them to carry on their business in violation of law," such acts should be charged. Likewise that, if the petitioners conspired with the violators of the law to permit them to carry on an illegal business by paying monthly fees, such acts should be charged. We may likewise call attention to the following language set forth as a charge, but which is really recital: "Said sums being collected and paid by order of the said city board of trustees above mentioned, and individuals thereof." The latter portion of this quotation is demurrable on the grounds of uncertainty as to who the individuals were. We do not need to discuss the authorities to the effect that accusations based upon either section 758 or section 772 of the Penal Code need not be drawn with all the particularity and nicety required in the drafting of indictments or informations. All the essential facts, however, to constitute a cause of action must be set forth.

The accusation being fatally defective, for the reasons herein stated, the demurrer of the respondents should have been sustained, and, as prohibition is the proper remedy, it follows that the writ prayed for herein, prohibiting the respondents from further proceeding on the accusation referred to, should be granted, and it is ordered that a peremptory writ to that effect be issued herein.

We concur: FINCH, P. J.; THOMPSON, J.

98 Cal. App. 390

MARTIN et al. v. BANK OF SAN JOSE.
(Civ. 6751.)

District Court of Appeal, First District, Division 1, California. April 20, 1929.

1. Mortgages 🔑369(7)—Complaint to set aside foreclosure sale and trustee's deed thereunder held insufficient as against demurrer for failure to allege plaintiffs had title.

In action to set aside foreclosure sale under deed of trust and deed given thereunder, for restoration of possession, and for accounting, complaint alleging that defendant agreed that it would foreclose trust deed securing unpaid debt, and after foreclosure defendants and plaintiffs would enter into agreement through which plaintiffs would pay off indebtedness, by an application of income from property and by giving new trust deed for balance, *held* insufficient, as against demurrer, for failing to allege that title to realty was in plaintiffs at time of alleged agreement.

2. Specific performance 🔑28(2)—Agreement alleged in complaint alleging breach of agreement to permit redemption from foreclosure of trust deed held too indefinite to authorize specific performance (Civ. Code, § 3390).

In action to set aside foreclosure sale under deed of trust and deed given thereunder, for restoration of possession, and for accounting, complaint alleging that defendant agreed it would foreclose trust deed, and after foreclosure defendants and plaintiffs would then enter into agreement through which plaintiffs would pay off indebtedness, first by application of income from property, and that when payments should reduce indebtedness sufficiently a new deed of trust should be given, providing for payment of debt in installments, amount or frequency of which was not stated, *held* too uncertain, vague, and indefinite to state a cause of action for specific performance, under Civ. Code, § 3390.

3. Pleading 🔑18—Complaint alleging breach of agreement to permit redemption from foreclosure of trust deed held demurrable for uncertainty (Code Civ. Proc. § 430).

In action to set aside foreclosure sale under deed of trust and deed given thereunder, for restoration of possession, and for accounting, complaint alleging that defendant agreed it would foreclose trust deed and after foreclosure defendants and plaintiffs would enter into agreement through which plaintiffs would pay off indebtedness, first by application of income from property, and that, when payments should reduce indebtedness sufficiently, a new deed of trust should be given for balance, *held* demurrable under Code Civ. Proc. § 430, as being uncertain and unintelligible.

4. Specific performance 🔑116¾—Ruling sustaining demurrer to complaint to enforce agreement to permit redemption from foreclosure sale held not objectionable, as based on technical grounds.

Ruling sustaining demurrer to complaint, seeking to enforce alleged agreement by defendant to permit plaintiffs to redeem property from mortgage foreclosure sale, *held* not objectionable as based on purely technical grounds.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Helen H. Martin and another against the Bank of San Jose. Judgment for defendant, and plaintiffs appeal. Affirmed.

Stanley Moffatt and L. N. Barber, both of Fresno, for appellants.

L. L. Cory and W. H. Stammer, both of Fresno, for respondent.

PARKER, Justice pro tem. This is an appeal from a judgment for defendant, entered after an order sustaining demurrer to third complaint; the plaintiffs having declined to further amend. The complaint will be referred to simply as the complaint without further reference to the fact that it is a twice amended pleading. The complaint, after preliminary allegations, states as follows:

That on March 15, 1920, plaintiff Helen Martin was the wife of N. H. Yeramian, and that plaintiff John Yeramian is the issue of their marriage. That on said date N. H. Yeramian and Krikor H. Tayian were the owners of certain described parcels of land in Fresno county, California. That on said date, March 15, 1920, the said N. H. Yeramian and his wife and the said Krikor H. Tayian made, executed, and delivered to defendant a certain promissory note in favor of said defendant in the sum of $18,000 payable on March 15, 1923, with interest at the rate of 7 per cent. per annum, payable semiannually, and at the same time, and as security for the payment of the said note, according to the tenor thereof, made and executed a certain deed of trust conveying the real property before described to San Jose Abstract Company, a corporation, as trustee, and authorizing the said trustee, upon default in the payment of said note, or of any payment of interest therein specified, to sell the property at public auction for the payment of all sums due on account of said note and paid out and expended under and by virtue of the terms of said deed of trust, and the expenses of said sale. Alleges the death of N. H. Yeramian on September 8, 1920, and thereafter the appointment of plaintiff Helen Martin as administratrix, which appointment is still in effect. Alleges the decree of distribution in the estate of N. H. Yeramian, wherein and whereby all the right, title, and interest of said decedent in and to the property described was distributed to the plaintiffs as tenants in common in equal shares.

That on February 19, 1924, Krikor H. Tayian and his wife executed a deed conveying all their right, title, and interest in and to the said real property to the plaintiff Helen Martin. That at all times hereafter, until ousted by defendant as hereinafter stated, plaintiffs held possession of all of said premises. That at all of the times mentioned one Tackaberry was an attorney at law, duly licensed and admitted to practice in the state, and from September 6, 1920, up to May 8, 1926, was employed as such to represent Helen Martin in the administration of the estate of her deceased husband, and in the matter of the guardianship of the estate and person of the minor plaintiff, and that at all of the times mentioned the defendant knew that Tackaberry was the attorney for plaintiff. That on or about August 2, 1924, an agreement was made and entered into, by and between defendant and plaintiff Helen Martin and her attorney, Tackaberry, whereby it was understood and agreed that the said deed of trust should be foreclosed, that the defendant should buy in the said real property at the foreclosure sale for the amount that should be due and owing to defendant on account of the said promissory note at the time of such sale, including interest and taxes advanced and expenses of sale; and it was further agreed and understood that plaintiff Helen Martin should be permitted to redeem said property from said sale by repaying to the defendant the amount so bid, in such annual installments as said Helen Martin might be able to pay out of the revenue from the property, until the said indebtedness should be reduced to the point where a new loan could be obtained on the security of the property sufficient to pay said indebtedness, and the whole of the same should then be paid, and that for the purpose of securing the performance of this agreement the parties should, within a reasonable time after said sale, execute such instrument or instruments as the said parties might then agree upon, and that such instrument or instruments should take the form of a deed conveying the said property to the said plaintiff, together with a promissory note and trust deed executed by plaintiff, providing for the payment of the amount due to defendant, in installments according to the terms of said agreement, with interest at 7 per cent. per annum, or of a contract in writing for the sale of the said property by the defendant, and the purchase of the same by Helen Martin, for a price equal to the total sum due defendant, in such installments and at the same rate of interest, and that the plaintiffs should at all times be entitled to the possession of the said property. That at the instance and request of said defendant the said attorney advised Helen Martin to enter into and perform the said agreement on her part and the said defendant employed the said attorney to conduct the foreclosure in its behalf and to represent and advise the defendant in all matters relating to the same. That defendant and said attorney thereupon foreclosed said deed of trust.

That Helen Martin, at the time of said foreclosure, was able to pay the promissory note and all sums due on account of the said deed of trust, but relied upon the agreement of said defendant and the advice of her attorney, and by reason of said reliance was induced to and did fail to pay such debt, and permitted said property to be sold to defendant at said foreclosure sale. That on January 7, 1925, the trustee, at the demand of defendant, and upon the advice of said attorney, sold said property, and defendant purchased the same for the price of $22,147.92, which said sum was the amount claimed by defendant to be due and unpaid at said time on account of said promissory note, and on January 21, 1925, the trustee executed an instrument purporting to be a deed conveying said real property to defendant, which instrument has been duly recorded in the records of Fresno county. That at the time of said sale, and at all times thereafter, the reasonable value of said property was $40,000. That at the time of said sale a purchaser had been secured who was ready and able to purchase said property for the sum of $50,000. That Helen Martin is, and at all times herein mentioned has been, ready and willing to execute a new note and trust deed, or a contract in writing, according to the terms of said agreement, but defendant has at all times failed and refused, and still fails and refuses, the said property to the said plaintiff or to execute such contract, and on March 12, 1926, repudiated said agreement and notified plaintiff that it would not perform the same, and on or about April 16, 1926, the said defendant, contrary to its said agreement and wrongfully, took possession of said premises and ejected plaintiffs therefrom. That at all times since April 16, 1926, defendant has been and still is in possession of said real property, and wrongfully detains and withholds the same from plaintiffs, and has harvested and sold the crops produced therein during the seasons of 1925–1926 and has received therefor a large sum of money, the exact amount of which is unknown to plaintiffs. That defendant has at all times refused, and still refuses, to account to plaintiffs for the rents, issues, and profits of said property and the proceeds thereof, and claims to be the owner of said property, and entitled to the exclusive possession of the same, and to the rents, issues, and profits thereof, adverse to the plaintiffs and each of them, by virtue of the sale.

The complaint prays: That the foreclosure sale and the deed executed by the trustee be declared null and void, and vacated and set aside. That plaintiffs be restored to the possession of the said property. That an accounting be had of the moneys received by defendant from said property. For such other or further relief as may be just in the premises. To this complaint defendant entered both a general and a special demurrer.

[1] We will take up the points raised by defendant in support of the demurrer, with-

out detailing the various grounds set forth. Respondent contends that the complaint fails to state a cause of action, because there is no allegation showing that either of the plaintiffs had any interest in or right to the possession of the real property involved in this action at the time the alleged agreement was entered into, or at the time the sale was made under the trust deed. This ground was and is urged by defendant in support of its general demurrer, and it was claimed by defendant by way of special demurrer as follows: That said complaint is uncertain in this: That it does not appear therein, nor can it be ascertained therefrom, that plaintiffs, or either of them, since February 19, 1924, have been the owners of any interest whatsoever in or to said real property, or whether the plaintiffs, or either of them, are now the owners of any interest whatsoever in or to said real property, or that the plaintiffs, or either of them, were ever entitled to possession at any time after February 19, 1924, or whether said plaintiffs, or either of them, are now entitled to possession of said property or any part thereof. A reading of the complaint will disclose the omission pointed out. It is alleged that N. H. Yeramian and Krikor H. Tayian were the owners of the property on March 15, 1920. There is no allegation that they or either of them owned the property or had any interest therein at any time subsequent thereto, or that they or either of them claimed any interest therein subsequent to said date. Particularly there is no allegation that the estate of N. H. Yeramian had any interest in or title to this property at the time of his death, or that any title passed through the decree of distribution, other than whatever interest the decedent might have had at the time of his death. Likewise there is no allegation that on February 19, 1924, when Krikor H. Tayian conveyed his interest in the real property to plaintiff that the said Tayian had any interest in or title to the property. And further, disregarding the lack of these allegations, there is no allegation that plaintiffs, or either of them, had any title to or interest in the real estate at the time of the alleged agreement between plaintiffs and the defendant, which agreement is the basis of the action.

It must be conceded, without argument or citation of authority, that if the plaintiffs were strangers to the title there would be no consideration to support the alleged agreement as pleaded. In Vance v. Anderson, 113 Cal. 535, 45 P. 816, plaintiff brought suit in ejectment. She alleged possession of the premises in question on May 1, 1894, and the date she brought suit was May 19, 1894. The court says: "It will be observed that while the complaint avers seisin and possession in the plaintiff on the 1st day of May, 1894, it fails to state that she was so seised at the date of the suit brought, which was May 19, 1894, or at any time after May 1st. This was, we think, a failure of an essential allegation in the complaint." Curtin v. Kowalsky, 145 Cal. 433, 78 P. 962, was an action to recover a sum due upon a money judgment. The complaint alleged an assignment to the judgment, and the court held that it was unnecessary to further allege membership at the time of commencement of the action, saying: "Such ownership and holding was the legal result of the assignment, and, that fact having been alleged, it follows as a matter of law that plaintiff thereby became the owner and holder thereof. This condition of ownership is presumed to continue, and it was not necessary to allege that plaintiff was the owner at the time the action was begun. Such an allegation, or its equivalent, is required in actions to recover the possession of specific property, but not in actions to recover on money demands."

By a greater force of reason it would be held that such an allegation would be necessary where the relief demanded was conditional upon the very fact of ownership at the time the agreement, the breach of which was the cause of action, was entered into between the parties. In Melvin v. Melvin, 8 Cal. App. 687, 97 P. 698, the court says: "It is, of course, elementary and fundamental that the complaint must state facts sufficient to constitute a present cause of action, and to show that plaintiff was entitled to relief as of the time the complaint is filed. In other words, allegations showing only that the cause of action existed some time in the past would be insufficient. * * * We look in vain for any averment in the complaint before us of a present interest in the property in controversy. There is nothing to show that plaintiff has had any title to the land since May 29, 1899 [a date prior to the bringing of the action]. Indeed, it has been held often that the presumption is that the pleader has stated his case as strongly as he can. * * * We have a right to infer, therefore, that subsequent to said date plaintiff parted with all of her title to said property, and at the time she brought the action she had no further interest in the same. She thus failed to state a cause of action, and the demurrer was properly sustained on that ground." See, also, Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 P. 395.

The reasoning of these cases applies to the instant case. We are not holding that plaintiffs here were required to allege more definitely their interest in the real property at the time of the commencement of the action. We hold that they were required to allege title in themselves at the time of the alleged agreement respecting the said property. Appellants argue that, irrespective of ownership, they have a cause of action on the agreement; in other words, that the agreement as pleaded is valid and binding, assuming that plaintiffs never did have any interest in the property.

The theory of the claim is that a trust for their benefit was created by the agreement. If there is merit in this contention it would seem only to emphasize the uncertainty complained of.

[2] Respondent makes the further claim: The complaint states no cause of action for the reason that the purported agreement alleged is too uncertain, vague and indefinite to be enforced. We deem it unnecessary to here repeat the allegations of the complaint in this particular, or to detail the arguments of respondents thereon. It is sufficient to say that if, as claimed, the action is one looking toward a specific performance of the alleged agreement, the complaint is not sufficient in any respect. Even if we disregard the relief demanded as being no part of the complaint, we still must consider what relief could be granted, if any, in determining the nature of the cause of action. And it seems clear that no relief of any kind could possibly be given without taking the pleaded agreement as the basis of such relief. That the contract or agreement as pleaded is too indefinite, uncertain, loose, and inexact to support a decree of specific performance we need but to consult the following authorities: Stanton v. Singleton, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334; Smith v. Taylor, 82 Cal. 541, 23 P. 217; Klein v. Markarian, 175 Cal. 37, 165 P. 3; Wood v. Anderson, 199 Cal. 440, 249 P. 862; Civil Code, § 3390. If the relief that might be claimed was damages for the breach of the alleged agreement it must be conceded that no damage is claimed or alleged and no definite agreement pleaded. Dillingham v. Dahlgren, 52 Cal. App. 322, 198 P. 832.

[3] Aside from the claim that the complaint did not state a cause of action in this particular, respondent demurred on the ground that the complaint was uncertain, and on the ground that it was unintelligible, because it does not appear therein, nor can it be ascertained therefrom, "what amount the plaintiff Helen H. Martin was to repay to defendant or what the amount of annual installments under the alleged contract was, or what interest was to be paid thereon, or when said installments were to be paid, or when said indebtedness was to be paid, or how or in what manner any new loan was to be made on the property, or when said new loan was to be made, or what parties were to execute any instrument or instruments to secure the performance of the alleged agreement, or what instruments were to be executed for said purpose, or what installments or how said installments were to be paid, or what terms said instruments were to contain." We think all of these specifications of uncertainty were well taken.

Summing up, plaintiffs, after leave of court to amend, and after the insufficiency of the complaint had three times been pointed out to them, elected to stand or fall upon the complaint now before us. Practically all that can be gleaned from the complaint is that defendant agreed that it would foreclose a trust deed given to secure an unpaid debt, and after foreclosure defendants and plaintiffs would then enter into some indefinite and undetermined agreement through which plaintiffs would pay off the indebtedness, first by an application of the income from the property, which is not alleged to be presently or potentially income producing, and when, if ever, these payments should reduce the indebtedness sufficiently, then a new trust deed should be given, providing for the payment of the debt in installments, the amount or frequency of which is not stated. And nothing in the complaint indicates that the plaintiffs at the time of the alleged agreement had any interest whatever in the estate or property involved.

Section 430, Code of Civil Procedure, particularly specifies uncertainty as a ground of demurrer, and, if we are to hold that the action of the court below in sustaining respondent's demurrer was erroneous, we must hold this section meaningless. That uncertainty is a well-established ground of demurrer needs no citation of authority. Mallory v. Thomas, 98 Cal. 647, 33 P. 757; Hennessey v. Mining Co., 159 Cal. 398, 113 P. 1071; Burke v. Maguire, 154 Cal. 467, 98 P. 21.

[4] Appellants complain that the ruling below was on purely technical grounds, and thus characterizes the argument of respondent here. In Callahan v. Broderick, 124 Cal. 83, 56 P. 783, it is said: "Most rules of pleading are technical, but they are founded in wisdom and justice; and orderly procedure imperatively demands their reasonable enforcement."

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

Ex parte BATHURST. (Cr. 1770.)★

District Court of Appeal, Second District, Division 2, California. March 26, 1929.

Rehearing Denied April 11, 1929. Hearing Denied by Supreme Court May 23, 1929.

1. Criminal law 🔑313—Defendant in municipal court must be presumed to have known law regarding new trial and appeal.

One convicted in municipal court of petty theft must be presumed to have known law regarding motion for new trial and regarding appeal to the superior court.

2. Criminal law 🔑951(2), 974(2)—Defendant in criminal case may move for new trial or arrest of judgment at any time before judgment is pronounced (Pen. Code, § 1450).

Under Pen. Code, § 1450, defendant in a criminal case may make motion for new trial or in arrest of judgment at any time before judgment is pronounced.

3. Criminal law 🔑260(9)—Motion for new trial, filed after judgment of conviction, and after notice of appeal deprived municipal court of jurisdiction, availed defendant nothing (Pen. Code, § 1450).

Under Pen. Code, § 1450, motion for new trial, filed after judgment of conviction in municipal court, and after notice of appeal had deprived municipal court of jurisdiction, availed defendant nothing.

4. Criminal law 🔑1101—Where no statement on appeal was filed when motion to dismiss appeal from municipal court was made, five months after judgment of conviction, appeal must be dismissed (Pen. Code, §§ 1466, 1468, as amended, and § 1468a, as added by St. 1925, pp. 950, 951).

Where no statement on appeal had been prepared, served, settled, or filed on date when motion to dismiss appeal from judgment of conviction in municipal court was made, five months after judgment was pronounced, appeal must be dismissed, under Pen. Code, §§ 1466, 1468, as amended, and section 1468a, as added by St. 1925, pp. 950, 951.

5. Criminal law 🔑1069(6)—That trial court erroneously granted new trial after appeal from judgment in municipal court, and defendant relied on such order, did not entitle her to pursue right of appeal after statutory period elapsed (Pen. Code, § 1468a, as added by St. 1925, p. 951).

That trial court erroneously granted new trial after sentence was pronounced, and notice of appeal had deprived municipal court of jurisdiction, and that defendant relied thereon, and did not take steps to pursue appeal, did not entitle her to pursue appeal after statutory period, under Pen. Code, § 1468a, as added by St. 1925, p. 951, had elapsed, and appeal had been dismissed.

6. Criminal law 🔑1192—Judgment of conviction became final on dismissal of appeal, and there was nothing then before the court (Code Civ. Proc. § 955; Pen. Code § 1468a, as added by St. 1925, p. 951).

Under Code Civ. Proc. § 955, judgment of conviction became final, where appeal was dismissed on ground it had not been brought on for hearing within time required by Pen. Code, § 1468a, as added by St. 1925, p. 951, and there was nothing then before court.

7. Habeas corpus 🔑113(12)—Constitutional provision relating to modifying or setting aside judgment in ends of justice does not apply in habeas corpus proceedings (Const. art. 6, § 4½).

Const. art. 6, § 4½, relating to modifying or setting aside a judgment by reversal on appeal in order to subserve ends of justice, does not apply in habeas corpus proceedings.

8. Habeas corpus 🔑92(1)—Function of habeas corpus writ is to determine legality of detention by inquiry into question of court's jurisdiction and validity of process by which prisoner is held.

Function of writ of habeas corpus is to determine legality of detention solely by inquiry into question of jurisdiction of lower tribunal and validity of process by which prisoner is held.

Application by Diana Bathurst, also known as Virginia Bathurst, for writ of habeas corpus to be directed to the Sheriff of Los Angeles County. Writ discharged, and petitioner remanded.

Benjamin Elconin and George D. Higgins, both of Los Angeles, for petitioner.

Lloyd S. Nix, City Prosecutor, and Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for respondent.

CRAIG, J. The petitioner was charged in the municipal court of the city of Los Angeles with petty theft, was tried by the court without a jury, and convicted. Oral notice of appeal to the superior court was given in open court, and a motion for new trial was interposed after sentence was pronounced and said notice had been given. The motion for new trial was granted, and thereafter on the date set for retrial of the cause in the municipal court, the order granting a new trial was set aside upon motion of the city prosecutor, upon the ground that it had been granted after sentence was pronounced, and a commitment issued. A writ of habeas corpus on behalf of the petitioner was prayed for in this court, and it then appearing that the motion for new trial had been filed and granted subsequently to the oral notice of appeal, and that said appeal had been perfected, though no statement was filed in the superior court, the writ was granted and the petitioner discharged from custody. 271 P. 781. We there said: "It must be obvious from the observations so far made that an appeal, once perfected, is pending in the appellate tribunal until dismissed by that court. The defendant in the action in the municipal court, having given bond to stay the execution of the judgment pending the appeal, is therefore entitled to her liberty until some further step is taken."

★Rehearing denied. Hearing denied by Supreme Court.

The city prosecutor thereupon moved the court last mentioned to dismiss the appeal, upon the ground that it had not been brought to a hearing within the time prescribed by section 1468a of the Penal Code, as added by St. 1925, p. 951. This motion was opposed by petitioner upon the grounds that, a new trial having been granted in the municipal court, it was impossible to have prepared a statement upon appeal within 15 days; that, believing the order granting a new trial valid, she relied thereon and prepared for trial, and strenuously endeavored to prosecute her defense of the same to judgment on the day set therefor. The appeal was dismissed upon the ground stated.

Petitioner contended upon the hearing of said motion, and here insists, that the provisions of sections 1466 and 1468 of the Penal Code are merely directory; that the original trial court having determined after careful consideration that she was entitled to a new trial, and having granted the same, she should not be penalized for the error of the court in so making an order as to prevent her from pursuing her right of appeal. It is also argued that, even though the order granting a new trial was late, it was voidable upon appeal by the people, but not void, and that, no appeal having been taken therefrom, it was in force and effect until held otherwise by a court having jurisdiction of the question as to its validity.

[1-3] The sections of the Penal Code principally relied upon provide that either party may appeal from the municipal court to the superior court in like cases and for like causes as appeals may be taken to the Supreme Court or to a District Court of Appeal; that the appellant must prepare and file with the court within five days after notice of appeal a statement of grounds of appeal and so much of the evidence as may be necessary to explain them; the respondent may file proposed amendments within five days thereafter; and such statement must then be settled by the court within ten days from the filing of the proposed statement. "If no statement is filed and served as herein provided, the appeal is ineffectual for any purpose, and shall be deemed dismissed, and the judgment or order appealed from shall be enforced as if no appeal had been taken." Unless good cause to the contrary appears, the appeal must be brought to a hearing within 60 days after it is perfected, or as soon thereafter as the business of the court will permit, and upon a failure in this respect the court shall, upon motion, dismiss the appeal. Pen. Code, §§ 1466, 1468, as amended, and section 1468a, as added by St. 1925, pp. 950, 951.

Regardless of the unfortunate dilemma produced by various steps initiated, but left unfinished, in the case, the petitioner must be presumed to have known the law, and the courts are not excepted from the rule. Not alone was the motion for a new trial filed after judgment, but after notice of appeal had deprived the municipal court of jurisdiction. The defendant in a criminal case may make a motion for a new trial or in arrest of judgment, at any time before judgment is pronounced. Pen. Code, § 1450; In re Bathurst (Cal. App.) 271 P. 781. It will avail him nothing to make such a motion after judgment. People v. Long, 7 Cal. App. 27, 93 P. 387.

[4-6] We cannot agree with petitioner's contention that, pending the existence of the order for a new trial, she was precluded from filing a statement upon appeal in the superior court within 5 days after having given notice of appeal. Petitioner indicates that the motion for dismissal of appeal, and the granting thereof, were founded solely upon the ground that it had not been brought on for hearing within 60 days. Had either party at any time insisted upon such hearing, there was no record before the superior court from which it might ascertain the grounds of appeal or the evidence upon which the appellant intended to rely as tending to support them. It does not appear that any statement had been prepared, served, settled, or filed on December 14, 1928, when the motion to dismiss was made, or 5 months after judgment was pronounced, and 3 months from the date when a hearing in the regular course should have been available. In that event the appeal must be dismissed. Pen. Code, sec. 1468a, as added. This section insures a defendant the right to demand a hearing within the time prescribed, or to discharge, but its salutary application is predicated upon compliance by the defendant with other indispensable requirements of the same Code. We are not in accord with the petitioner's theory that, because the municipal court favorably ruled upon her application for a new trial, it constituted such error as to inure to her benefit after she chose to rely upon illegal proceedings and sleep on her rights. There remained no alternative for the superior court but to dismiss the appeal, and, there being nothing then before the court, the judgment became final. Code Civ. Proc. § 955; Stowe v. Superior Court, 72 Cal. App. 174, 236 P. 985.

[7, 8] Finally, it is argued that, in order to subserve the ends of justice, the writ should be granted under the provisions of section 4½, article 6 of the Constitution. The petitioner having led the court into making an illegal order granting a new trial, her position is not wholly unlike that of one who attempts to complain of a failure to bring his case to trial within 60 days after a mistrial, when he caused the delay by requesting and obtaining a continuance. People v. Dyer, 26 Cal. App. 429, 147 P. 217. The cited provision of the Constitution permits a modification or setting aside of a judgment by reversal upon appeal, but we are referred to no authority, and are aware of none, authorizing its application in habeas corpus proceedings. The function of that writ is to determine the legality of detention solely by inquiry into the question of jurisdiction of the lower tribunal, and the validity of the process by which the prisoner is held. In re Leonardino, 9 Cal. App. 690, 100 P. 708. The return to the petition herein recites that petitioner is held by virtue of a certain commitment of the municipal court, a copy of which is attached thereto, and it does not appear upon its face to be defective.

The writ is discharged and the petitioner remanded.

We concur: WORKS, P. J., IRA F. THOMPSON, J.

207 Cal. 134

HURST v. CITY OF BURLINGAME et al.★

(S. F. 12777.)

Supreme Court of California. April 29, 1929.

Rehearing Denied May 27, 1929.

1. Municipal corporations ⚷57, 59—City organized under general laws has only powers expressly conferred and those necessarily incident to those granted or essential to declared purposes (St. 1883, p. 93, and amendatory and supplemental acts).

City of sixth class, organized and existing under General Municipal Corporations Act (St. 1883, p. 93, and acts amendatory thereof and supplemental thereto), has only powers expressly conferred and such as are necessarily incident to those expressly granted, or essential to declared objects and purposes of the municipal corporation.

2. Municipal corporations ⚷57—City's powers are strictly construed, and any reasonable doubt is resolved against city (St. 1883, p. 93, and amendatory and supplemental acts).

Powers of city of sixth class organized under General Municipal Corporations Act (St. 1883, p. 93, and amendatory and supplemental acts) are strictly construed, and any fair and reasonable doubt concerning exercise of a power is resolved against city.

3. Municipal corporations ⚷601—Zoning ordinance falls within classification of police measures (Const. art. 11, § 11).

A zoning ordinance falls within the classification of police measures authorized by Const. art. 11, § 11.

★Rehearing denied.

4. Municipal corporations 🔑111(2)—Ordinance adopted by city organized under general law is controlled by general law (Const. art. 11, § 11).

An ordinance adopted by a city organized under general law is subject to and controlled by general law, under Const. art. 11, § 11.

5. Municipal corporations 🔑106(1)—Method prescribed by Zoning Act for enactment of zoning ordinance is binding on city organized under general law (Zoning Act of 1917; St. 1883, p. 93, and amendatory and supplemental acts).

Method prescribed by Zoning Act of 1917 (St. 1917, p. 1419) for enactment of zoning ordinance is binding on city of Burlingame, a city of sixth class organized under General Municipal Corporations Act (St. 1883, p. 93, and acts amendatory thereof and supplemental thereto).

6. Municipal corporations 🔑108—Ordinance proposed by electors of city under initiative law must constitute such legislation as legislative body of city could enact.

Ordinance proposed by electors of city under initiative law must constitute such legislation as legislative body of city could enact under law granting, defining, and limiting powers of such body.

7. Municipal corporations 🔑108—Zoning ordinance adopted by electors of city under initiative law held void, where requirements of Zoning Act as to public hearings were not complied with (Zoning Act of 1917, §§ 4, 5).

Zoning ordinance adopted by electors of city of Burlingame under the initiative law *held* void, where requirements of Zoning Act of 1917, §§ 4, 5 (St. 1917, p. 1420), relating to public hearings, were not complied with.

8. Constitutional law 🔑278(1)—Statutory notice and hearing as to possible effect of zoning ordinance on property rights are necessary to satisfy requirements of due process (Zoning Act of 1917, §§ 4, 5).

Under Zoning Act of 1917, §§ 4, 5 (St. 1917, p. 1420), requiring notice and hearing as to possible effect of zoning ordinance on property rights, action of legislative body becomes quasi judicial in character, and statutory notice and hearing are necessary, in order to satisfy requirements of due process, and may not be dispensed with.

9. Statutes 🔑225½—Zoning Act, being special statute dealing with particular subject, is controlling over initiative law, which is general in its scope (Zoning Act of 1917).

Zoning Act of 1917 (St. 1917, p. 1419), being a special statute dealing with a particular subject, must be deemed to be controlling over initiative law, which is general in its scope.

10. Municipal corporations 🔑111(4)—Invalidity of section of ordinance would not strike down entire ordinance, where provisions of such section are separable from remainder.

In validity of section of ordinance would not necessarily strike down entire ordinance, where provisions of such section are readily separable from remainder, and could be eliminated without disturbing remainder.

11. Municipal corporations 🔑626—Zoning ordinance held void as to plaintiff on ground classification of his property as residence property only was arbitrary, oppressive, discriminatory, and void.

Zoning ordinance of city of Burlingame *held* void as to plaintiff, on ground that classification of his property as residence property only was arbitrary, oppressive, and void, where plaintiff's property was used for sale and storage of lumber, and on one side, across the street, was right of way of main line of railroad, and on another side was lot used wholly for business purposes, and on another side was block used wholly for business purposes, including a lumber yard, storage tanks, gravel bunkers, and elevators, and on the other side were three unoccupied lots.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action to enjoin the enforcement of a zoning law by R. W. Hurst against the City of Burlingame and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Rehearing denied; CURTIS, J., dissenting.

Fletcher Cutler, of Burlingame, and John F. Davis, of San Francisco, for appellants.

Kirkbride & Gordon, of San Mateo, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff in an action to enjoin the enforcement of a zoning ordinance of the city of Burlingame.

The plaintiff is the owner of lots 21 and 22 in block 20 of the Lyon and Hoag subdivision of the city of Burlingame. The defendants are the city of Burlingame, its board of trustees, and the executive officers thereof. At a special election held for that purpose on September 17, 1923, the electors of said city, acting under the initiative provisions of the Constitution and laws of the state, approved an ordinance, No. 162, and entitled "An ordinance regulating and establishing the location of residences, apartments, trades, industries and business buildings, and establishing the boundaries for said purposes, providing for the creation of a city planning commission, and providing penalties for the violation of its provisions." For more than six years prior to the filing of the complaint on February 5, 1926, the plaintiff was continuously engaged in the business of the retail sale and distribution of lumber, mill work and other building materials in said city. The property described in the complaint and owned by the plaintiff has been and is improved by fencing the same and the construction thereon of driveways, platform, and other structures, adapting the same for use as a lumber storage yard, and as a place for the storage and sale of lumber and other building materials. The zoning ordinance in question so classified the plaintiff's property as to prohibit the use thereof for any purpose, except the erection, alteration, and maintenance of a building or buildings pertaining to the housing of persons and places of abode. The purpose of the ordinance was, and its effect, if valid, is, to prohibit the use of said property for commercial purposes, a use to which the plaintiff is devoting the same. The city authorities threatened to prosecute the plaintiff for alleged violation of said ordinance, whereupon this action was brought.

The complaint alleged that the entire ordinance was and is invalid for failure of the city authorities to comply with the requirements of the Zoning Act of 1917 (Stats. 1917, p. 1419), and further by reason of the inclusion therein of section 12, which provides for a reclassification of any of the property in the city only with the consent of a majority of the owners of property within 500 feet outside of the exterior boundaries of the area sought to be reclassified, and that with such consent, and not otherwise, the board of trustees would submit the question of such reclassification to a vote of the people of the city at the next general or a special municipal election. The complaint alleges in detail the situation of the property surrounding the lots in question and in the same neighborhood, and the nature and character of the use thereof. It was alleged and proved that immediately to the west of the plaintiff's property, across an intervening street, is the right of way of the main line of the Southern Pacific Railroad, over which more than 73 regularly scheduled passenger and freight trains are operated daily; that along the easterly boundary of said right of way for several blocks northerly and southerly are spur tracks, railroad structures, and business establishments, all of which property is by said ordinance zoned for commercial purposes; that immediately to the north of plaintiff's property is lot 20 in block 20, which is, and was at the time of the approval of said ordinance, improved and occupied wholly for business purposes; that to the south of the plaintiff's property is block 19, which was and is wholly used for business purposes, including a lumber yard, material distributing yard, storage tanks, gravel bunkers, and elevators, and an oil distributing plant; and that just to the east of said property are three unoccupied lots.

In response to appropriate issues raised by the pleadings and the proof adduced, the court found that the provisions of the Zoning Act were not complied with in the enactment of said ordinance. It was also found that the zoning of the plaintiff's property for residential and apartment house purposes and the restriction against the use of said property for commercial purposes was arbitrary, oppressive, discriminatory, and void. The first and a vital point raised on the appeal is whether the conceded failure of the city to comply with the requirements of the Zoning Act renders the ordinance void in its entirety.

[1-5] The city of Burlingame is a city of the sixth class organized and existing under and by virtue of the provisions of the General Municipal Corporations Act (Stats. 1883, p. 93, and acts amendatory thereof and supplemental thereto). As such the city is limited in the exercise of its powers by the Constitution and general laws. It has only the powers expressly conferred and such as are necessarily incident to those expressly granted or essential to the declared objects and purposes of the municipal corporation. Its powers are strictly construed, and any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation. These rules are elementary. Egan v. San Francisco, 165 Cal. 576, 133 P. 294, Ann. Cas. 1915A, 754; 18 Cal. Jur. pp. 797, 801, and cases cited. Section 11 of article 11 of the Constitution contains a broad grant of police power to municipalities. A zoning ordinance falls within the classification of police measures. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016. But an ordinance adopted by a city organized under general law is subject to and controlled by general law. Const. art. 11, § 11; Boyd v. City of Sierra Madre, 41 Cal. App. 522, 183 P. 230.

The Zoning Act of 1917 is a general law of the state and the method prescribed by that law for the enactment of a zoning ordinance is binding on the city of Burlingame. Section 1 of the act contains the general grant of power to enact a zoning ordinance. Section 2 provides, among other things, that in the enactment of such an ordinance the legislative body of the city "shall give reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development in accord with a well-considered plan." Section 3 enjoins on the legislative body reasonable regard for the value of the land and the uses to which it may be put to the end that regulations may promote public health, safety, and welfare. Section 4 provides that in municipalities having a planning commission the legislative body shall require said commission to recommend the boundaries of the districts to be established and the appropriate regulations and restrictions to be enforced therein; that the planning commission shall make a tentative report and hold public hearings thereon at such times and places as the legislative body shall require before submitting its final report; that the legislative body "shall not hereafter determine the boundaries of any district or impose any regulations until after the final report of the city planning commission is filed with the city clerk"; that upon receiving such report the legislative body "shall afford persons particularly interested, and the general public, an opportunity to be heard, at a time and place to be specified in a notice of hearing to be published in a newspaper to be designated for that purpose. Said newspaper to be a local newspaper, if there be one, otherwise a newspaper of general circulation within the municipality, and to be published not less than three times in any daily, or not less than once in any other newspaper of general circulation within the municipality, and, within the week within which said meeting is to held." Section 5 provides that in municipalities where there is no planning commission the legislative body may proceed in the manner provided in section 4 and "shall make the tentative report, arrange for and hold such public hearings, make such final report and afford all persons particularly interested and the general public, an opportunity to be heard at the time and place and in the manner prescribed in section four hereof."

It appears beyond dispute in this case that there was not, at the time the ordinance under attack was prepared and submitted to a vote of the electors of Burlingame, a regularly constituted planning commission. It is also an undisputed fact that there was an entire failure on the part of the legislative body of the city and of the electors of the city to comply with the requirements of sections 4 and 5 of the Zoning Act. It appears that factional differences developed in said city with reference to a comprehensive zoning plan. One faction furthered one plan and caused an ordinance to be drafted in conformity therewith. Another group furthered another and different plan and likewise caused the same to be incorporated in a proposed ordinance. Each proposed ordinance was incorporated in an initiative petition. These petitions were signed by the requisite number of electors, and upon certification of their sufficiency they were submitted to the legislative body in pursuance of the initiative law, with the request that said ordinances be passed by the legislative body without alteration or amendment or that the legislative body call a special election and submit the approval or rejection of said ordinances to a vote of the electorate of the city. The board of trustees took no official action with reference to the enactment of said ordinances, except to call the special election, as it felt itself bound to do under the law relating to the initiative. At the special election held on September 17, 1923, the ordinance now under attack was approved and the other proposed ordinance was disapproved.

[6-8] It is the established law of this state that an ordinance proposed by the electors of a county or of a city in this state under the initiative law must constitute such legislation as the legislative body of such county or city has the power to enact under the law granting, defining and limiting the powers of such body. Newsom v. Board of Supervisors (Cal. Sup.) 270 P. 676; Galvin v. Board of Supervisors, 195 Cal. 686, 235 P. 450. See, also, Hopping v. Council of City of Richmond, 170 Cal. 605, 150 P. 977; Hyde v. Wilde, 51 Cal. App. 82, 196 P. 118; State ex rel. Davies v. White, 36 Nev. 334, 136 P. 110, 50 L. R. A. (N. S.) 195. It is too clear for controversy that, if the board of trustees of the city of Burlingame had adopted the ordinance in question without compliance with the requirements of the Zoning Act above outlined, said ordinance would have been inoperative and void. It is equally clear that the infirmity would not be cured by the purported adoption of the ordinance by the electors of the city under the initiative law. The Zoning Law vests in the legislative body of the city broad discretionary power, but when the method for the exercise of the power is prescribed by the statute such method is the measure of the power to act. Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96. The Legislature may have considered, and very properly so, that in the enactment of a zoning ordinance property rights might be seriously affected. While the detriment flowing from a validly enacted zoning measure would be damnum absque injuria, the requirement of notice and hearing provided by the statute may not be treated lightly or at all disregarded. When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body becomes quasi judicial in character, and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with.

[9] Whether the requirements of the Zoning Act as to notice and hearing could be complied with in the enactment of an ordinance by the board of trustees pursuant to the demand of the initiative petition that the proposed ordinance be passed without alteration or amendment need not be passed upon. It would seem to be an idle proceeding for the board of trustees, after an initiative petition is presented to it, to enter upon an investigation as to a proper zoning plan, give notice and conduct hearings for the benefit of interested property owners and the public in general and at the conclusion of its deliberations have no power to change the terms of the proposed ordinance. The initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance. The Zoning Act is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative, which is general in its scope.

The appellants cite and rely upon the case of Dwyer v. City Council, 200 Cal. 505, 253

P. 932, as direct authority for the proposition that the initiative and referendum law may be applied to zoning ordinances and when so applied the Zoning Act of 1917 would be superseded. The case relied upon is not controlling nor applicable for at least two reasons. The zoning ordinance of the city of Berkeley there involved was adopted by the legislative body of the city pursuant to the provisions of the charter and ordinances of said city specifying the mode and manner for the adoption of such an ordinance. It appeared that the city was operating under a freeholders' charter and had fully complied with the Constitution to the end that the matter of zoning was a municipal affair as contemplated by section 6 of article 11 of the Constitution. The Zoning Act of 1917 was therefore not controlling.

It also appeared that the city council had taken all of the requisite preliminary steps in order that the measure might become a valid city ordinance and had actually adopted the same. Its effective date was suspended by the filing of a petition under the law relating to the referendum. The city authorities contended that the referendum did not apply to such an ordinance and this court held that the contention was without merit. The question of the operation of the initiative law to such local legislation was not involved in the Dwyer Case, and therefore no necessity arose to distinguish between the effectiveness of the initiative and the referendum in zoning cases. If the point were involved, it would undoubtedly be conceded that, had the board of trustees of the city of Burlingame adopted a zoning ordinance, as provided by the statute, its final action would be subject to the referendum provisions of the Constitution and laws of the state, for the obvious reason that there is embodied in the enactment of a zoning ordinance such elements of legislative action as to subject the ordinance when adopted to the reserved legislative power of the electors of the city, when properly invoked, to approve or reject it. We therefore conclude that the ordinance under attack is void in its entirety, for failure to comply with the requirements of the Zoning Act.

[10] It is contended by the respondent that the entire ordinance is void for the further reason that in section 12 thereof the power to reclassify any of the property in the city is made contingent upon the consent of a majority of the owners of property within 500 feet of the property sought to be rezoned. Such an attempted suspension of legislative power has been held ineffective, and such an attempted delegation of power to be an unauthorized interference with the rights of property owners adversely affected. Ex parte Sing Lee, 96 Cal. 354, 31 P. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218, and cases cited. A late pronouncement on the subject is State of Washington v. Roberge, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. —— (November 19, 1928). But the invalidity of said section 12 would not necessarily strike down the entire ordinance, for the reason that the provisions of said section are readily severable from the remainder of the ordinance and could be eliminated without disturbing the remainder if the latter were otherwise operative.

[11] There is much force in the contention of the respondent that the ordinance, if otherwise valid, is void as to him for the reason, as concluded by the trial court, that the classification of the respondent's property as residence property only was arbitrary, oppressive, discriminatory, and void. In addition to the findings and conclusions of the court on the evidence presented, the court also declared with reference to the plaintiff's property: "A mere inspection of the property would present to the dullest of minds the impracticability of maintaining the portion left in this block for residential purposes."

An inspection of the record before us leads us to the same conclusion and satisfies us that the question of whether the respondent's property was or was not properly zoned as residential property is not fairly debatable; that no consideration of public health, peace, safety, morals, order, or welfare required that the respondent be prohibited from using his property for commercial purposes; and that the ordinance, if otherwise valid, would be void as to him. We might well rest our decision on the point last mentioned, were it not for the fact that the ordinance is clearly void in its entirety, and the city authorities should be so advised.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.; PRESTON, J.

207 Cal. 115

JEAN v. JEAN et al. (L. A. 9640.)★

Supreme Court of California. April 26, 1929.

Rehearing Denied May 23, 1929.

1. Gifts 🔑4—Intent to give and delivery are necessary elements of "gift inter vivos."

Intent to give and a delivery of the gift are necessary elements of a "gift inter vivos."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Gift Inter Vivos.]

2. Gifts 🔑49(6)—Evidence held to warrant finding of donors' intention to make irrevocable gift of stock to children and of sufficient delivery.

Evidence that husband and wife, in order to avoid probate proceedings and inheritance taxes, conveyed hotel property owned by them as tenants in common to corporation and thereafter had secretary issue five certificates transferring to each of their five children equal shares of stock received for such property of which certificates were delivered by husband to one of sons and kept by latter in his safe deposit box to which he alone had access, *held* to warrant finding that they intended to make irrevocable gift of such stock, subject only to income therefrom during their natural lives and of a delivery necessary to pass title free from power of donors to exercise jus disponendi.

3. Corporations 🔑94—Shares of stock are incorporeal right, of which certificate is merely evidence not necessary to ownership of stock.

Shares of stock are incorporeal right, not susceptible of transfer by manual delivery, certificates being only evidence of the shares, and not the shares themselves, and a duly registered stockholder may exercise all rights of owner without certificate.

4. Gifts 🔑49(6)—Notation of transfer of stock on corporation's books by issuance of new certificates makes prima facie case of transfer and delivery necessary to gift (Civ. Code, § 324).

Under Civ. Code, § 324, relating to transfer of corporate stock, notation of transfer of stock on books of corporation by issuance of new certificates makes at least a prima facie case of transfer sufficient to create a legal delivery of the shares necessary to constitute a gift thereof, and fact that donor retains certificates does not necessarily overcome this prima facie showing.

5. Gifts 🔑48—Testimony of statements by alleged donors that stock had been delivered to one child to be surrendered to children on donors' death held competent on issue of delivery.

In action to establish ownership of corporate stock, testimony that original owners during a period of several years told their children and others that the stock had been delivered to one of children to hold during owners' lifetime and then to be physically surrendered to children *held* competent on issue of delivery necessary to establish gift.

6. Gifts 🔑48—Evidence that donors owned as their separate property realty converted into stock of corporation held admissible on issues of intent to make gift of stock and delivery.

In action to establish ownership of corporate stock through gift from plaintiff's parents, evidence tending to show that plaintiff's parents owned the real property converted into stock of corporation as their separate property *held* admissible on issues of intent to give and delivery.

7. Gifts 🔑51—Instruction that issuance of new certificates to donor in name of donors' children completed delivery held unobjectionable, where gift intent existed.

Instruction that, if alleged donors with intent to give corporate stock to their children indorsed stock certificate for transfer and delivered it to proper officers of corporation, requesting them to reissue stock to their five children in equal shares, and officers did issue said certificates as requested, on which such new certificates were delivered to one of donors, delivery of stock was complete, *held* unobjectionable, where intent to make gift and all other elements of gift were present.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by John E. Jean against F. O. Jean and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Bernard F. Potter, Earle M. Daniels, G. C. De Garmo, and H. B. Cornell, all of Los Angeles, for appellants.

J. Wiseman Macdonald, of Los Angeles, for respondent.

PRESTON, J. The judgment is affirmed. Whether respondent owns without restriction certain shares of stock in a family corporation as a gift inter vivos from his father and mother, or whether he owns a life interest in the income of their equivalent as a legacy under the will of his father, is the foundation of this proceeding. The control of this corporation is perhaps involved also in the result of this action. The discussion of counsel is voluminous and covers a wide field, but the reasons impelling our conclusion may be confined to a comparatively narrow space. As we have determined that the evidence is sufficient to support the verdict and judgment, we shall emphasize only that evidence favorable to respondent's contentions, as it may be freely admitted that the evidence is in sharp conflict.

On June 8, 1914, and for many years prior thereto, F. A. and Mary Jean, husband and wife, and owned as tenants in common, and not as community property, a certain lot on Flower street in the city of Los Angeles, upon which was situated on the above date the Jean Hotel, a hostelry of some 100 rooms. The couple had five children, four sons and a

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★Rehearing denied.

daughter. Having reached an advanced age in life, they began to consider the disposition of their property. Acting under legal advice, they caused to be incorporated under the laws of California the Jean Investment Company, with a capital stock of 25,000 shares of the par value of $1 each. Certificates of stock numbered 1, 2, and 3 were issued to F. A. Jean, the father, Mary L. Jean, the mother, and F. O. Jean, one of the sons, for one share each, respectively, qualifying them as directors of the corporation; said F. A. Jean being made president thereof and said F. O. Jean, secretary. The husband and wife then deeded to the corporation the said real property above mentioned in exchange for 24,997 shares of the capital stock of said corporation, which was evidenced by certificate No. 4 issued in their joint names and delivered to them.

The avowed object of this couple was to so arrange their affairs as to fix the descent of their property and yet to retain the income therefrom during the remainder of their lives. They further desired to dispense with all probate proceedings and to avoid inheritance taxes. Accordingly, on the 9th day of June, 1914, the said couple indorsed said certificate No. 4 and delivered it to the secretary of the said corporation with instructions to issue five certificates of 4,999⅖ shares each to each of the following named children, as follows: Certificate No. 5 to W. L. Jean; certificate No. 6 to plaintiff J. E. Jean; certificate No. 7 to Walter Jean; certificate No. 8 to Mamie Jean Wyman; and certificate No. 9 to F. O. Jean. Said certificates were duly signed by the president and secretary and the seal of the corporation was affixed thereto, all in the presence of the alleged donors. The company had no stock book, having only loose leaves with stubs attached in lieu of a certificate book, which stubs were not detached from said certificates so made out, with the one exception of that issued to F. O. Jean.

The evidence is in sharp conflict at this point, and happenings for the ensuing eight years will be reverted to later. On the 15th day of August, 1922, said F. A. Jean, the father, undertook to cancel said five certificates of stock, by writing across the face of each thereof these words: "Aug. 15 22 cancelled," signed "F. A. Jean." Accordingly there was issued on the same day in lieu of said five certificates, certificate No. 10 for 24,997 shares to F. A. Jean. The record shows that at this time Mary L. Jean, the wife, was living, but was incompetent, and a few months later she died. Later, and on the 21st day of August, 1922, the said F. A. Jean made and published his last will and testament, in which he conveyed his entire estate to the son F. O. Jean, in trust, the whole thereof to remain in trust until the death of his wife, Mary L. Jean, and upon her death the interests of F. O. Jean and Mamie Jean Wyman were to be released from the trust, but the interests of plaintiff and his other two brothers continued thereunder, each to receive the income of a one-fifth interest in said estate during his lifetime, the remainder upon his death to vest in other persons according to the existing contingency therein provided for.

Mary L. Jean died in 1922. F. A. Jean died in 1924. F. O. Jean, as executor of his last will and testament, claimed all of said shares of stock represented by said certificate No. 10 as part of the estate of F. A. Jean, whereupon plaintiff brought this action to establish his ownership of the shares of stock represented by said certificate No. 6 and to recover the said certificate from defendants. To that end he filed a complaint, which later was amended to conform to proof. The issues tendered by the amended complaint were traversed by the answer of defendants. The cause was submitted to the court sitting with a jury. As a result the jury returned a general verdict in favor of plaintiff as well as answering certain special issues propounded to them in his favor. Judgment followed for the plaintiff. Defendants have appealed.

[1] As above noted, the chief contention centers around the sufficiency of the evidence to support the verdict of the jury. The two necessary elements of a gift inter vivos involved here are intent to give and a delivery of the gift. We need not pause for an extended citation of authorities upon the necessary elements of such a gift. See Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947, and Code sections therein cited. Further portions of the evidence will now be considered bearing upon these two questions.

[2] It was the testimony of Bernard Potter, the attorney for the donors and the corporation and the present attorney for the defendants, that it was the intention of the husband and wife to avoid probate proceedings on their death. This, of course, could not be lawfully done unless the title to the stock passed to the children named in the five certificates. He testified that, as their legal representative, he thought that these shares of stock would, upon the death of F. A. Jean, pass to the children upon the theory that no one would question the delivery thereof. F. O. Jean testified that he could not remember what his father and mother said to him at the time the five certificates above referred to were made out and signed. He testified that the father took said certificates home, but admitted that a short time later they were handed to him by the father and by him kept in his own safe deposit box to which he alone had access for a period of about one year; that later they were returned to the father, who kept them a short time, and still later a box was rented in the name of the Jean Investment Company, wherein the stock remained for a period of about eight years; that during this interval upon request of the father from time to time the stock was returned to his residence and there kept by him

for varying periods, being always thereafter returned to the safe deposit box of the company.

It seems that the father did not have access to the box in the company's name, although he paid the rental charges upon it. The father and mother repeatedly told the children, and others also, that they had fixed their property so that it could not be changed and that the children would receive it share and share alike at their death, and many other expressions of similar import. Upon one occasion, at the request of the father, the daughter went down to the safe deposit box and the brother F. O. Jean exhibited the stock to her. The father said that everything was fixed as he wanted it and that all the children would be treated fairly and right. Upon another occasion the son Walter inquired of his father about the stock and was directed to seek F. O. Jean and to have him exhibit the stock to him, which was done. This was in June or July, 1922. On this day a family meeting was held, at which practically all the children were present and at which, also, the attorney attended and the existence of the stock and the purpose of its issuance were the subjects of discussion. While the reports of this interview vary, testimony favorable to respondent was adduced to the effect that, at the request of the father, the attorney explained that the stock was so made out that the children would receive it share and share alike and that this arrangement was final and could not be changed and that upon death of the parents the physical possession of the stock would result. From the circumstances of the surrender of certificate No. 4 and the issuance of the five certificates of stock above referred to and from the above set forth facts shown by the record, the jury was amply warranted in finding that said F. A. and Mary L. Jean intended to give irrevocably to their children these shares of stock, subject only to the income therefrom during their natural lives; in fact, it can hardly be doubted that this was their intent at that time.

The next question that presents itself is: Does this evidence warrant the finding of the jury that a delivery, either actual or symbolical, was made of the stock? At the threshold we find a compliance with section 324 of the Civil Code, which reads in part: "Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock, except as hereinafter provided, are personal property, and may be transferred by indorsement by signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer. * * *"

[3, 4] Shares of stock are an incorporeal right and are not susceptible of transfer by manual delivery. The certificates, indeed, are not the shares, but only evidence of them. A duly registered stockholder may exercise all the rights of an owner without a certificate. Under the above section the notation of the transfer upon the books of the corporation by the issuance of the new certificates certainly made at least a prima facie case of transfer, sufficient to create a legal delivery of the shares. Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745; Bacon v. Traders' Oil Corp., 52 Cal. App. 172, 201 P. 477; 6 Thompson on Corporations (3d Ed.) § 4317, p. 168; Thomas v. Thomas, 70 Colo. 29, 197 P. 243; Roberts' Appeal, 85 Pa. 84. A case strikingly similar in principle and in its facts to the case before us, wherein a delivery of stock was found to have been made, is Jones v. Jones (Mo. App.) 201 S. W. 557. See, also, to the same effect, Whitney v. Whitney, etc., Co., 121 Misc. Rep. 461, 200 N. Y. S. 792.

The fact that the donors or one of them may have retained the certificate does not necessarily overcome this prima facie showing Stone v. Daily, 181 Cal. 571, 581, 185 P. 665; Coward v. DeCray, 38 Cal. App. 290, 176 P. 56.

[5] But we need not rely altogether upon the records of the corporation. The father and mother repeatedly, during the years intervening, told their children and others as well that the stock had been delivered to F. O. Jean to hold during their lifetime and then to be physically surrendered to them. This is competent evidence of an important character where delivery is the issue. Williams v. Kidd, 170 Cal. 631, 652, 151 P. 1 (Ann. Cas. 1916E, 703).

As above noted, the son F. O. Jean had in reality practically exclusive control of these certificates. They were in his safety deposit box, or in a box to which alone he had access for practically all the subsequent years after their issuance. It was to him that the other children were directed by the father when inquiries were made as to their existence and contents, and to him they repaired for this information. This, coupled with the final observation that to carry out the admitted design of the parents to avoid probate proceedings it would be necessary that delivery be made, we do not hesitate to declare evidence ample both to warrant a finding of the intent to give and the delivery necessary to pass the title free from the power of the donors to exercise jus disponendi.

[6] We see no error in permitting the evidence which tended to show that Mary L. Jean and F. A. Jean owned the real property converted into the stock of this corporation as their separate property, nor in the instructions based upon this assumption. The fact that the wife owned one-half of the real prop-

erty and one-half of the stock thereafter converted to the names of the children threw some light at least upon the issue of an intent to give and delivery, as she was equally interested in the whole matter, and her conduct, whether by action or inaction, was not without material bearing upon those issues.

[7] The only other assignment which we think requires consideration is the instruction to the jury to the effect that, if the alleged donors, with intent to give said shares of stock, indorsed said certificate for transfer and delivered it to the proper officers of the corporation, requesting them to reissue said stock to said five children, and said officers did issue said certificates in equal shares as requested, and thereupon the original certificate No. 4 and the said five new certificates so issued were delivered to said F. A. Jean, then delivery of said stock was complete. This instruction is without objection where the intent to make and deliver a gift of shares of stock is found to exist. If this intent is assumed to be present and all other elements of a gift are likewise present, then a transfer upon the books of the corporation is sufficient delivery and the matter no longer rests upon a presumptive or prima facie basis; hence the instruction as applied to this case is without objection. The charge to the jury was full and covered every material question contained in the requested instructions that were refused.

After careful examination of the cause we adhere to the conclusion above announced.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

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207 Cal. 131

PEOPLE v. PRICE. (Cr. 3183.)

Supreme Court of California. April 29, 1929.

1. Homicide ⇐238—Evidence, though showing defendant had been drinking just before commission of crime, held sufficient to support conviction of first degree murder (Pen. Code, § 22).

Evidence *held* sufficient to support conviction of murder in first degree, notwithstanding that defendant had been drinking intoxicating liquor just prior to commission of crime, and was under its influence to some extent when he fired shots; such facts furnishing no legal excuse, notwithstanding Pen. Code, § 22.

2. Homicide ⇐294(2)—Statute providing that jury may consider intoxication in determining intent is inapplicable in murder case, where defendant did not claim he was intoxicated when he planned or executed crime (Pen. Code, § 22).

Provision of Pen. Code, § 22, that, when intent is necessary element to constitute degree of crime, jury may consider fact of intoxication in determining intent with which act was committed, is inapplicable in prosecution for murder, where there was no evidence of intoxication, and where no claim was made that defendant was intoxicated when he planned or executed crime.

3. Homicide ⇐294(2)—In prosecution for murder, instructions as to intoxication held properly refused under evidence.

In prosecution for murder, trial court under evidence properly refused to instruct that jury should consider whether defendant was intoxicated to such extent at time of crime as to be incapable of forming specific intent, and that, if defendant was intoxicated when crime was committed, that fact should be taken into consideration in fixing degree of crime.

In Bank.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Jack H. Price was convicted of murder in the first degree, with sentence of death, and he appeals. Affirmed.

Frederic H. Vercoe, Public Defender, and Franklin Padan, Chief Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

LANGDON, J. The defendant was found guilty of murder in the first degree, without recommendation, and the death penalty was imposed. He has appealed from the judgment, asserting that the trial court erred in refusing to modify the verdict and judgment and fix the degree of the crime at second degree murder, as moved by appellant and authorized by subdivision 6 of section 1181, Penal Code (as amended by St. 1927, p. 1037), and in refusing to give certain instructions requested by appellant with reference to intoxication.

[1] Both of appellant's contentions are based upon his position that he was intoxicated at the time the crime was committed, and that he was incapable, therefore, of premeditation. We have examined the record in the case, and find that it supports the verdict of murder in the first degree. It is true that the record shows defendant had been drinking intoxicating liquor just prior to the commission of the crime, and that he was under its influence, to some extent at least, when he fired the shots at his victim; but this fact furnishes no legal excuse. Section 22, Pen. Code. The evidence shows that, for several years, the defendant had been living with Maurillia Adame. She had previously been married, and was the mother of two children by this marriage. She was generally reputed to have been the wife of defendant, although they were not legally married. Defendant, according to some of the testimony, was engaged in the illegal sale of intoxicating liquor, and, according to his own

account, he had been confined in jail for a time shortly before the crime we are considering was committed, for drunkenness. After his release, Maurillia Adame left him and went to live in another apartment. Defendant watched her movements and associations, telephoned to her, and attempted to persuade her to return to him. Upon her refusal, he secured a revolver from one of his associates, by representing that he could sell it at a good price. He then wrote a letter to the men with whom he was living, in which he stated: "When you come home, you may find me in the can (meaning jail). * * * I hope you will bring me something to smoke. * * * Come down and see me. I may want you to bring some clothes back. * * * I have a watch. You come down. I will tell you where it is." He then wrote to Maurillia Adame: "I ask you to come to me, but would not listen to me. It is too late now. I love you more than any one; so goodby." The deceased was working in a laundry, and defendant came up to her on the street, as she was leaving for her luncheon. He had obtained some whisky that morning and had consumed some of it. At the time this was done, however, his plans seem to have been very definitely made.

[2] The provision of section 22 of the Penal Code, to the effect that, when purpose, motive, and intent is a necessary element to constitute the degree of crime, the jury may take into consideration the fact of intoxication in determining the purpose, motive, and intent with which the act was committed, is inapplicable here, because, as stated by the trial judge, there was no evidence of intoxication, and no claim made by the defendant that he was intoxicated at the time he planned or executed the crime. It is true, as considered by the trial court, that the defendant said he had drunk some whisky in the morning, and that the detective said he showed evidence of drinking at the time he was brought to the police station, but the claim of defendant at the trial was that he had secured a revolver for the purpose of committing suicide, and that he had started out at noon to send a note to the deceased, and had accidentally met her on the street; that he attempted to hand her the note, and she repulsed him in a manner which so angered and distracted him that, in a sudden rage, he shot her. This theory of the defense was before the jury, and they rejected it. There was insufficient evidence in the record regarding intoxication to warrant the giving of the instruction on this subject requested by the defendant.

The record shows a jealous man, who determined to kill his common-law wife when she refused to return to him, because he wished to prevent any one else from having any relations with her. There is nothing in the record which would justify a jury in believing that this purpose was conceived during a period of intoxication. Appellant would have us take the view that no purpose of killing deceased existed in the mind of defendant until the moment he encountered her on the street, at which time he was under the influence of intoxicating liquor. Apart from the fact that the record is unsatisfactory as to the fact of intoxication at the time of the killing, it also appears that the defendant secured, cleaned, and prepared a revolver, with which the crime was committed, at a time when there is no evidence of intoxication. He also wrote the letter from which quotation is made herein, which also shows premeditation, and, armed with a loaded revolver, he went to the place where he knew he would find the deceased at the hour for her luncheon. Under the circumstances, we think the conclusion of the trial judge was correct: That the record did not warrant a finding of intoxication at the time of the crime, or at the time of its conception.

[3] The trial court properly refused to instruct the jury to the effect that it should consider whether the defendant was intoxicated to such an extent at the time the crime was committed as to be incapable of forming any specific intent, and that, if defendant was found to have been intoxicated at the time the crime was committed, that fact should be taken into consideration in fixing the degree of the crime.

What we have said with reference to the evidence disposes of the contention that the trial judge should have reduced the degree of the crime. The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

LAHANEY v. LAHANEY et al.★
(S. F. 12775.)

Supreme Court of California. April 29, 1929.

Rehearing Granted May 27, 1929.

Husband and wife ⚿267(7)—Husband's deed of community property to wife and sister, without wife joining, held to convey one-half thereof to sister (Civ. Code, § 172).

Deed executed by husband to community property, in which wife did not join, granting to his wife and his sister each an undivided half interest therein, is to be interpreted as single instrument, whereby husband intended to transfer entire community ownership, and that it was his intention to convey to his wife that undivided one-half which was represented in her theretofore inchoate community interest, constituting her owner thereof in sense that same was to thereafter be her sole and separate estate, thus setting him free to dispose of his share of community property as he wished, regardless of

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★Rehearing granted. 281 P. 67.

Civ. Code, § 172, and hence vested one-half of community property in sister.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for partition by Catherine E. Lahaney against Ivy L. Lahaney and others. From an interlocutory judgment, plaintiff appeals. Reversed, with directions.

Raymond D. Williamson and W. A. Breen, both of San Francisco, for appellant.

Ramsey Moran, M. C. Sloss, and Sloss & Ackerman, all of San Francisco, for respondents.

Louis Ferrari and Tobias J. Bricca, both of San Francisco, for respondent Bank of Italy.

William A. Kelly, of San Francisco, in pro. per.

RICHARDS, J. This is an appeal from an interlocutory judgment in an action for partition, determining the respective rights and interests of plaintiff and defendant Ivy L. Lahaney, in four parcels of real estate, situate in the city and county of San Francisco, and formerly owned by one Joseph F. Lahaney, a brother of plaintiff and husband of said defendant, and who is now deceased. Joseph F. Lahaney and the defendant Ivy L. Lahaney were married on June 29, 1908, and remained husband and wife thereafter until the husband's death in 1922. Of the four parcels of real estate in question, one was acquired by Joseph F. Lahaney in the year 1908, another in 1909, another in 1913, and the last in 1917. The title to these four properties was taken in the name of Joseph F. Lahaney alone, but it is a conceded fact that each and all of them were community property. On January 27, 1919, Joseph F. Lahaney executed a deed describing these four properties, which was in form a deed of grant, bargain, and sale, with a recited consideration of $10, wherein he was named as grantor, and wherein Catherine E. Lahaney, his sister, and Ivy L. Lahaney were named as grantees, and whereby he granted to each of said grantees an undivided one-half interest in said four parcels of land. It is conceded that this deed, in form a grant, bargain, and sale deed, with a nominal consideration of $10, amounted in fact to a deed of gift of said properties in undivided interests to the grantees named therein. This deed was delivered to the appellant herein on December 27, 1921. The respondent herein did not join in said conveyance as a grantor therein, and according to her testimony did not know of its existence until her husband's death intestate in September, 1922.

The plaintiff commenced this action for the partition of said properties on October 17, 1922, against the defendant Ivy L. Lahaney, individually, and also as administratrix of the estate of Joseph F. Lahaney, deceased, and against certain other defendants, whose relation to said properties is not material upon this appeal. In her complaint she alleged herself and the defendant Ivy L. Lahaney, individually, to be the owners in fee simple and as equal tenants in common of said four parcels of land as described in her said complaint, and prayed for a partition thereof accordingly in kind, or, if that were not practical, then for a sale of said properties and a division of the proceeds thereof according to the aforesaid equal interests of said parties therein.

The defendant Ivy L. Lahaney appeared and filed an answer, and also a cross-complaint, in the former of which she denied that the plaintiff was the owner of any interest whatever in said parcels of land, or any of them, but, on the contrary, alleged that all of said properties were the community property of herself and Joseph F. Lahaney, and so continued to be up to the time of his death. In her cross-complaint the said defendant repeated these averments, and further averred that the document by the terms of which the plaintiff claimed to have some right or title or interest in said properties, or any of them, was void or voidable as against the community interest of the said defendant and cross-complainant therein. She prayed affirmatively that it be so decreed, and that the said plaintiff be required to execute a conveyance transferring to the estate of Joseph F. Lahaney, deceased, all of whatever right, title, or interest she alleged in her complaint to have in said properties.

The plaintiff answered said cross-complaint, by repeating substantially the averments of her original complaint. Thereafter the said defendant presented and filed an amended cross-complaint, setting forth with somewhat more of detail her contention that the conveyance upon which the plaintiff relied was in fact a deed of gift in which she had not joined, and to that portion thereof purporting to convey any portion of the community property to any other person she had not consented. She further alleged that said Joseph F. Lahaney was not of sound mind at the time of making said conveyance. The plaintiff answered this amended cross-complaint with full denials.

The cause came on for trial upon the issues as thus framed, and upon its submission the trial court filed its findings of fact and conclusions of law, wherein, briefly stated, it found that the properties in question were the community property of Joseph F. and Ivy L. Lahaney; that Joseph F. Lahaney had made and executed the conveyance as set forth in the plaintiff's complaint, and that the same was in fact a deed of gift to the grantees named therein; that Ivy L. Lahaney had not joined in nor consented to the execution of said deed; that at the time of the execution thereof Joseph F. Lahaney was of sound mind. As a conclusion of law from the foregoing findings of fact, the trial court found that the plaintiff and the defendant Ivy L. Lahaney were the owners and tenants in common of each and all of said properties, in the proportions that the plaintiff was the owner of an undivided one-fourth thereof and that the defendant Ivy L. Lahaney was the owner of an undivided three-fourths thereof. An interlocutory decree of partition was ordered and entered accordingly. It is from such decree that the plaintiff herein has taken and prosecutes this appeal.

It is the contention of the appellant herein that the conveyance made and executed by Joseph F. Lahaney on January 27, 1919, is to be interpreted as a single instrument, whereby the grantor named therein intended to transfer to the grantees named therein the entire community ownership and interest in each and all of the properties described therein. We are satisfied that this contention is sound and constitutes the only rational interpretation to be placed upon said instrument and upon the intent of Joseph F. Lahaney as embodied in its terms. This being so, we are led to the other and equally irresistible conclusion that it was the grantor's intention to convey to his wife by his said deed of gift that undivided one-half of each and all of said properties which was represented in her theretofore inchoate community interest therein, and thus to constitute her the owner thereof in the sense that the same was to become and be thereafter her sole and separate estate. Such is the usual interpretation which has been placed upon gifts of the community property when made by a husband to his wife. Marlow v. Barlew, 53 Cal. 460; Burkett v. Burkett, 78 Cal. 310, 20 P. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58; Carter v. McQuade, 83 Cal. 274, 23 P. 348; Hamilton v. Hubbard, 134 Cal. 603, 65 P. 321, 66 P. 860; Estate of Klumpke, 167 Cal. 415, 139 P. 1062.

If such is to be the interpretation and effect to be given the aforesaid conveyance of Joseph F. Lahaney, in so far as the same relates to the undivided one-half interest in the properties in question which he thus transferred to his wife, it would seem with like conclusiveness to follow that as to the other undivided one-half thereof, which constituted his (husband's) share of the said community property, he was thus set free to make such disposition thereof as he might be minded to do, untrammeled by the provisions of section 172 of the Civil Code, as amended in 1891 (St. 1891, p. 425). Such, as we read it, is the effect of the decision of this court in the case of Dargie v. Patterson, 176 Cal. 714, 718, 169 P. 360, 361, wherein, in directly dealing with this precise question, it was stated: "During his lifetime the husband, notwithstanding the statutory limitation upon his power of disposition, is the owner of the community property. The proviso attached to section 172 does not impair his right to dispose of the property, so far as concerns his own interest, and that of those claiming under him. If he had made no conveyance, the widow would, upon his death, have been entitled to one half of the property in question, as of all other community property. The other half would have passed to his heirs or devisees, and the widow, as such, would have had no interest in it. His heirs or devisees are bound, as he himself was bound, by the conveyance made. Why, then, should the widow's claim extend to any more than the one-half which would pass to her as survivor of the community? The privilege of avoiding the gift is conferred upon her as a means of protecting her interest in the community property. We see no reason why, in assailing the gift, she should enjoy greater rights than she would have had if the gift had never been made."

The foregoing statement seems to us conclusive of the instant case. The husband having by a single stroke disposed of the entire community interest in the properties in question by giving to his wife that which must in reason be held to have been her whole community interest and estate in these properties, and having thus entitled himself to dispose by grant or gift of his own entire interest in the remaining undivided one-half interest therein, and having exercised that right by the grant or gift thereof to his sister, the plaintiff herein, it follows that she became entitled thereto as the grantee thereof by virtue of said deed as fully as the defendant Ivy L. Lahaney, the grantor's wife, became entitled to her undivided one-half of these theretofore community properties as her sole and separate estate by the terms of the same identical instrument. Such properties must be held to have thereby ceased as a whole, and as to every portion thereof to be community property in which the grantor thereafter had no interest, and in which, upon his death, neither his heirs nor his widow, as such, succeeded to any interest or estate. It follows that the trial court was in error in its legal conclusion, and in its decree based thereon, in holding that the interest of the plaintiff herein was to be limited to a one-fourth interest in the aforesaid properties, and that the interest of the defendant Ivy L. Lahaney amounted to an undivided three-fourths interest therein.

The judgment is reversed, with directions to the trial court to set aside its conclusions of law and decree heretofore made and entered herein, and in the place and stead thereof to adjudge and decree that the plaintiff and the defendant Ivy L. Lahaney are the owners and entitled each to an undivided one-half ownership and interest in the properties in question, and that, having done so, the court shall make such disposition of the rights and claims of the other defendants herein as may be meet in the premises and as are not involved in this appeal.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

PRESTON, J. I dissent. The deed in question was a voluntary conveyance during coverture of the community property of the grantor and his wife. The delivery of the deed was to the sister alone, the wife being in ignorance both of its contents and existence. The grantor did not deliver the deed to the sister until a short time before his death, and more than two years after execution of the instrument. The appeal is upon the judgment roll alone, and these facts appear from it. The main opinion construes the deed as an effort on the part of the husband to destroy inter vivos and during coverture community property, by converting the wife's inchoate interest into a vested right therein as her separate estate, and the conveyance of the other one-half to the sister.

The misconception of the situation taken by the main opinion is in holding that on the face of the deed the husband must be said to have been dealing exclusively with the inchoate right of the wife in making her a grantee thereunder. I see no reason whatever for this conclusion. The only conclusion I can draw therefrom is that the husband, assuming to own the whole estate in all the property, undertook to divide it half and half between his wife and sister, without any thought of the nature or extent of the wife's right therein. Under the doctrine in the case of Dargie v. Patterson, 176 Cal. 714, 718, 169 P. 360, relied upon in the opinion, the wife had, after the death of her husband, the undoubted right to pursue the identical property into the hands of the grantee and to secure one-half thereof. There is no reason why the wife may not have this right accorded her, notwithstanding a deed to her was also at the same time and as part of the same instrument made to an interest in the same property. If a third party had been substituted for the wife as grantee in the deed, the wife could have undoubtedly gone by a separate action into court and secured half of the property transferred to each of said grantees. The wife might also have pursued her right against the one and waived it as against the other. It is plainly a discrimination against her to hold that she got nothing under the deed. Moreover, during the lifetime of the husband, the wife could doubtless have set the deed aside in toto under section 172 of the Civil Code, and, as to one parcel of the property, under section 172a thereof.

Furthermore, I think the situation is in reality akin to the principle announced in the line of cases holding that, where the husband attempts to make testamentary disposition of the whole of the community property, the wife takes half in her own right and half of the remaining half by the law of descent. Estate of Rossi, 169 Cal. 148, 146 P. 430; Estate of Prager, 166 Cal. 450, 137 P. 37; Estate of Gilmore, 81 Cal. 240, 22 P. 655; Robbins v. U. S. (D. C.) 5 F.(2d) 704. I cannot bring my mind to any interpretation of said sections of the code or of the case of Dargie v. Patterson, supra, which will discriminate against the wife under the facts shown by this record. In other words, the main opinion imputes an intent to the husband that is unwarranted in my view of the matter by anything appearing in the deed. The opinion reasserts the interest of the wife in the community during coverture to be nothing, and yet at the same time attributes an intent to the husband to confirm in her, when it is to her disadvantage, the very right that has been consistently denied her for all these years.

I think the judgment of the court below is correct, and should be affirmed.

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207 Cal. 172

PEOPLE v. BROWN et al. (Cr. 3154.) ★

Supreme Court of California. April 30, 1929.

Rehearing Denied May 27, 1929.

1. Homicide ⟹253(1)—Evidence held to sustain conviction of murder in first degree of convicts killing another during attempted escape.

Evidence *held* to sustain conviction of several convicts of murder in the first degree for killing of another convict during a concerted attempt to escape from prison.

2. Criminal law ⟹1166½(3)—That acting court reporter was not qualified reporter pro tempore did not prejudice defendants' rights, where full and accurate transcript of proceedings were taken.

That acting court reporter was not a qualified court reporter pro tempore because he had not been regularly appointed and had not subscribed to oath of office did not prejudice rights of defendants, where a full, true, and accurate transcript of proceedings at trial were taken by reporter, and even though reporter was given status of officer of court, notwithstanding the omission of court reporter from list of county officers under Pol. Code, § 4013, court would be required to hold on collateral attack that he had at least status of pro tempore reporter de facto.

3. Criminal law ⟹1109(3)—Record showing that accepted juror answered "Yes" to question whether he was prejudiced against capital punishment was treated as clerical misprision under circumstances (Pen. Code, § 1074, subd. 8).

Record showing that accepted juror on his voir dire answered "Yes" to question whether he had any conscientious scruples against death

★Rehearing denied.

penalty was treated as a clerical misprision and juror considered as having answered "No," in view of showing that numerous other prospective jurors were challenged for cause which was allowed on their stating they were prejudiced against capital punishment, fact that no challenge was interposed against juror in question under Pen. Code, § 1074, subd. 8, and juror signified his assent openly six times when polled by clerk to three verdicts rendered by jury.

4. Indictment and information ⚷10—That indictment was based solely on hearsay evidence is not reviewable.

That indictment was based solely on hearsay evidence is not reviewable, as an indictment is only an accusatory paper and is not of itself considered as evidence against accused on trial.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Anthony Brown, alias James Dale, who answers his true name to be Anthony Brown, and five others, were convicted of murder, and they appeal. Affirmed as to all defendants, except Albert M. Stewart, whose appeal was not before the court.

J. J. Henderson, of Sacramento, for appellant Brown.

Frank L. Murphy, of Sacramento, for appellant Stokes.

Eugene Crosby, in pro. per. and for appellants Burke, Gregg, and Stewart.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Neil McAllister, Dist. Atty., of Sacramento, for the People.

PRESTON, J. The defendants and appellants Anthony Brown, Roy Stokes, Walter E. Burke, James H. Gregg, and James Gleason and defendant Albert M. Stewart, convicts in the Folsom penitentiary, were jointly charged and tried for the murder of a fellow convict, George Baker. All the defendants were convicted of murder in the first degree without recommendation. Motions for new trial and in arrest of judgment were made and denied. All the defendants have appealed, but the appeal of defendant Stewart, taken separately, is not yet before us.

This charge grew out of a bold and desperate plan of escape from said prison, a plan which involved the use of force to the extent of taking the life, if necessary, of any person who stood in the way of its accomplishment, or who might by accident or for some other reason be within the line of march of the revolt.

On Thanksgiving morning, November 24, 1927, at about 10 o'clock, defendants began the execution of their well-planned scheme of escape, Stokes armed with a gun, afterwards carried by Brown, Burke with a hatchet, and the others with razor and knives. They first rounded up some five or six convicts who were trusties, and a guard, and locked them in cell 239 in the back alley of the prison. Thereafter they proceeded to the rotunda and attacked the guard and others in an attempt to gain entrance through the door leading to the warden's office. Failing in this, they took guards Neal and Gorahnson, the latter being already wounded by them, and proceeded to the rear of the prison, where there is an inner gate and passageway or tunnel, with counting booth therein, leading to the outer gate, captain's office, and the yard.

This passageway is about 50 feet long and about 15 feet wide; the captain's office is located just west of the outer gate at the north end leading to the yard; said counting booth, about three and a half feet wide by seven feet long and seven feet high, is located at the northeast corner of said passageway and is usually occupied by a convict counter, who assists the guard stationed just outside the outer gate in keeping and checking the count of the convicts going in and out thereof. On said morning, during the hour or so prior to said time, deceased, George Baker, was seen by several witnesses in said counting booth. A small stove was lighted inside and, having recently been let out of the hospital and being sensitive to the cold, he had stopped therein to get thoroughly warm, but was not on duty as a counter.

Upon reaching said inner gate located at the south end of said passageway, said escaping convicts, with said guards, ordered them to have the gate opened. As the prisoner on the other side opened the gate, guard Neal stepped through and attempted to close it after him. Not succeeding, he ran through the passageway, toward the outer or north end, whereupon, in furtherance of the plot to escape, two shots were fired; one hit him and the other is claimed to be the shot which killed said Baker while in said counting booth. Defendant Brown is identified by the witnesses as the convict who carried the gun and fired the two shots. The other defendants were present with weapons aiding and abetting him. There is a conflict in the evidence as to whether the first or second shot hit the deceased. Certain it is that one of the shots passed through a pane of glass in the window of said counting booth and could have hit any person therein within its line of travel.

Guard Neal dragged himself on through the passageway and outer gate to the captain's office. Guard Gorahnson was hit over the head with a hatchet and left lying in the passageway inside said inner gate. The inner gate was closed, and evidently remained so until early the next morning. Said escaping band, still in mutiny and acting in concert for said deadly purpose, then proceeded to the schoolhouse, where they imprisoned other guards and some 1,400 convicts and kept them as prisoners until about 6 or 7 o'clock the next morning, November 25th, when, seeing

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

their plan had failed, they capitulated. There is testimony that the two gates opening upon said passageway were locked immediately after the above incident of the firing of said two shots and remained locked until about 7 o'clock the next morning, at which time the body of decedent, Baker, was found in said counting booth. We shall now discuss such of the assignments of error urged by appellants as appear important.

[1] The first is the attack upon the sufficiency of the evidence. In our opinion this assignment requires but little consideration. In reality the argument on the evidence is not so much with respect to its alleged insufficiency as to the alleged discrepancies therein and the incredibility of portions thereof. The chief reason for the attack made upon it seems to be to strengthen the other assignments of error. However, the desperate and determined attempt to escape by force of arms is admitted, as is also the participation therein by each of the appellants. The firing of the two shots into the tunnel or passageway by the defendant Brown is also conceded to be shown by the evidence. The presence of the other defendants aiding and abetting his act is also conceded. The wounding of turnkey Neal by one of the shots is likewise conceded. The finding of the body of the deceased Baker in the counting booth at 7 a. m. on the morning of November 25th is also admitted; that he was killed by a bullet entering just below the left nipple and passing entirely through his body, nicking his heart, is also admitted. A bullet hole in the glass of the counting booth was also found, which could well have been made by the same bullet that hit the deceased, and the same is true of a dent on the outer gate found in the line the bullet could have traveled after piercing the glass and penetrating the body of the deceased. The admitted armed mutiny in which all the defendants were engaged, the admitted firing of the two shots, which all the defendants aided and abetted, and the physical evidence on the premises as well as the evidence upon the body of the deceased furnished itself ample and sufficient evidence that one of the two shots fired by Brown killed Baker.

But, aside from this, there is in the record ample testimony given by eye-witnesses, which the jury was warranted in crediting, to the effect that Brown fired the two shots and that one of them at least hit and killed the deceased, Baker. In fact, Stewart, the sixth defendant in the revolt testified himself that he saw the convict in the counting booth and saw him go down at the time of the shooting, but could not tell whether he was hit or was hiding to escape danger. In this state of the record it is a useless consumption of time to argue discrepancies in the evidence, such as whether shot 1 or shot 2 hit Neal or whether shot 1 or shot 2 hit the deceased, Baker; as is also true as to whether Neal called upon the convict Taylor to open the gate or whether Taylor opened it himself; or whether Neal, after being wounded, dragged himself alone to the captain's office or was assisted by guard Thompson; or whether the captain of the guard was at a place where he could see any of the shooting; or whether Thompson was unworthy of belief because, if he saw the deceased fall, he should not have neglected looking after him until 7 a. m. the next day. The defendants' testimony offered no reasonable explanation of any kind of the death of Baker consistent with their innocence, and we are entirely satisfied with the finding of the jury in this behalf.

[2] The next assignment is that the acting court reporter was not a qualified court reporter pro tempore because he had not been regularly appointed and had not subscribed to an oath of office. We can discover no merit whatsoever in the contention that this situation could have been in anywise prejudicial to the rights of appellants. Franklin had acted for three and one-half years in the capacity of court reporter and was thoroughly competent and faithful in his work. No effort is made to show that his transcript of the proceedings was in any way untrue or incorrect. This is but a collateral attack upon his status as an adjunct or employee of the court. The court reporter is not among the list of county officers under section 4013 of the Political Code. We know of no constitutional or statutory provision which requires a court reporter to be an indispensable ingredient of a court. The object of having a reporter is to be able to secure an accurate transcript of the proceedings taken in the court. If appellants were enabled to receive and did receive a correct transcript of the proceedings had and taken at their trial, the ends of the law have been satisfied. If, however, they were unable to secure a record upon appeal or suffered any other material injury, we might be inclined to view their contention as having force. But we have here what purports to be and, in fact, what must be a full, true, and accurate reproduction in full of all the proceedings had and taken upon the trial. Even were a reporter given the status of an officer of the court, nevertheless, in view of this collateral attack, we would be required to hold in an instance of this kind that he had at least the status of a pro tempore reporter de facto. In re Danford, 157 Cal. 425, 431, 108 P. 322; People v. Kempley (Cal. Sup.) 271 P. 478.

[3] Appellants next contend that the trial court unduly restricted the examination of jurors upon their voir dire. Scarcely any specific instances are pointed to, but we are enjoined to read the whole transcript upon this subject in order to discern the attitude of the court in this respect. The court himself conducted the examinations, permitting the attorneys to suggest questions, as well as also permitting some of the individual de-

fendants to do so. When a challenge was interposed and denied, the examination of the talesman was taken over by the attorney making the challenge. We have examined the entire transcript of these proceedings, which covers some 400 pages, and in our opinion the examination of each talesman was full, fair, just, and proper, and no substantial right of any kind was denied defendants or any of them. This method of examining jurors has been provided for by the recent statute (section 1078 of the Penal Code, as amended by St. 1927, p. 1039), and where fairly conducted has been approved by this court. People v. Estorga (Cal. Sup.) 273 P. 575. Appellants particularly stress the contention that the court permitted juror Dawson to serve as such in violation of law, in that the record shows that on his voir dire he answered "Yes" to the following question: "Have you any conscientious opinions which would preclude you from returning a verdict of guilty, where the charge involved the death penalty?" The record shows the following questions and answers preceding this question: "The Court: Q. Mr. Dawson, I take it you have heard the questions we have been asking here all day, more or less? A. Yes, sir.

"Q. Is there anything in any of those questions which you think would disqualify you, or prevent you from sitting fairly and impartially in the case? A. No, sir."

Also the following, among many other questions, were subsequently asked him:

"Q. Are you prejudiced in any way against circumstantial evidence? A. No, sir.

"Q. If you were sworn as a juror in this case, could you try it fairly and impartially to both sides? A. Yes, sir.

"Q. Have you any preconceived notion or idea which way you would like to have the verdict go, or is your mind open and free? A. No, sir; my mind is open."

Whereupon at the close of the examination the following occurred:

"The Court: Either side any further questions from this gentleman? Hearing none, we will pass on to challenges.

"Mr. Johnson: We will pass the juror."

Neither the prosecution nor any of the defendants interposed a challenge for cause against this talesman. At the time this examination occurred some 77 proposed jurors had been examined, each of whom had been asked questions in substance the same as the questions above set forth upon the subject of conscientious scruples against capital punishment. Upon the day of the occurrence in question at least 4 had answered in the affirmative and had been excused. Indeed, the prospective juror who was questioned immediately preceding Mr. Dawson, one Mrs. Bender, answered that she was prejudiced against capital punishment, was challenged for cause by the district attorney, and the challenge was allowed by the court. Taking the context of this examination, together with the proceedings preceding it, coupled with the reference thereto by the court in its questions, and supplementing it with the fact that this jury rendered three verdicts as to each of these appellants, to which juror Dawson assented and signified his assent openly six times when polled by the clerk, we have no hesitancy in concluding that said answer "Yes" is a clerical misprision and does not represent the state of mind of said juror, but, on the contrary, the answer "No" was intended. It is conceded that neither the district attorney nor the trial judge would have thought of compelling or permitting a juror to serve who entertained the state of mind referred to in section 1074, subd. 8, of the Penal Code. Had the juror answered "Yes," the prosecution would have immediately interposed a challenge or else the court would on its own motion have excused the talesman for cause. The motive for silence in such a situation existed only upon the part of appellants themselves. This holding renders it unnecessary to pass upon the motion for diminution of record made by the people to correct the record in this particular, and the motion for this reason alone is denied.

[4] The contention that the indictment was based solely upon hearsay evidence is unfounded in fact, and were the assertion true, the law wisely affords no review of such a situation. An indictment is only an accusatory paper, and at most is to be considered as nothing more than part of the method of putting the defendant on trial for the charge made therein. It is not of itself considered as evidence against him upon the trial.

The form of the verdict was proper and the instructions of the court as to fixing the punishment were in harmony with the holding of this court in People v. Hall, 199 Cal. 451, 249 P. 859.

The numerous assignments of error directed at the statements in the argument of the district attorney have been examined, and in view of the facts of the record, but little serious objection could be urged to them, but in all cases where the proper bounds were exceeded, the court was prompt in its admonishment, relieving any cause for prejudicial results.

The two pages, consisting merely of page and line references, where alleged errors on the part of the trial judge may be found, we consider not in proper shape for review. However, we have read enough of them to convince us that the criticisms are entirely groundless. In most instances they are comments or questions by the court to which no objection was made.

This cause was heard by the trial judge under trying and at times exasperating conditions, but, notwithstanding this fact, the record is singularly free from error. The judgment of conviction and order denying motion for a new trial as to each of the five appellants first hereinabove named, but not as to defendant Albert M. Stewart, is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.

207 Cal. 123

LOS ANGELES & S. L. R. CO. v. RAILROAD COMMISSION OF CALIFORNIA et al.

(S. F. 13152.)

Supreme Court of California. April 26, 1929.

1. Carriers 🔑12(6½)—Railroad commission may waive requirements as to form in which complaints against carriers must be presented (Public Utilities Act, § 60).

Rules of railroad commission as to form in which complaints against carriers, under Public Utilities Act, § 60 (St. 1915, p. 157), must be presented, may be waived.

2. Carriers 🔑12(6½) — Failure of railroad commission to serve copy of complaint presented to it upon carrier will not prejudice complainant's rights (Public Utilities Act, § 60).

Failure of railroad commission to serve copy of complaint on carrier as required by Public Utilities Act, § 60 (St. 1915, p. 157), does not prejudice rights of complainant, if legal complaint is presented to commission.

3. Carriers 🔑12(6½)—Letter to railroad commission setting forth claim against carrier for refund, and requesting commission to refer matter to carrier for purpose of bringing about informal adjustment, held not complaint avoiding limitation statute (Public Utilities Act, § 60, and § 71, subd. b, as amended by St. 1925, p. 648).

Shipper's letter to railroad commission setting forth demand for refund of freight charges, amount claimed, and facts out of which claim arose, and closing with request that complaint be referred to carrier informally in hope that shipper and carrier might reach amicable settlement through an informal adjustment, *held* not to constitute complaint under Public Utilities Act, § 60 (St. 1915, p. 157), providing for filing of complaint with commission, so as to avoid defense of railroad that action was barred under section 71, subd. b (St. 1915, p. 165, as amended by St. 1925, p. 648), requiring complaints to be filed with commission within two years, where the commission declined to take up the matter with the carrier but returned the papers.

4. Carriers 🔑12(6½)—Reference in letter filed with railroad commission to avoidance of limitation did not make letter legal complaint within limitation statute (Public Utilities Act, § 60, and § 71, subd. b, as amended by St. 1925, p. 648).

Provision in letter written railroad commission setting forth nature of complaint against carrier for refund of freight charges, requesting that commission return papers after registering freight bills to prevent operation of statute of limitations, did not have effect of making the letter a legal complaint within Public Utilities Act, § 60 (St. 1915, p. 157), so as to avoid defense that complaint was not filed within time required under section 71, subd. b (St. 1915, p. 165, as amended by St. 1925, p. 648).

5. Carriers 🔑12(6½)—Practice followed before railroad commission of filing informal complaint against carriers preceding formal complaint did not avoid effect of limitation statute, where no legal complaint was filed within time (Public Utilities Act, §§ 53, 60, and § 71, subd. b, as amended by St. 1925, p. 648).

Where letter sent railroad commission complaining of railroad's overcharge in freight rates did not constitute formal complaint under Public Utilities Act, § 60 (St. 1915, p. 157), practice of filing informal complaint and thereafter filing formal complaint on same claim or demand, though followed before commission and acquiesced in by shippers and carriers, did not avoid effect of section 71, subd. b (St. 1915, p. 165, as amended by St. 1925, p. 648), requiring complaints to be filed within two years, notwithstanding section 53 (St. 1915, p. 153).

6. Public service commissions 🔑8—Rules of practice of railroad commission must conform to provisions of statute (Public Utilities Act, § 53).

Rules of railroad commission, under Public Utilities Act, § 53 (St. 1915, p. 153), empowering it to adopt rules of practice and procedure, must conform to provisions of act.

In Bank.

Application by the Los Angeles & Salt Lake Railroad Company for writ of certiorari to review an order of the Railroad Commission directing refund of freight charges. Order annulled.

Fred E. Pettit, Jr., and E. E. Bennett, both of Los Angeles, F. G. Athearn, of San Francisco, and Harry B. Ellison, of Los Angeles, for petitioner.

Carl I. Wheat, Reginald L. Vaughan, and Roderick B. Cassidy, all of San Francisco, for respondents.

CURTIS, J. This proceeding was instituted by the petitioner to have reviewed and annulled by this court an order and decision of the respondent, the railroad commission of the state of California, authorizing and directing petitioner to refund to the Van Camp Sea Food Company, referred to herein as the complainant, a certain sum of money which the commission found was the difference between the freight charges actually paid and those legally collectable by petitioner on certain shipments of merchandise involved in said proceeding before said commission. One of the defenses interposed by petitioner in the proceeding before said commission was that "complainant's cause of action is barred by reason of that portion of section 71 of subparagraph (b) of the Public Utilities Act of the State of California (St. 1915, p. 165, as amended by St. 1925, p. 648) reading as follows: 'All complaints concerning unreasonable, excessive or discriminatory charges shall be filed with the Commission within two years from the time the cause of action accrues.'"

The complaint in said proceeding showed that the cause of action involved therein resulted from shipments of merchandise made by Van Camp Sea Food Company between April 13, 1923, and October 24, 1923, and, therefore that the causes of action accrued not later than the last-named date. The so-called formal complaint therein was filed with the commission on January 30, 1928, four years, three months, and six days after the date of the last of said shipments of merchandise. Notwithstanding this fact, the commission held that the filing with the commission of an "informal complaint covering said charges on the 21st day of September, 1925," tolled the statute of limitations, and entered its order referred to above against petitioner. Hence this proceeding in this court.

There is no dispute as to the date of the shipments on which it is claimed that an excess freight charge was made by the petitioner against the shipper, the Van Camp Sea Food Company. The record discloses the fact that a letter written on the letterhead of the Carmichael Traffic Corporation, and signed by said corporation, was, on the 21st day of September, 1925, received by the commission. On receipt of this letter by the commission the same was filed or registered by the commission and the number I. C. 33274 assigned to it. The letters "I. C." stand for and mean "informal complaint." It does not appear that any action was taken by the commission upon this so-called informal complaint except to acknowledge its receipt and to return to the writer thereof certain freight bills which had been inclosed with the letter written to the commission. No notice of the filing of said letter, or informal complaint, was ever given to the petitioner, and no hearing was ever had on said so-called informal complaint. This "informal complaint" sets forth the nature of the demand of the complainant, the Van Camp Sea Food Company, against petitioner, the amount thereof, and the facts out of which it arose. It closed with the request that the commission "refer our complaint to the carrier informally for an expression of their attitude towards an informal adjustment, returning papers to us after registering the freight bills, to prevent operation of the statute of limitations, in order that we may take the matter up with them direct." The sending of this letter, and its receipt and assignment to it of a number by the commission as an informal complaint were in accordance with a practice followed by the commission for many years, and which appears to have been acquiesced in both by shippers and carriers in proceedings before said commission. The purpose of this procedure was to stop the running of the statute of limitations by the filing of the informal complaint, and thus permit the shipper and the carrier to arrive at an amicable settlement of their controversy, subject to the approval of the commission, without the necessity of a hearing before the commission, or, as stated in a letter of September 21, 1925, to arrive at an "informal adjustment" of their differences. Just what efforts were made by the parties interested in the present proceeding, after the filing of said "informal complaint," to arrive at an amicable adjustment of the claim of the Van Camp Company, is not disclosed by the record. The next action taken before the commission by either of said parties was the filing by the Van Camp Company of a so-called formal complaint, in which it asked that "defendant may be required to answer all charges herein; that after due hearing and investigation an order be made commanding said defendant to pay to complainant, by way of reparation for the unlawful charges hereinbefore alleged, the sum of $743.67," etc. Upon the filing of this complaint the commission caused a copy thereof to be served upon the carrier, the petitioner herein, and in other respects complied with the requirement of the Public Utilities Act providing the procedure to be followed in such proceedings. This procedure is to be found set forth in section 60 of said act (St. 1915, p. 158), and is as follows: "Upon the filing of a complaint, the Commission shall cause a copy thereof to be served upon the corporation or person complained of. Service in all hearings, investigations and proceedings pending before the Commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure of this state, and may be made personally or by mailing in a sealed envelope, registered, with postage prepaid. The Commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than ten days before the time set for such hearing, unless the Commission shall find that public necessity requires that such hearing be held at an earlier date."

By section 60 of said act (St. 1915, p. 157) it is also provided that: "Complaint may be made * * * by any corporation or person, * * * by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public utility including any rule, regulation or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission." Then follows the provision already quoted, requiring the commission to give notice to the "corporation or person complained of," after which the commission shall fix the time and place of a hearing on said complaint and shall serve notice thereof not less than ten days before the date of hearing. It is admitted that none of these steps was taken by the commission upon the filing of the letter of September 21, 1925. However, after the filing of the complaint on January 30, 1928, referred to as a formal complaint, the same was served on the corporation complained of, and in all other respects the provisions of section 60 of the act, above quoted, were complied with.

[1-4] The question, therefore, presented for decision is whether the letter of the Carmichael Traffic Association, received by the commission on the 21st day of September, 1925, was a valid and legal complaint within the provisions of the Public Utilities Act of this state. No question is made as to the authority of the Carmichael Traffic Association to write said letter in behalf of the Van Camp Company. It may not comply in form with the rules of the commission, but these may be waived. Ghriest v. Railroad Commission, 170 Cal. 63, 148 P. 195. It was in writing, as provided by section 60 of said act. We have already referred to the nature of its contents, including the prayer or request made upon the commission regarding the action which the sender thereof desired to be taken by the commission in response to the letter. We may assume that it stated the necessary facts required to be alleged in a complaint of this nature. If it were a legal complaint under said act, it was the duty of the commission to serve a copy upon the carrier, the petitioner herein, to fix a time and place for a hearing thereon and to give the parties notice of said hearing. This was not done by the commission, but its failure to do so would not prejudice the rights of the complainant. The commission, however, took no steps to hold a hearing on the so-called informal complaint, for the reason, no doubt, as it appeared to the commission, and as it appears to us, that the letter was not written for any such purpose, but it was written for the purpose, as stated therein, that the complainant might secure an informal adjustment of its claim. This it desired to accomplish either by the commission informally obtaining an expression from the carrier as to its attitude towards an informal adjustment, or, in case the commission did not care to act in the matter, to return the papers to the complainant "in order that we may take the matter up with them (the carrier) direct." It is not claimed that there is anything in the Public Utilities Act providing for an informal adjustment of claims of this nature, nor is it contended that there was any legal requirement on the part of the commission to act in such a proceeding in any manner. It seems that the commission declined to accede to the request of the writer of the letter to take the matter up with the carrier, but returned the papers as requested. It probably never occurred to the commission to treat said letter as a complaint, or else no doubt it would have followed the provisions of the statute and would have taken steps to hold a hearing thereon. We think that there can be no question as to the correctness of the conclusion reached by the commission in this regard. The letter on its face showed that it was not written for the purpose of having it serve as a complaint upon which a hearing might thereafter be held for the purpose of determining the merits of the complainant's claim, but in the hope that the shipper and the carrier might reach an amicable settlement of the controversy through an "informal adjustment" of their differences. This conclusion is fortified by the practice or custom, which appears to have been acceded to by the commission, of filing what has been referred to as an "informal complaint," after which the shipper and carrier would attempt to adjust their differences, and if this failed, a "formal complaint" would then be filed, under which a hearing would be held for the purpose of determining the merits of the claim of the shipper. Under this practice the "informal complaint" is not filed for any purpose contemplated by the statute. It cannot, therefore, have any legal effect as to the rights of the parties under the Public Utilities Act. So, in the proceeding now before us, the letter of September 21, 1925, asked for no relief in the power of the commission to grant. It cannot, therefore, be considered or held to be a complaint as contemplated by the terms of said act. We have not overlooked the following statement in said letter in reference to the statute of limitations: "Returning papers to us after registering the freight bills, to prevent operation of the statute of limitations." We confess we are in doubt as to the meaning or purpose of this statement except it be that, in the opinion of the writer of said letter, the sending thereof to the commission would stop the running of the statute. If such was his opinion, we think he was in error, as the letter without this reference to the statute of limitations was not a legal complaint as contemplated by the State Utilities Act, the mere statement of the opinion of the writer thereof that it might have such effect, and was written and filed with the commission for that purpose, would not change its legal effect.

We have but to look at the result of following such a practice to see how it circumvents the provisions of the act limiting the filing of a complaint to two years after the cause of action accrued. Under the practice followed by the complainant, a shipper, having a claim for excessive freight charges against a carrier, just prior to the date his claim would be barred by the statute of limitations, writes a letter like that written by the Carmichael Traffic Corporation to the commission, or files an informal complaint with the commission. No steps are taken to hold a hearing before the commission on this letter or informal complaint, and none has been asked for or contemplated by the terms of the letter or the informal complaint. No notice is given of the writing of such letter or the filing of said informal complaint to the shipper. Two years thereafter, and it might just as well be five or ten years thereafter, the shipper files a so-called formal complaint, setting up the facts upon which he bases his claim, and asks for a hearing thereon to determine the question on its merits. Under the contention made by respondent herein the plea of the statute of limitations would be unavailing to the carrier for the reason that the shipper, before the tolling of the statute, had written this letter or filed this so-called informal complaint with the commission, of which the carrier never had any notice or knowledge. Surely such a practice would be against both the spirit and the letter of the act which bars proceedings before the commission two years after the action accrues.

[5, 6] The fact that the practice of filing an informal complaint and thereafter filing a formal complaint upon the same claim or demand has for some considerable time been followed before the commission and acquiesced in by both shippers and carriers cannot affect the result of this proceeding. It cannot find sanction in the statute, and for that reason it cannot be upheld in a legal proceeding. It may be true that a larger number of claims may be handled in this manner by the commission with but little expense, labor, or trouble, and that in the past this practice has been followed in many cases without objection from the parties thereto, but it does not follow that in those proceedings where an objection is made, the party objecting is not entitled to the legal rights afforded him by the act. We are loath to make any ruling which will interfere with the prompt and efficient dispatch of the large and increasing number of matters coming before the commission for its consideration and determination. We appreciate the heavy burden that this important branch of our state government is being called upon to bear, and the necessity for it to adopt a procedure that will enable it to expeditiously handle and dispose of the large volume of business demanding its attention. Nevertheless, the Constitution of the state and the statutes passed in accordance therewith are the measure of its power, and the procedure followed by the commission must conform to the constitutional and statutory requirements. If the present law is not feasible nor practical, and a longer period than two years should be provided by statute, after the accrual of a cause of action, in which the parties might endeavor to arrive at an informal adjustment of their differences, then resort should be had to the Legislature for the purpose of amending the statute in that respect. Neither the commission nor the courts can render this relief. While the commission, under section 53 of the act (St. 1915, p. 153), has power to adopt rules of practice and procedure, such rules must conform to, and not be in conflict with, the provisions of said act. We think therefore that the commission did not regularly pursue its authority in said proceeding when it made its order under the circumstances related herein, directing petitioner to refund to the Van Camp Sea Food Company the amount of said excess charges upon a complaint which was filed over four years after the cause of action alleged therein had accrued.

Said order for that reason is therefore annulled.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.

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207 Cal. 167

MAXWELL HARDWARE CO. v. FOSTER et al. (S. F. 12783.)★

Supreme Court of California. April 30, 1929.

Rehearing Denied May 29, 1929.

1. Mechanics' liens ⚷61—Realty is not subject to lien for materials used in construction of building without owner's knowledge (Code Civ. Proc. § 1192).

In absence of evidence that contractor was authorized by owner of realty to construct building thereon or purchase materials therefor, or that owner had any knowledge that it was being constructed, realty is not subject to lien for materials under Code Civ. Proc. § 1192.

2. New trial ⚷99—Denial of new trial for newly discovered evidence is largely in trial judge's discretion.

Denial of motion for new trial on the ground of newly discovered evidence rests largely in the discretion of the trial judge.

3. New trial ⚷103—Denial of new trial for newly discovered evidence of lease, as to which lessee did not testify, held not abuse of discretion.

Where building contractor, who was witness for plaintiff in trial of action to foreclose materialman's lien, did not testify that he had lease contemplating making of improvements on demised premises by him, Supreme Court cannot hold that trial court abused his discretion in denying plaintiff's motion for new trial on ground of newly discovered evidence of such lease.

★Rehearing denied.

4. Appeal and error ⚷1041(2) — Refusal of leave to amend complaint held not prejudicial error, in absence of sufficient evidence to support judgment for plaintiff.

Where evidence was insufficient to support judgment for plaintiff establishing materialman's lien, plaintiff was not prejudiced by court's refusal to permit filing of amended complaint supplying material facts lacking in original complaint.

5. Appeal and error ⚷1033(7)—Plaintiff appealing from judgment denying foreclosure of materialman's lien cannot complain of personal judgment against contractor.

Plaintiff appealing from judgment denying foreclosure of materialman's lien cannot complain of personal judgment against contractor for value of materials furnished him on ground that no process was served on him; plaintiff not being aggrieved party.

6. Appeal and error ⚷151(5)—Only aggrieved party can appeal from judgment, unless amount thereof is less than that demanded.

An appeal from a judgment can be taken only by an aggrieved party thereto, not by party in whose favor it was rendered, unless amount thereof is less than that demanded.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by the Maxwell Hardware Company against E. H. Foster and others. From a judgment for defendant E. Kates, plaintiff appeals. Affirmed.

Rehearing denied; PRESTON, J., dissenting.

L. L. Steele, of Oakland, for appellant.

C. A. Odell, of Richmond, for respondents.

CURTIS, J. [1] Action for the foreclosure of a materialman's lien for building materials furnished defendant Foster in the construction of a building upon real property belonging to the defendant Kates. The court gave judgment in favor of defendant Kates. The plaintiff has appealed. The evidence fails to show that Foster had any authority from Kates to purchase said materials, or to construct said building, or that Kates had any knowledge that the building was being constructed. Without evidence showing that defendant Kates had knowledge of the construction of said building, the real property owned by him and upon which said building was constructed would not be subject to a lien for materials used in its construction. Code Civ. Proc. § 1192. The judgment, therefore, denying plaintiff a lien upon the property of the defendant Kates was properly entered.

[2, 3] After judgment plaintiff made a motion for a new trial, and among the grounds upon which said motion was based was that of newly discovered evidence. The court denied said motion. That the action of the trial court in denying a motion for a new trial on the ground of newly discovered evidence is a matter largely in the discretion of the trial judge is so well settled in this state that a citation of authority upon the subject is unnecessary. At the hearing of the motion for a new trial the plaintiff presented an affidavit to the effect that Foster had, at the time the materials were furnished him, a lease upon the real property on which the building was constructed, and that said lease provided for, or at least contemplated, the making of improvements thereon by Foster. Under these conditions the plaintiff contends that Kates, the owner of the property, was charged with constructive notice of the making of said improvements. Foster was a witness at the trial of this action on behalf of the plaintiff. He testified to the existence of no such lease, and the trial court may well have concluded that the plaintiff failed to exercise proper diligence in eliciting evidence from Foster regarding the existence of said lease, at the time Foster was being examined by plaintiff at the trial of this action. Under these circumstances we are not warranted in holding that the trial court abused its discretion in denying said motion.

[4] Another ground upon which the plaintiff based its motion for a new trial was the action of the court in denying its application to amend its complaint. The original complaint was fatally defective in a number of material respects. After the submission of the case to the court, but before decision, the plaintiff presented to the court, without notice to the defendant, an amended complaint and asked leave to file the same. This request the trial court denied. The amended complaint supplied the material facts lacking in the original complaint. Assuming that the court should have permitted the filing of said amended complaint under the conditions under which it was presented, it would not have availed anything to the plaintiff in view of the state of the evidence which we have before referred to. As the evidence was insufficient to support a judgment in favor of the plaintiff establishing his lien, plaintiff was not prejudiced by the action of the trial court in refusing to permit the filing of said proposed amended complaint.

[5, 6] While the court gave judgment denying plaintiff the right to foreclose its lien against the defendant Kates' property, it did render a personal judgment against the defendant Foster for the value of the materials furnished the latter. The plaintiff now claims that this judgment is void for the reason that no process was ever served upon said defendant Foster. The judgment, however, was in favor of the plaintiff, and even if the same were void, that fact cannot be taken advantage of on an appeal therefrom by the plaintiff in whose favor the judgment was rendered. An appeal from a judgment can

only be taken by an aggrieved party thereto, and the plaintiff herein does not sustain that relation to said judgment. A party cannot appeal from a judgment in his favor. Estate of Funkenstein, 170 Cal. 594, 150 P. 987; United Railroads v. Colgan, 153 Cal. 53, 94 P. 245. This is the general rule. There may be exceptions to this rule, but the present appeal does not come within any of such exceptions. A plaintiff may appeal from a judgment in his favor, when the amount of said judgment is less than the amount demanded and to which the plaintiff considered himself entitled. But in such a case the appeal is not from that part of the judgment in plaintiff's favor, but is from the provisions of the judgment denying him the full relief demanded. In the present action on this appeal the plaintiff seeks to object to any judgment in its favor and against the defendant Foster.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

PRESTON, J. I dissent. The amount involved in this cause is small. Errors of judgment were perhaps made by counsel for plaintiff upon the trial, but rules of law should, if possible, be applied to promote justice. Here, in my opinion, justice has been denied, although it could have been granted without violence to any rule of law.

The majority opinion is predicated upon the absence of pleading and proof that the owner of the real property knew that defendant was erecting a building thereon. An examination of the record shows that defendant's counsel did make the point that the above mentioned pleading and proof was not present, but the court below several times expressly stated that this was not necessary, amplifying it by the further statement that, unless the owner posted the notice required by statute, he would be held liable for the material that entered into the construction of the building. It was not pleaded by the defendant, nor contended by him, that he did not have full knowledge of the erection of this building, nor did he plead or claim that he had not authorized its erection. The court below apparently ordered the findings in favor of defendant upon the ground that the complaint showed that there was no agreed price for the material, and that there was a large amount of material included in the claim of lien which did not enter into the construction of the building. However, when the findings were made up, all the material allegations of the complaint, including the regularity of the claim of lien, were found to be true, said findings covering substantially all the allegations in the first seven paragraphs of the complaint—but the court added a final finding which read as follows: "That at the time defendant E. H. Foster purchased and ordered the materials described in plaintiff's complaint he had no authority from E. Kates to purchase or order the materials described in the complaint or any other material for or in behalf of said Kates and at the time said materials were ordered and purchased as aforesaid the said E. H. Foster was not acting by the authority of or under the direction of the defendant E. Kates either as contractor or otherwise."

The materiality of the above mentioned omitted allegations and proof, theretofore declared unnecessary by the court, became the sole ground for the judgment, whereupon plaintiff made a motion for a new trial and supported it by an affidavit which set up the fact that he had offered to file an amended complaint to cover this defect, and a copy of said complaint was made an exhibit to the affidavit. Further, he showed and made an exhibit to said affidavit, a lease between the landowner and the tenant which expressly authorized the tenant to cause the building in question to be erected, setting forth therein, also, copies of documents which showed that certain of the material that entered into said building was receipted for by the owner and transportation charges thereon were paid by him. Against this showing of the plaintiff, defendant offered absolutely nothing. There was, therefore, no room whatever for the exercise of discretion by the trial court in denying the motion for new trial. This is doubly true because of the attitude of the court himself as to the materiality of this showing during the trial of the cause. Plaintiff, without substantial fault on its part, has suffered because of the trial court's change of attitude, and has never had an opportunity to introduce the uncontradicted proof within its possession which would remove the ground upon which the court predicated its judgment.

That the judgment should be reversed is, to my mind, too clear for controversy.

207 Cal. 181

GRIGSBY v. DAVEY et al. (S. F. 12795.)★

Supreme Court of California. May 2, 1929.

As Modified on Denial of Rehearing, May 27, 1929.

1. **Waters and water courses ⚷87—Evidence held to sustain finding that lands to which water was diverted were not riparian to stream.**

Evidence, in action to restrain a maintenance of a dam and diversion of waters of stream from natural channel, *held* sufficient to sustain finding that lands to which water was diverted were not riparian to the stream.

2. **Appeal and error ⚷1012(1)—Judgment against undisputed evidence cannot be upheld.**

Where judgment is against the undisputed evidence of the case, it cannot be upheld on appeal.

3. **Judgment ⚷717—Judgments in previous actions, confirming ownership of land and riparian rights, were not complete adjudication as respected right of owner to divert waters.**

Judgments in previous actions, confirming ownership of land and riparian rights to waters of stream, *held* not a complete determination and adjudication as respected right of one of owners to maintain a dam and divert waters of natural stream.

In Bank.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Mrs. Isadore F. Grigsby against H. C. Davey and others. Judgment for plaintiff, and defendants appeal. Affirmed in part and in part reversed with directions.

Thomas, Beedy, Presley & Paramore, of San Francisco, and Benjamin C. Jones, of Lakeport, for appellants.

Tum Suden & Tum Suden, of San Francisco, for respondent.

CURTIS, J. Plaintiff is the owner of the south 10 acres of the northwest quarter of the northwest quarter of section 11, township 11 north, range 8 west, Mount Diablo base and meridian. The defendant Camp Calso Company is the owner of the north 30 acres of said quarter section above described, and also the north 35 acres of the northeast quarter of the northeast quarter of section 10, said township and range. Said 35 acres in section 10 join on the east said 30 acres in section 11. All of said lands are situated in Lake county. The other defendants are officers of the defendant Camp Calso Company. Houten creek is a small perennial rivulet flowing between 15 and 18 miner's inches of water, having its source in large springs on the lands belonging to the Camp Calso Company and flows through said 30-acre tract belonging to said defendant and then into and across plaintiff's said land. After leaving plaintiff's land it makes an abrupt turn to the south and flows into Kelsey creek. The defendant company some time prior to the commencement of this action constructed a dam in the bed or channel of said creek at a point some distance above the land of the plaintiff where said stream enters plaintiff's said land, and by means of said dam and a two-inch pipe line connected therewith diverted a portion of the waters of said stream from their natural channel and conveyed the same in a westerly direction for use upon lands belonging to said defendant corporation. A portion of the land to which said water was conveyed by said defendant was included within the boundaries of said 30-acre tract, and a portion thereof was within said 35-acre tract.

Plaintiff brought this action to restrain defendants from maintaining said dam in said stream and from diverting any of the waters of said stream from its natural channel for use upon said lands of the defendants. The trial court in its decree adjudged that the lands of the defendant corporation were nonriparian to Houten creek, and that defendants were not entitled to divert any of the waters of said stream for use upon any of said land belonging to said defendants and situated in said sections 10 and 11. We will assume that the judgment is supported by the findings, and will direct our attention to the findings with the view of ascertaining whether the evidence is sufficient to support the judgment. There is no question but that the lands of plaintiff are riparian to Houten creek and that plaintiff as the owner thereof is entitled to all rights and privileges which an owner of riparian lands may possess and enjoy in a stream to which his lands are riparian. We will therefore proceed to the consideration of the evidence produced at the trial and which the court held was sufficient to establish that the lands of the defendant Camp Calso Company were not riparian to Houten creek.

[1] As to said 35 acres situated in section 10, the principal, if not the only, basis upon which the defendants make the contention that said tract or any part thereof is riparian to said stream, is that Houten creek had been diverted from its original channel some years previous to the trial of said action and that but for said diversion said stream after leaving plaintiff's land would flow in a westerly direction through said 35-acre tract. At present said stream, after entering plaintiff's land along its north boundary line and a short distance from the northeast corner thereof, runs in a generally southwesterly direction through the lands of plaintiff and leaves the same at the south boundary line and near the southwest corner thereof. Said stream while flowing in its present channel does not, therefore, enter said 35-acre tract, but after leaving plaintiff's land flows away and in an opposite direction from defendants' land situated in said 35-acre tract. There was some evidence to support defendants' claim that said stream originally flowed through said 35-acre tract

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★Rehearing denied.

in said section 10. The engineers employed by defendants testified that they found traces of an old bed of a stream leading from a point in the present stream before it leaves plaintiff's land, and extending in a westerly and a northwesterly direction through said 35-acre tract. There were also witnesses who for many years prior to the trial of said action were acquainted with the locality where the lands of the parties hereto are situated, and who testified that the waters from said stream ran across the county road, which county road is now and was at the time covered by the testimony of these witnesses located some distance west of the present channel of said stream, and only a short distance from said 35-acre tract, and that for the purpose of protecting said road said stream had been diverted from a westerly course, where said stream had been accustomed to flow, to a more southerly course, as it now flows or as it flowed at the time of the trial. It may well have been inferred if this were the only evidence before the court that a change had been made in the location of the channel of said stream, and that before said change had occurred said stream had run through said 35-acre tract. But there was evidence on behalf of plaintiff which undoubtedly negatived this claim of the defendants. We need only briefly refer to a portion of this evidence to show that upon the question as to the location of the original bed of the stream the evidence as a whole presents a substantial conflict. The witness Max Hoberg, who lived in the neighborhood of plaintiff's property, testified that he was acquainted with the location of the channel of Houten creek for over 40 years, and that said stream during the years he had known it ran in the same channel as it did at the time of the trial. He further testified that the water therefrom crossed the county road, but at a point some distance south and below where the defendants claimed that the old bed or channel of the creek was located, and far below said 35-acre tract. Another witness for the plaintiff was Rodney Smith. He also had been acquainted with the property for over 40 years. His father had owned the land lying to the south of plaintiff's land, and only separated therefrom by a 10-acre strip of land lying immediately south of plaintiff's land. He testified that when he was a small boy, so small that he was unable to assist his father, that Houten creek, at a point considerably east of the point where the defendants claim that the old abandoned channel of the creek began, ran almost due south through plaintiff's property and the intervening 10-acre tract upon the lands of his father; that during the winter the waters of the stream brought down driftwood upon his father's land, and for the purpose of keeping this driftwood from his land his father constructed a dam across Houten creek at the point just mentioned and diverted the water in a westerly direction so that from that time on it ran in its present channel. He further testified that the waters of said stream never ran any further west than the present channel except in time of high water. We might mention other evidence in the record to the same effect, but that already referred to is sufficient to warrant the implied finding of the court that the course and channel of Houten creek did not and never did lie through defendants' 35-acre tract. As already stated, the only basis upon which defendants can claim that said 35-acre tract, or any part thereof, was riparian to said creek, rested upon their ability to prove that the original channel of the stream ran through said tract. The finding of the trial court upon conflicting evidence was against this claim of defendants. This, we think, disposes of said 35-acre tract in so far as its riparian character is concerned.

[2] Coming now to the land of the defendants referred to as the 30-acre tract and situated in the northwest quarter of the northwest quarter of section 11, we have an entirely different situation. As we have seen from the statement heretofore made, Houten creek for some considerable distance before it enters plaintiff's said land runs directly through said 30-acre tract in section 11. There is no evidence that the lands of the defendant through which said creek runs have ever been deprived of their original riparian character. There are undoubtedly portions of said 30-acre tract which are not riparian to said stream. In fact, there is a substantial showing in the record that much, if not all, of the land in said 30-acre tract upon which the defendants had conveyed water from said stream through the two-inch pipe line is not riparian to said stream. Had plaintiff confined her efforts in this action to restraining defendants from diverting the waters of said stream for use upon these portions of said 30-acre tract, she may have secured a judgment which would have been supported by the evidence. But she did not stop there. On the other hand, in her complaint she alleged that none of said 30-acre tract was riparian to said stream, and that the defendants were without any right to use the waters of said stream upon any part of said 30-acre tract. The findings and judgment followed her complaint, with the result that the present judgment was rendered whereby all of said 30-acre tract is adjudged to be nonriparian to said stream and the defendants are enjoined and restrained from using any of the waters thereof upon any of said land. This judgment is against the undisputed evidence in the case, and therefore cannot be upheld.

In her complaint plaintiff set up two certain judgments, one in action No. 2460 and the other in action No. 2586, and alleged that the judgment in action No. 2460 was a full and complete determination and adjudication of the water rights of the defendant Davey (one of the defendants in the present action and the predecessor in interest of the other of said defendants) and the plaintiff in this action. Plaintiff further alleged that by the judgment in action No. 2586 the said Davey was permanently enjoined and restrained from maintaining any dam in Houten creek above the lands of plaintiff for the purpose of diverting any of the waters therefrom for use upon lands belonging to said Davey. As to these allegations the findings of the trial court follow the complaint.

In our opinion neither of said judgments determined any of the issues involved in the present action. In the action No. 2460 the facts briefly related show that the defendant Davey, together with two associates, owned all of the land now owned by the parties to this action. Davey and associates sold to the plaintiff herein and a Mrs. Fields the land now owned by the plaintiff and the 10-acre tract immediately to the south of plaintiff's said land, and the plaintiff and Mrs. Fields owned and held the same as tenants in common. Thereafter Davey and associates instituted said action No. 2640, claiming that the plaintiff and Mrs. Fields had agreed to relinquish to him and his co-owners all water rights belonging to the land conveyed to them; that they refused to make or sign said relinquishment; that upon said refusal he had demanded a reconveyance to him and his associates of the land conveyed to plaintiff and Mrs. Fields and had tendered back to plaintiff and Mrs. Fields the consideration paid by them for said land. In said action Davey and his associates sought a decree compelling plaintiff and Mrs. Fields to reconvey to him and his associates the said land. The court denied the plaintiffs in said action any relief and held that the plaintiff herein and Mrs. Fields were the owners in fee simple of said land "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging." It is apparent that this judgment does not purport to determine any issue involved in the present action. By the judgment in action No. 2640 the plaintiff herein and Mrs. Fields were confirmed in their ownership of the land purchased by them from Davey and associates, and their riparian rights to the waters of said stream as against Davey and his associates were also, we think, established by said decree. But said judgment went no further. It did not attempt to adjudicate the rights of the plaintiff with reference to the claims of the upper riparian proprietors on said stream. These upper riparian proprietors were Davey and his associates, the predecessors of the present defendants; but their rights as such upper riparian proprietors were not involved in action No. 2640, and the judgment rendered in said action did not in any way affect said rights.

The same conclusion must be reached in reference to the judgment in action No. 2586. At the time this action was commenced the defendant herein, H. C. Davey, had become the owner of the Smith property situated just south of the property purchased by the plaintiff and Mrs. Fields from Davey and his associates. In that action he claimed the right to maintain a dam in Houten creek above the point where the same enters the land of plaintiff, and by means of said dam and a ditch, constructed by Smith before he sold his land to Davey, to divert the waters from said creek and to convey the same across the land of the plaintiff herein and the 10-acre piece lying south thereof for use upon the land purchased by him from Smith. The court held that he had no such right. That action was entitled Davey v. Grigsby. From the judgment rendered therein Davey appealed, and the decision affirming the judgment is found reported in 51 Cal. App. 220, 196 P. 296. That action, however, did not in any way involve the right of Davey and his associates to use the waters of Houten creek upon lands owned by them in the northwest quarter of the northwest quarter of said section 11. While the judgment in each of these actions was properly admissible in evidence as showing or tending to show the past transactions between the parties hereto, neither of them was a conclusive determination of any of the issues involved in the present action.

That portion of said judgment restraining defendants from diverting the waters of said stream and using the same upon said thirty-five acre tract in section 10 is affirmed. That portion of said judgment, based upon the finding that no part of said thirty acre tract in section 11 is riparian to said stream is reversed, with directions to the trial court to ascertain and determine upon the evidence already adduced, and upon such other evidence as said court may deem necessary for the decision of said issue, what portion of said thirty acre tract is riparian to said stream.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

207 Cal. 189

VENTURA COUNTY v. BARRY et al.*

(L. A. 11120.)

Supreme Court of California. May 2, 1929.

Rehearing Denied May 29, 1929.

1. Taxation 🔑314—Statute was substantially complied with where oath signed did not contain name of office, but was attached to certificate of election showing office (Pol. Code, § 904).

Where blank in form of oath for name of office was not filled in, but oath which assessor signed was preceded on same sheet of paper by certificate of election, showing that person signing oath had been elected to office of county assessor, there was substantial compliance with Pol. Code, § 904, relating to oaths.

2. Taxation 🔑549(4)—Tax assessor held not entitled to 6 per cent. commission on taxes collected by him on property classified by statute as real property (Pol. Code, §§ 3617, 3820, 4290).

Under Pol. Code, § 4290, providing that assessor is entitled to 6 per cent. commission on personal property tax collected by him as authorized by section 3820, assessor *held* not entitled to retain 6 per cent. of taxes collected by him on possession of, claim to, or right to possession of land, together with chattels real and leasehold interests in and to real property, together with all rights and privileges appertaining thereto and improvements thereon, which are classified by section 3617 as real estate, even though such taxes are collected in manner provided by section 3820.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, Ventura County; Fred A. Treat, Judge.

Action by Ventura County against Jasper Barry and another to recover money retained as commissions on the collection of taxes. From judgments for defendants, plaintiff appeals. Judgment as to one cause of action affirmed, and judgments as to the other causes of action reversed.

Rehearing denied; PRESTON, J., dissenting.

See, also, 202 Cal. 550, 262 P. 1081.

J. C. Hollingsworth, Dist. Atty., Don. R. Holt, Chief Deputy Dist. Atty., and Blackstock & Rogers, all of Ventura, for appellant.

Clarke & Bowker, of Los Angeles, for respondents.

LANGDON, J. This is an appeal by the county of Ventura from a judgment sustaining demurrers without leave to amend to the first and second causes of action set forth in the county's complaint, and from a judgment in favor of respondent Barry as to the third cause of action set forth in the county's complaint. Separate appeals were taken from these judgments, but upon stipulation they were consolidated in this court.

[1] The first cause of action is based upon the theory that respondent Barry wholly failed, refused, and neglected to take his oath of office, as prescribed by section 904, Political Code. The form of oath prescribed by said section leaves a blank line for the insertion of the name of the office. Respondent Barry signed and filed an oath, which was in the exact language of the form prescribed by section 904 of the Political Code, but the blank in the form was not filled in. The oath, however, is preceded on the same sheet of paper by the certificate of election, signed by the county clerk, from which it appears that the person signing the oath had been elected to the office of county assessor. We are of the opinion that there was a substantial compliance with the statute under the rulings in the cases of State of Minnesota ex rel. Edward T. Young v. Ladeen, 104 Minn. 252, 116 N. W. 486, 16 L. R. A. (N. S.) 1058; People ex rel. Finigan v. Perkins, 85 Cal. 509, 514, 26 P. 245. We think the demurrer to the first cause of action was properly sustained.

The second cause of action was based upon the theory that the respondent, while acting as assessor of the county of Ventura, collected and received certain sums of money as taxes in the said county; that the sums of money so received and collected by the respondent were collected and received by him as taxes on real property situated in the county of Ventura, and consisting entirely of the possession of, the claim to, or right to the possession of land, together with chattels real and leasehold interest in and to real property, together with all rights and privileges appertaining thereto, and improvements thereon, as defined in section 3617 of the Political Code of the state of California, and that the said taxes so collected and received were collected and received by the said Jasper Barry under and by virtue of section 3820 of the Political Code of this state. It is further alleged that the amount of taxes so collected amounted to $990,736.76 from which the respondent deducted 6 per cent. thereof amounting to $57,792.99, which he failed to pay over and deliver to the county treasurer of the county of Ventura, and further alleging that demand was made of respondent for the said sum of $57,792.99, but that the respondent failed to pay the same over to the county, etc.

The issues raised here are twofold: (1) Whether taxes upon "possession of, claim to or right to the possession of land, together with chattels real and leasehold interests in and to real property, together with all rights and privileges appertaining thereto and improvements thereon," are taxes upon real estate to be assessed, levied, and collected in the same manner as taxes upon other real estate mentioned in section 3617, Political Code, or whether such taxes are to be collected under sections 3820, 3821, and 3822, Political Code; (2) if such taxes are collectible under the latter sections, whether they lose their identity as taxes upon real estate as defined by section

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*Rehearing denied.

3617, Political Code, and become subject to 6 per cent. compensation for the assessor under the provisions of section 4290, Political Code, allowing him 6 per cent. of "all personal property taxes."

It is insisted by respondents that the questions are concluded in this state by the case of Mohawk Oil Co. v. Hopkins, 196 Cal. 148, 236 P. 133. In that case an injunction was sought by the plaintiff, a corporation, owner and holder of certain oil and gas leases, to prevent the assessor from assessing and collecting taxes upon such interests under the provisions of section 3820 et seq. The claim was that such possessory rights and leasehold interests were real property, and that whatever taxes were to be imposed upon them should be assessed, levied, and collected in the same manner as taxes upon other real estate. It was alleged that the defendant assessor was claiming the right to demand and collect county taxes upon the plaintiff's possessory rights on oil and gas leases upon said lands, and to have the same paid in conformity with section 3820 of the Political Code and in default of the payment, to have the possessory and leasehold rights seized and sold under the provisions of sections 3821 and 3822 of the said Code. A general demurrer was sustained without leave to amend, and upon appeal it was held that the nature and character of the property generally denominated as an oil and gas lease is such that it must be subjected to the method of assessment and collection of taxes as provided by section 3820, Political Code.

The court used the following language: "The present contention of the plaintiff and appellant herein is that since possessory rights and leasehold interests in lands are real estate under section 3617 of the Political Code as interpreted in the foregoing cases, no reason exists for the application to these forms of real estate of a different principle and method of assessment and of the payment of taxes than that which under the general laws relating to taxation of real property is provided for the assessment and collection of the taxes upon the land out of which these lesser interests therein have been carved. This contention was answered in part by this court in the case of Graciosa Oil Co. v. Santa Barbara [155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211] supra, wherein Mr. Justice Shaw pointed out certain essential differences between possessory rights under leases for the extraction of oil and like substances from the land and ordinary possessory interests under leases for the purpose of usufructuary production which import to the former a character resembling that of a servitude or chattel real. There are yet other differences easily to be discerned. The operations of lessees under oil leases contemplate the erection of derricks and other structures of an impermanent character and the sinking of deep wells at large expense, but which derive their main value not from the expenditure necessary to their creation but from the oil content of the land into which they penetrate. If oil or other mineral substance or essence is found and extracted, these immediately become personal property upon their severance from the soil, the value of which is to be realized only by their removal from the place of their extraction to near or distant markets."

The case proceeds upon the theory that oil leases are essentially different from ordinary agricultural leases with reference to the incidents to be considered by the assessor and it decides only that a tax upon oil leases is collectible under section 3820 et seq. of the Political Code.

The pleading of the second count in the instant case does not mention oil leases, but refers to "possession of, claim to, or right to possession of land, together with chattels real and leasehold interest in and to real property." We think, therefore, it was not subject to demurrer under the rule of the Mohawk Oil Case and other cases involving oil leases, even though we were to concede, which we do not, that taxes collected upon such leases are subject to the 6 per cent. charge of the assessor.

However, the record indicates a disposition on the part of counsel for all parties to have the case decided upon its merits, and the omission to plead that the possessory rights in land involved here were oil leases is unimportant, because, in the offer of proof under the third count, it is admitted that the leases were oil leases, and whether they were oil or agricultural leases becomes immaterial, in view of our conclusion as to the law of this case.

The third cause of action was to quiet title to personal property. It was alleged that the county was the owner and entitled to the possession of that certain personal property consisting of the said sum of $57,792.99 on deposit in the defendant bank, and that the respondent Barry claimed some right, estate, or interest in and to said sum of money adverse to the county, and it was further alleged that the claim of Barry was without right, etc. The general demurrer interposed to this cause of action was overruled. An answer was filed, in which, among other defenses, Barry claimed the money in controversy as representing 6 per cent. of the personal property tax collected by him as such assessor, as authorized by section 3820, Political Code.

Upon the trial the county, in support of the allegations contained in its third cause of action, offered to prove the matters pleaded in its first and second causes of action. The offer was in the language of the pleading, and to the effect that the defendant had collected certain moneys on personal and real property, and that a specified portion of it was collected upon possessory rights and leasehold interests in land, under section 3820, Political Code. The attorneys, in stipulating as to what plaintiff's proof would show, agreed that the taxes in dispute are taxes on leasehold interests in and to real property, consisting of oil leases or leases in oil-producing territory of the county. The offer of proof was objected to on the ground that it showed that the taxes were all collected under and by virtue of section 3820 of the Political Code. It was conceded that the facts offered could be proved, but it was objected that they were incompetent, irrelevant, and immaterial.

But it is the contention of appellant that, even though it be admitted that the tax was properly collected under the provisions of section 3820 et seq. by the procedure employed for the collection of taxes upon personal property, nevertheless, the compensation of 6 per cent. allowed to the assessor does not apply to such taxes, which are assessed and collected against property which is classified by section 3617, Political Code, as real property. This last point is a novel one in this state. The Mohawk Oil Case merely decides that taxes upon oil leases may be collected under the provisions of section 3820, Political Code, which reads: "The assessor must collect the taxes on *all property* when, in his opinion, said taxes are not a lien upon real property sufficient to secure the payment of the taxes." The succeeding sections provide for seizure and sale in cases covered by section 3820.

But let us return to a consideration of section 3617, Political Code, relied upon by appellant. It is contained in chapter 2, part 3, title 9, on Revenue. Chapter 2 deals with definitions, and section 3617 therein declares that real estate includes: "The possession of, claim to, ownership of, or right to the possession of land," etc. Clearly, the case pleaded and the offer of proof are within the above definition of real estate. We then turn to section 4290, Political Code, for the law with reference to the compensation of the assessor, at the time the collections in question were made. We find: The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers, their deputies and assistants. * * *"

"*Assessor.* Provided and except, that the assessor shall be entitled to receive and retain for his own use, unless in this title otherwise provided, six per cent. on *personal property tax* collected by him, as authorized by section 3820. * * *"

Appellant's position is well stated in its own language, as follows: "If a tax on leasehold interests and possessory rights as defined in section 3617 of the Political Code is a personal property tax as defined in section 4290 of the Political Code, then we concede that respondent Barry is entitled to receive and retain 6 per cent. of said taxes so collected by him. Upon the other hand, if the definitions as set forth in section 3617 of the Political Code are to be followed and adhered to in the decision of this question, then it must be held that a tax on leasehold interests and possessory rights is a tax on real estate as defined by section 3617 of the Political Code, and that, regardless of the manner or method in which a tax on leasehold interests or possessory rights is collected, an assessor making this collection would not be entitled to receive and retain for his own use 6 per cent. thereof, for the reason that he is collecting a tax on real estate and not on personal property."

In the case of People v. Smith, 123 Cal. 70, 55 P. 765, it is said: "Section 3617 of the Political Code defines the terms used in the assessment of property for the purposes of taxation, and these definitions must control in matters relating to taxation, whether they conform to the definitions used in the law for other purposes or not." And again, in Western Union Telegraph Co. v. Modesto Irr. Co., 149 Cal. 662, 87 P. 190, 9 Ann. Cas. 1190, it was said: "Moreover, we think that, for the purpose of the revenue to the district, the definition of real property and personal property in the general revenue and taxation laws of the state, as found in the Political Code, must prevail."

In the case of San Pedro, L. A. & S. L. R. Co. v. City of Los Angeles, 180 Cal. 18, 179 P. 393, it was said: "If, then, the Legislature had not provided any mode for the assessment of leasehold estates, it might well be said, as was said in the former opinion, that such an estate is not 'property for the purposes of taxation,' under our fiscal laws. But there does not appear to be any such deficiency in our revenue laws. Section 3617 of the Political Code declares that the term 'property' includes 'all matters and things, real, personal, and mixed, capable of private ownership,' and that the term 'real estate' includes 'the possession of, claim to, ownership of, or right to the possession of land.' A leasehold estate carries a right to the possession of the land leased. Civ. Code, § 819. It is, therefore, real property within the above definition. Other sections of the Political Code provide for the listing of real property, the description and valuation thereof, and contain a complete scheme for the assessment of the property, and the levy and collection of the taxes. This scheme is as readily adaptable to an estate for years as to a freehold estate."

[2] We conclude that section 3820, Political Code, while providing a special method and manner for the collection of the tax upon all property, when in the opinion of the assessor said tax is not a lien upon real property, does not extend, either expressly or impliedly, to the assessor, the right to receive and retain 6 per cent. of the taxes collected by him upon such property as has been classified by section 3617 as real estate. It follows that the judg-

ment for defendant Barry upon the third cause of action, in which the county sought to quiet its title to the money in question was erroneous, as was also the judgment sustaining the demurrer without leave to amend upon the second cause of action. Both causes of action involve the same legal principles. Such judgments are reversed.

The judgment in favor of defendants, upon plaintiff's alleged first cause of action, is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

PRESTON, J. I dissent from the conclusion announced above because I cannot accept the construction given by the court to that portion of section 4290 of the Political Code, which refers to compensation of county assessors for extra work done by them under section 3820 of the Political Code, which said work is not within their general duties as defined by section 4125 of the Political Code. The paragraph in question reads: "Provided and except, that the assessor shall be entitled to receive and retain for his own use, unless in this title otherwise provided, six per cent. on personal property tax collected by him, as authorized by section three thousand eight hundred twenty. * * *"

Pol. Code, § 3820, reads: "The assessor must collect the taxes on all property when, in his opinion, said taxes are not a lien upon real property sufficient to secure the payment of the taxes. The taxes on all assessments of possession of, claim to, or right to the possession of land and the taxes on taxable improvements located upon land exempt from taxation, shall be immediately due and payable upon assessment and shall be collected by the assessor as provided in part III, title IX, chapter VIII of this Code. * * *"

It is held in the majority opinion that the words "personal property," as found in said first quoted section, must be denied their ordinary meaning and be limited by the special provisions found in section 3617 of the Political Code, relating to taxation, which said section in this connection reads: "*Definitions.* Whenever the terms mentioned in this section are employed in this act, they are employed in the senses hereafter affixed to them: * * * The term 'real estate' includes: 1. The possession of, claim to, ownership of, or right to the possession of land. * * *"

In other words, the holding is that oil leases, and all such property as possession of, claim to, or right to the possession of land, shall not be classified as personal property under section 4290. But at the outset we are met with the fact that, under said section 3820, the assessor must assess and collect taxes upon this species of property as though it were personal property. It is only upon the theory that it is in legal effect personal property that the summary method of assessment and collection of taxes thereon may be lawfully applied. This is the undeniable construction of the opinion of this court in the case of Mohawk Oil Co. v. Hopkins, 196 Cal. 148, 236 P. 133.

The construction given said section 3820 in the Mohawk Oil Case and the construction here given it by our court cannot be harmonized. It was because oil leases partook of the nature of personalty rather than realty that they were classified as personalty and this classification justified under the Constitution, article 4, § 25, which prohibits special laws for the assessment or collection of taxes. If this class of property is not personal property, then so much of said section as provides for the assessment and collection of taxes upon it is void under said provision of the Constitution. It is thus seen that there is a lack of harmony between sections 3617 and 3820.

The truth is that this kind of property is classified as personal property in certain instances, even in the tax laws of the states themselves. Observe article 13, § 9a, of the Constitution, adopted in 1924, which reads: "The taxes levied upon personal property for any current tax year where the same is not secured by real estate shall be based upon the tax rate levied upon real property for the preceding tax year. Nothing in this section shall be construed to prohibit the equalization each year of the assessment on personal property in the manner now or hereafter provided by law." If these words "personal property" do not include all species mentioned in said section 3820, then what rate of taxation shall the assessor apply to oil lease properties?

Again, take section 3824 of the Political Code, which provides for a rebate where excess taxes have been collected, and the following language is found; "Such warrant shall state that it is for refund of excess county tax on unsecured personal property collected by the county assessor and shall state the year for which the tax was collected and the number of the assessment." If unsecured personal property does not include oil leases, then no provision for a refund has been made for an overpayment of tax on this species of property and again the Constitution is violated.

But from another angle the matter seems clear. The assessor under his general duties assesses, but does not collect, taxes. For pursuing and obtaining taxes, where unsecured, the law intended to give him compensation. This statute allowing it is in another part and title of the Political Code from the one on taxation. Is it reasonable to suppose, therefore, that the Legislature meant to give him compensation for one duty performed under section 3820 and to deny him compensation for another duty performed thereunder by the selfsame process and in the selfsame manner? A leasehold estate is personal property. Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 45 P. 680; Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243; Guy v. Brennen, 60 Cal. App. 452, 213 P. 265. Why, then, may not these words in section 4290 be allowed their ordinary significance, or, if this may not be done, why may not the phrases "personal property tax," "authorized by section 3820," be held to cover any tax collected under said section, as all such taxes are in fact collected in the same manner and by the same process as taxes upon personal property?

To my mind, section 4290 of the Political Code is in no way restricted by section 3617 thereof. Moreover, the plain intent of the Legislature was to give the assessor 6 per cent. of all taxes collected by him pursuant to said section 3820. The result of this decision, if it is allowed to stand, is that many of the county assessors of the state will be required to perform difficult and exacting services without compensation. Lack of incentive will cause a loss of revenue. It is unfortunate if an unusual situation in one county causes a mistaken interpretation of a statute of general application.

I think the judgment should be affirmed.

207 Cal. 199

VENTURA COUNTY v. BARRY et al.★
(L. A. 11046.)

Supreme Court of California. May 2, 1929.
Rehearing Denied May 29, 1929.

Appeal and error 🔑478—Where judgment had been reversed on appeal, appellant's right to writ of supersedeas was moot question, and petition was denied.

Where appellant petitioned for writ of supersedeas to restrain enforcement of judgment pending appeal, but appeal had been determined and judgment had been reversed before hearing on petition, question of appellant's right to writ of supersedeas became moot question, and petition was denied.

In Bank.

Action by Ventura County against Jasper Barry and another. Judgment for defendants. Application by plaintiff for writ of supersedeas to restrain the enforcement of the judgment pending appeal. Writ denied.

Rehearing denied; PRESTON, J., dissenting.

James C. Hollingsworth, Dist. Atty., Don. R. Holt, Chief Deputy Dist. Atty., and Merle J. Rogers, all of Ventura, for petitioner.

Clarke & Bowker and Walter E. Barry, all of Los Angeles, for respondents.

LANGDON, J. This matter comes before us upon a petition for a writ of supersedeas to restrain the enforcement of a judgment in favor of defendant and respondent, Jasper Barry, pending the appeal of plaintiff and appellant herein from said judgment. Said appeal has been determined by this court this day (No. 11120 of the records of this court) 277 P. 333, and the judgment in favor of the defendant and respondent has been reversed. The question of the right of appellant to the restraining writ sought becomes, therefore, a moot question.

The petition for the writ of supersedeas is denied.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

98 Cal. App. 580

ALLERS v. BEVERLY HILLS LAUNDRY, Inc. (Civ. 3760.)

District Court of Appeal, Third District, California. April 29, 1929.

1. Attachment 🔑16—Attachment will issue in favor of defendant on counterclaim stating cause of action on express contract for direct payment of money; "plaintiff" (Code Civ. Proc. §§ 537–540).

Attachment will issue under Code Civ. Proc. §§ 537–540, in favor of defendant filing a counterclaim stating a cause of action on express contract for direct payment of money within state; the word "plaintiff" as used in the statute meaning the claimant or moving party or any party to the action seeking affirmative relief, rather than being limited to party designated as plaintiff therein.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Plaintiff.]

2. Pleading 🔑4—Allegations of pleading determine its nature.

Allegations of a pleading determine its nature, regardless of the name by which it is designated.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Leslie Allers against the Beverly Hills Laundry, Inc., wherein defendant filed a counterclaim. From an order refusing to dissolve and attachment issued in favor of defendant, plaintiff appeals. Affirmed.

Hays & Jacobson, of Los Angeles, for appellant.

Walter H. Hewicker and William B. Neeley, both of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal from an order refusing to dissolve an attachment issued in favor of defendant.

The plaintiff, Leslie Allers, brought this action against defendant, Beverly Hills Laundry, Inc., a corporation, alleging in his complaint: "That between the 20th day of January, 1925, and the 16th day of March, 1927, * * * the plaintiff performed work, labor and services in the capacity of manager of the construction of the building, the installa-

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★Rehearing denied.

tion of the machinery therein, and manager of the business of running the laundry, for the defendant at its special instance and request. * * * That the services were reasonably worth the sum of $100 per week, making a total of $10,960. * * * That the same has not been paid * * * except the sum of $5,381. Wherefore, plaintiff demands judgment against defendant for $5,579. * * *"

The defendant filed an answer in which it denied any indebtedness to plaintiff and also alleged, among other defenses, that all sums due or owing from it to plaintiff for labor or services had been fully paid.

The answer also contains this allegation: "Admits that it has paid to plaintiff the sum of four thousand six hundred forty ($4,640.00) dollars, as salary for the period from August 22, 1925, to March 16, 1927, the day on which the employment of plaintiff with defendant was terminated. That plaintiff accepted said sum in full satisfaction of all claims and demands against defendant for services rendered to defendant during said period. Admits that it has paid to plaintiff the additional sum of seven hundred forty-one ($741.00) dollars, but that said sum of seven hundred forty-one ($741.00) dollars did not represent salary paid plaintiff, but represented money advanced to plaintiff."

At the time of filing the answer, defendant also filed what is designated "Counterclaim," which is in part as follows:

"That within two years last past, plaintiff became indebted to defendant in the sum of seven hundred forty-one ($741.00) dollars for money advanced to plaintiff's use by defendant. That plaintiff agreed to repay the same to defendant prior to the 16th day of March, 1927. That no part of said sum of seven hundred forty-one ($741.00) dollars has been paid, and that the whole thereof remains due, owing and unpaid.

"For a second, separate and distinct counterclaim defendant alleges as follows: That within two years last past, plaintiff became indebted to defendant in the sum of seven hundred forty-one ($741.00) dollars on an open book account. That said sum of seven hundred forty-one ($741.00) dollars became due and payable prior to March 16, 1927. That no part of said sum of seven hundred forty-one ($741.00) dollars has been paid, but that the whole remains due, owing and unpaid."

After the answer and so-called "counterclaim" was filed, and on April 26, 1927, the defendant filed its affidavit for attachment against the property of plaintiff. The affidavit was made by the attorney for defendant, and states "that the plaintiff herein is indebted to defendant in the sum of $741.00, lawful money of the United States, over and above all legal setoffs and counterclaims, upon an express contract, for the direct payment of money, to wit: for money advanced, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real estate or personal property, or any pledge of personal property. * * *"

An undertaking was duly filed by defendant, and the clerk issued a writ of attachment, which in due time was levied by the sheriff on 15 shares of the preferred stock of the said Beverly Hills Laundry, Inc. Thereafter, and on April 28, 1927, the plaintiff made a motion to dissolve said attachment on the ground "that said attachment was erroneously and illegally issued. * * *" The court, on May 21, 1927, made the following order: "Motion to release attachment heretofore submitted is now by the court denied."

From this order plaintiff Leslie Allers prosecutes this appeal.

Appellant contends that said attachment was erroneously issued and that the trial court erred in refusing to dissolve it. This contention is based upon the claim that sections 537, 538, 539, and 540 of the Code of Civil Procedure do not permit an attachment to issue on a "counterclaim." No attack is made upon either the affidavit or undertaking.

[1] Defendant has stated in its pleading a cause of action against plaintiff on an express contract for the direct payment of money in this state. It is therefore, by virtue of having stated said cause of action against plaintiff, entitled to make, through its officers or attorney, the affidavit required by section 538 of the Code of Civil Procedure, and receive the benefits of the statute relating to attachments. If defendant Beverly Hills Laundry, Inc., had brought an independent action, stating the same facts in a complaint that it has in the pleading designated "counterclaim," and had made the same affidavit and filed the same undertaking, there could have been no question but that it would have been entitled to have an attachment issued. Defendant having already been brought into court by the act of plaintiff himself to litigate their conflicting demands, we are unable to perceive why defendant Beverly Hills Laundry, Inc., in order to secure the benefits of the statute on attachments, should be required to go to the trouble and expense of bringing an independent action against plaintiff, simply in order to be able to designate him in the complaint as "defendant" and itself as "plaintiff."

In sections 537 and 538 of the Code of Civil Procedure the legislative intent, it must be conceded, is not made as clear as might be desired. It is, however, safe to assume, in view of the purpose intended by the Legislature, that it was not intended to afford one party a remedy not open to the other. We think it not unwarranted to assume that by the word "plaintiff," as used in these sections of the Code, the Legislature intended to mean the *claimant* or *moving party;* or, in other words, any party to the action seeking affirmative relief, who had brought himself within the provisions of said sections on attachments, whether he be designated in the complaint as plaintiff or defendant. We do not believe the Legislature intended to limit the operation of the statute on attachments solely to the party designated in the complaint as "plaintiff."

If appellant's contention be sound, and only the party designated as "plaintiff" can receive the benefits of the statute on attachments, then any debtor could absolutely deprive a just creditor of his right to an attachment by being the first to institute suit against the just creditor on an insignificant claim, and thereby become the plaintiff in the action, and defeat the just creditor's right to an attachment. Certainly, this was not the intention of the Legislature when it enacted sections 537 and 538 of the Code of Civil Procedure.

[2] The appellant has discussed at some length the distinction between counterclaims and cross-complaints. We do not consider a discussion of the difference between a counterclaim and a cross-complaint at all essential to a proper disposition of this appeal, because it is immaterial how defendant designates its pleading. The allegations of a pleading determine its nature. Here the pleading in question is in the nature of a cross-complaint.

We think the case of Interlocking Stone Co. v. Scribner, 19 Cal. App. 344, 126 P. 178, supports the conclusion that we have reached in this case.

We think the order refusing to dissolve the attachment was proper and should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

CITY OF SAN DIEGO v. CUYAMACA WATER CO. et al. (LA MESA, LEMON GROVE & SPRING VALLEY IRR. DIST. et al., Interveners). (Civ. 5353.) ★

District Court of Appeal, Second District, Division 1, California. April 29, 1929.

Hearing Granted by Supreme Court June 27, 1929.

1. Appeal and error 🔑1010(2)—Insufficiency of evidence, to justify appellate court's refusal to accept fact finding, must amount to complete absence of substantial supporting evidence.

Insufficiency of evidence, to justify Court of Appeal in refusing to accept and follow a finding of fact, must amount to complete absence of any substantial evidence in support of finding.

2. New trial 🔑72—Trial judge must use his own judgment as to whether evidence supports verdict.

Trial judge should not grant a new trial, unless clearly satisfied that the verdict is wrong, but must act on his own judgment as to whether it is supported by evidence.

3. Eminent domain 🔑224—Counsel's expressions of dissatisfaction with, and emphasis of defendants' opposition to, condemnation of land, held to justify new trial of issues as to value thereof.

Numerous expressions of dissatisfaction with court's decision that right to condemn land had been established by defendants' counsel in jury's presence and their endeavor to emphasize and impress on jurors' minds fact that land was being taken against defendants' will *held* to justify order granting plaintiff new trial of issues as to value of land on ground that verdict was influenced by such contentions and excessive.

4. Eminent domain 🔑47(1)—Decree condemning land, being used to supply water to other municipalities than plaintiff city, for dam and reservoir, subject to common use of land by parties, held unauthorized (Code Civ. Proc. § 1240, subd. 4, and § 1241, subd. 3).

Decree condemning land, already appropriated and being used to supply water to certain cities and towns, for construction and maintenance of dam and reservoir, by another city, though subject to restrictions permitting use of lands by latter city and water company or its successors in common, *held* not authorized under Code Civ. Proc. § 1240, subd. 4, and § 1241, subd. 3.

Appeal from Superior Court, Orange County; M. W. Conkling, Judge.

Action by the City of San Diego against the Cuyamaca Water Company, a corporation, and others, in which the La Mesa, Lemon Grove & Spring Valley Irrigation District and others intervened. From a part of the judgment rendered and an order granting plaintiff's motion for new trial of part of the case, defendants and interveners appeal. Appellants' motion to take additional evidence denied, order granting new trial affirmed, and portion of judgment appealed from reversed.

Crouch & Sanders and Sweet, Stearns & Forward, all of San Diego, for appellants.

Shelly J. Higgins, City Atty., and Arthur F. H. Wright, both of San Diego, and Hunsaker, Britt & Cosgrove, of Los Angeles, for respondent.

CONREY, P. J. The defendants and interveners have appealed from that portion of the judgment "which adjudges that the plaintiff is entitled to condemn the lands described in its complaint as amended, subject to the reservations and restrictions contained therein and the further restrictions in the findings of fact and conclusions of law specified"; and also appeal from the order granting plaintiff's motion for a new trial of that portion of the case decided by the jury and setting aside the verdict of the jury heretofore rendered in said action. A more detailed

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★Hearing granted. 237 P. 496.

description of the case and of the proceedings leading up to said judgment and order will be found in the decision of this court wherein we denied a motion to dismiss the appeal from part of the judgment. City of San Diego v. Cuyamaca Water Co. et al., 80 Cal. App. 599, 251 P. 341.

In considering these appeals we shall first dispose of the questions relating to the order granting a new trial. The verdict of the jury determined that the value of the property sought to be condemned was, at the date of the trial, $600,000; that the damages accruing to the remaining portion of the entire parcel, to wit, the 130 acres lying west of the 190 acres sought to be taken, of which the property taken is a part, by reason of its severance from the land condemned and the construction of the improvement in the manner proposed by the plaintiff, is the sum of $2,000; and found that the portion of the entire parcel not sought to be condemned will be benefited by the construction of the improvement proposed by the plaintiff in the sum of $3,000. Upon the motion for a new trial as submitted, the court made its order as follows: "The verdict of the jury herein is vacated and a new trial is granted to the issues heretofore submitted to the jury only, and upon all the grounds specified in plaintiff's notice of intention to move for new trial." The grounds of the motion were: (1) Irregularity of the proceedings of the adverse parties, to wit, the defendants, by and through their attorneys, by which the plaintiff was prevented from having a fair trial; (2) an excessive verdict, appearing to have been given under the influence of passion and prejudice; (3) insufficiency of the evidence to justify the verdict of the jury, and that said verdict is against law; (4) errors in law occurring at the trial and excepted to by the plaintiff. The motion was based upon the minutes of the court, and upon affidavits.

The case came on for trial on the 15th day of June, 1925, before the superior court of the county of Orange, to which court the cause had been transferred from the superior court of San Diego county. A jury having been duly impaneled and sworn, the jurors were excused until the 22d day of June, and thereafter until the 30th day of June, and during their absence the court proceeded with the trial of the issues which were to be tried without a jury, including the issue relating to the existence of any necessity that the land sought to be condemned be taken by the city for the purposes alleged in its complaint. Upon the return of the jury into court on June 30th the trial proceeded before the jury for the purpose of determining the issues involving the value of the property sought to be condemned, and the damages which would accrue to the remaining portion of the entire parcel of which the property taken is a part, by reason of its severance from the land condemned and the construction of the improvement in the manner proposed by the plaintiff. The verdict of the jury was received and entered on the 9th day of August, 1925, and thereafter on the 22d day of August, 1925, the findings of fact and conclusions of law were signed and filed. Subsequently such proceedings were had that the motion for a new trial was granted as heretofore stated.

The trial court held, in effect, that the evidence was insufficient to justify the verdict; and more particularly that the verdict was so excessive that it appeared to have been given under the influence of passion and prejudice.

[1, 2] Insufficiency of the evidence, before it will justify a court of appeal in refusing to accept and follow a finding of fact, must amount to a complete absence of any substantial evidence in support of the finding. A common statement of the rule on appeal is that if the evidence is conflicting, the finding will not be disturbed. But it is not so with a trial court in passing upon a motion for a new trial. The trial judge should not grant a new trial unless he is clearly satisfied that the verdict or other decision is wrong. "But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in rendering a verdict, in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence." Green v. Soule, 145 Cal. 96, 103, 78 P. 337, 340.

[3] In the case at bar there was a wide diversity of opinion of witnesses concerning the value of the land sought to be taken. The value stated in the verdict, though less than that shown by the testimony of some witnesses, is many times the value given by other witnesses. Counsel for defendants were deeply dissatisfied with the announcement of the intention of the court to decide that the right to condemn the land had been established. To such decision they had the right of exception, and the right to have the matter reviewed upon appeal, but upon that issue they had no right of appeal to the jury. Nevertheless, on numerous occasions, and apparently with a studied intention, they expressed this dissatisfaction in the presence of the jury, and endeavored to emphasize and impress upon the minds of the jurors the fact that the land was being taken away from the defendants against the will and contrary to the desire of the defendants. If this overpressed insistence of the defendants that the court was erroneously permitting their land to be taken away from them caused the jury to increase the amount of the compensation award and to raise it above the value which normally would have resulted from the tes-

timony of the witnesses, this easily might have produced an excessive verdict. For the standard of measurement of value of the land about to be taken did not in any way depend upon the fact that the defendants were objecting to the condemnation. The plaintiff was entitled to have the actual market value established in accordance with law, unaffected by any belief or suggestion that the property was being wrongfully condemned and taken. It is apparent that the court in ruling on the motion for a new trial had reached the conclusion that the jurors, in arriving at the amount of compensation given by their verdict, had improperly allowed themselves to be influenced by these contentions of the defendants, and that the verdict so obtained was excessive. We are of the opinion that the order granting a new trial of the issues tried by jury should be affirmed.

The condition of the record in relation to the judgment and the appeal therefrom has been set forth in our decision of the motion to dismiss the appeal from part of the judgment. City of San Diego v. Cuyamaca Water Co. et al., 80 Cal. App. 599, 251 P. 341. This appeal is from "that certain portion of the judgment * * * which adjudges that the plaintiff is entitled to condemn the lands described in its complaint as amended, subject to the reservations and restrictions contained therein and the further restrictions in the findings of fact and conclusions of law specified."

By its complaint, filed on the 20th day of May, 1924, plaintiff stated certain facts concerning its existence and powers as a municipal corporation. The complaint then alleged the due enactment of an ordinance whereby the city council determined and declared that the public interest, convenience and necessity of the city of San Diego and the inhabitants thereof, for public use and for the impounding, conserving, and delivering of water to said city for municipal purposes, required the construction of a dam and reservoir on, over, and across certain lands in the county of San Diego; that by said ordinance the council further determined and declared that the taking and acquiring by the city of the lands, property, and rights described in the ordinance is deemed necessary for the acquisition and completion of additional water impounding and conserving facilities to be used for the purpose of impounding, conserving, and delivering water to the city of San Diego and the inhabitants thereof for municipal purposes, etc. The ordinance characterized the interest to be acquired in the land sought to be taken as being "the fee simple of the following described lands, to be used for the purpose of constructing and maintaining a dam and reservoir thereon." By said ordinance the city attorney was instructed to prosecute this action for the purpose of condemning and acquiring the property and rights demanded pursuant to said ordinance. The complaint, following the terms of the ordinance, alleged that it was necessary to condemn and acquire a fee simple in the described property, "for the use of said city in constructing and maintaining thereon a dam and reservoir."

On June 27, 1925, the plaintiff filed an amendment to its complaint, whereby its demand for condemnation of the fee simple of the described property sought to be taken was modified by providing that there should be reserved to the defendants the easement and right to conduct over and across said land by means of the flume or conduit now located thereon (giving by description the location of the strip of land on which said flume is located) any water which said defendants or either or any of them may now or hereafter be entitled to conduct across said land, together with the right to enlarge and repair said flume or conduit, or to relocate the same in a manner not inconsistent with the use of said land by plaintiff for reservoir purposes; reserving further to said defendants the right to conduct, carry, and have flow through, under, and across and beyond said land any water which defendants now own or have the right to carry, conduct, or have carried and conducted through, under, and across said land; reserving also to said defendants the right to withdraw and take from said land by pumps or otherwise any water which defendants or either of them now have the right to withdraw and take from said land; reserving also to said defendants the right to store upon said land any water which said defendants or either or any of them are now entitled to store thereon, and which said defendants or either or any of them might now or hereafter store upon said property without using or flooding any land of the plaintiff; further reserving to said defendants the right of access, etc., for the purposes of said reservations.

By further amendment on July 1, 1925, the plaintiff modified its demand by providing that in the enjoyment of the common use of said lands herein sought to be condemned, the plaintiff shall not be entitled to construct improvements thereon in a manner which shall flood said land to a height in excess of 150 feet above the level of the stream bed located upon said lands.

The case was tried upon the complaint as so amended, and a second amended answer of defendants and interveners filed July 9, 1925. It may be noted here that the trial commenced on June 15, 1925, and it thus appears that the amendments to the complaint were filed during the period when the issue concerning the right of the plaintiff to take said property was being tried by the court in the absence of the jury, and prior to the introduction of any evidence before the jury. The answer denied many of the allegations of the complaint; denied the necessity that the city of San Diego acquire a fee simple or any other right or estate in the property demanded, and denied the right of the city to take said property at all. The answer further denied the right of the plaintiff to take the property in fee simple and at the same time reserve to the defendants the rights proposed to be reserved, or to limit the rights of the defendants in any way by means of such reservations.

The defendants further by their answers set forth facts showing that defendant Cuyamaca Water Company and its predecessors in interest have been, and that said defendant now is, operating a public utility, and engaged in the conservation, impounding, and distribution of water to public and private consumers, including incorporated cities and their inhabitants, and to other territories, for domestic and irrigation purposes. The defendants alleged that the value of the property sought to be taken is the sum of $1,000,000, and they further alleged their ownership of certain other lands, waters, water rights, and water distribution properties, alleged to be of certain stated values, and which would be damaged in certain stated large sums as a result of the condemnation and taking of the property demanded by the plaintiff. It was alleged that the property sought to be taken is an integral part of the water system owned and operated by the defendants, appropriated by them to the use and actually used in conservation and distribution of water, as before stated; and that said water system will, by reason of the condemnation herein, be greatly damaged in a sum not less than $1,000,000.

It was further alleged in the answer that on April 5, 1924, the defendant Cuyamaca Water Company, a copartnership, executed to intervener irrigation district an option in writing for the purchase of all of the property of the water company, including the land described in the complaint; that said district has complied with all of the terms and conditions of said option, and the said option has thereby now become a contract of purchase and sale between the water company and the district. It was further alleged that the land sought to be taken constitutes a large underground basin or reservoir capable of developing by means of a pumping plant installed thereon, large quantities of water; that prior to the year 1916 there had been installed by said company on said land a pumping plant and water was pumped from said underground reservoir situated on said land and used and supplied for the public purposes heretofore stated. The history of said pumping plant and its connected uses down to the time of the filing of said answer was set forth at length in the answer, and it was alleged that should said lands be acquired by the city of San Diego the district would thereby be deprived of additional water which could be developed by said pumping plant and put to public use. The answer further set forth the ownership of certain lands by the irrigation district within the watershed of the San Diego river, and riparian thereto, which were acquired by the district for the purposes of a pumping plant; and that by the building of the dam sought to be constructed by the plaintiff the flow of water to said lands of the district will be absolutely cut off and said lands will be deprived of all water whatsoever. Facts were stated at length showing how the supply of water in the sands on the district's said lands is replenished from time to time from the surface and underground flow of the river, and how the supply thus obtained will be destroyed by the proposed dam, and the district be damaged thereby.

The foregoing statements are a brief summary of what seem to be the chief elements of the answer, which sets forth said matters at great length.

The court by its findings of fact affirmed the right and necessity of the city to acquire the demanded tract of land, subject to the reservations and restrictions set forth in the findings, which are the reservations and restrictions to which we have referred in describing the complaint as amended. The court found that the lands to be taken, amounting to 190 acres, are a part of a larger tract amounting to 320 acres; and that no other land owned by the defendants, or any of them, is contiguous to said 320-acre parcel. The findings of fact concerning the defendants and their several properties, and concerning the development and distribution of water by them, are too extensive for convenient repetition here, further than may be required in discussion of the questions presented for decision.

[4] The first proposition relied upon by appellants is that at the time this action was commenced the property sought to be condemned was already appropriated to the use of various cities and towns other than the plaintiff, and was being used for the public purposes for which it had been so appropriated; and that for this reason the plaintiff has no right to take the property by condemnation. It is the law that "property appropriated to the use of any county, city and county, incorporated city or town or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated." Code Civ. Proc. § 1240, subd. 4, and section 1241, subd. 3.

The San Diego river is a stream rising in the Cuyamaca Mountains, northeast of the city of San Diego, and flowing down in a general southwesterly direction some 65 miles, reaching the Pacific Ocean at the city of San Diego. The so-called El Capitan dam site is located in and just above a rocky gorge through which the river passes, at a point about 35 miles from the city. In the year 1899 a company known as the San Diego Flume Company, which is a predecessor of the defendants in ownership and operation of the water development and distribution system now owned by the irrigation district, was organized and began the construction of a dam, reservoir, and flume for the diversion and use of water of the San Diego river and of certain of its tributaries. The site of that dam and reservoir is on Boulder creek, about 30 miles, more or less, above the location of the property sought to be condemned in this case. The reservoir became known as Cuyamaca Lake. The water from that reservoir, after passing along Boulder creek for a distance of 14 miles, was diverted and thence flowed through a flume constructed at a suitable grade and which carried the water down to the city; some of the water being distributed to smaller cities and towns, and to agricultural and other lands along the line of this flume and above the city. This flume, as now situated, crosses the lands sought to be condemned in this case, at a level approximately 50 feet higher than the high-water mark of the proposed reservoir.

At a point about five miles below El Capitan dam site, on the river, there is a certain tract of land on which there is a pumping plant, which was first installed in the year 1898 by La Mesa Development Company, which afterwards transferred that property to the San Diego Flume Company, and by further transfers the same property at the time of the commencement of this action belonged to the Cuyamaca Water Company, a partnership. Upstream from the pumping plant, and below El Capitan dam site, there is a basin of approximately 1,400 acres, filled with sand and gravel (and under the same ownership as the pumping plant), and known as El Monte reservoir. Within the area which would contain the reservoir to be created by El Capitan dam there are other water-bearing lands on which at one time a pumping plant had been established and operated by defendant Cuyamaca Water Company, a partnership, and the waters so obtained were carried into the distributing system of that company. Said pumping plant, which had been operated during the years 1913 and 1914, was completely destroyed by flood waters in January, 1916, and that pumping plant has not since then been restored. As a part of its defense herein the defendants claimed that the waters contained in the sands located in El Capitan reservoir site slowly seep down into El Monte reservoir, and thus act as a feeder for that reservoir. They further claimed that the Cuyamaca Water Company and its successors at all times intended, whenever the necessity therefor should appear, to resume the pumping of water from El Capitan reservoir lands, and to use the waters so developed and obtained, either by diverting the same directly to the flume or by permitting them to percolate down into the sands of El Monte reservoir. They further claimed that said owners, prior to and at the time of commencement of this action, held and owned the land constituting the dam site for the purpose and with the intention that they would thereafter construct at that place a dam for the purpose of holding back flood waters and increasing the supply of water available for use in the sands of El Monte reservoir.

At this point it seems necessary to quote certain of the findings which have a bearing upon the foregoing issues of the case:

"X. The Cuyamaca Water Company, a copartnership, is in charge of and operates a public utility, and for many years past has been and now is engaged in the conservation, impounding and distribution of water to public and private consumers for municipal, domestic and irrigation purposes, within the county of San Diego, and that among the consumers are the incorporated cites of La Mesa and El Cajon and the towns of Lakeside, Foster, Lemon Grove, Kensington Park and the territory so served by said public utility is without the boundaries of the city of San Diego. It is not true that defendant has been for many years last past, or now is, conserving or distributing water from a portion of said lands herein condemned by the plaintiff, subject to said reservations and restriction, to the inhabitants of said cities or of said territory for domestic or other uses.

"XI. It is not true that by the building and erection of the dam sought to be constructed by plaintiff the rights of the defendants, or of any one or more of them in and to the waters of the San Diego river will be destroyed or severed from the land of the defendants or of any one or more of them, or that the defendants, or any one or more of them will be damaged by the destruction or taking of said water rights, if said property, subject to said reservations and restriction, is condemned by plaintiff herein."

"XIX. It is not true that the property taken and condemned by this plaintiff in this action is an integral part of a water system owned and operated by the defendant, Cuyamaca Water Company, a copartnership, as herein found, or was at the time of the commencement of this action, or at the time of the trial of this action, appropriated to the use, or actually used in the conservation or distribution of water to the inhabitants of said cities and towns, or of said irrigation district, for domestic or irrigation purposes, other than as used for a right of way for a flume or conduit for the transmission and conveyance of water as herein found, and other than for the pumping of water therefrom at the times and in the amounts all as herein specifically found. It is not true that the lands herein taken and condemned, subject to said reservations and restriction, are used as a means of conducting water or impounding water, or as a reserve storage reservoir for periods of drought."

"XXII. That said lands consisting of 190 acres herein taken and condemned, subject to said reservations and restrictions, and no part thereof is now, or was at the time of the commencement or of the trial of this action or ever has been, used by the defendants or any one or more of them for a public use or purpose other than as a right of way for said flume or conduit as herein specifically found and other than for the purpose of pumping water therefrom during the years 1913 and 1914, as herein specifically found, and that said 190 acres of land herein taken and condemned, subject to said reservations and restriction, and no part thereof, is now or ever has been appropriated to a public use or purpose which is inconsistent with the use sought to be made of said property by said plaintiff; and that the use to be made of said property by plaintiff is consistent with the continuance of the use of said 190 acres of land herein sought to be condemned, subject to said reservations and restriction, and every part and portion thereof heretofore made of said property or any part or portion thereof, by said defendants or any one or more of them.

"XXIII. That the defendant Cuyamaca Water Company, a copartnership, is in charge of and operates a public utility and for many years last past has been, and is now, engaged in the conservation, impounding and distribution of water to public and private consumers for domestic purposes within the county of San Diego. That said defendant Cuyamaca Water Company has not, for many years last past, and is not now conserving and distributing water from a portion of said 190 acres of land herein taken and condemned, subject to said reservations and restriction, to the inhabitants of any city or incorporated village or town, or any other person or persons for any purpose whatsoever, and that no part of said 190 acres herein taken and condemned by plaintiff has, at any time since January, 1916, been used by said defendant Cuyamaca Water Company, a copartnership, or by any one or more of said defendants, for public use other than as a right of way for a flume or conduit as herein found. That no part of said 190 acres herein taken and condemned has ever been appropriated or dedicated to a public use other than as herein specifically found, and that no part of said property at the date of the issuance of the summons in this case or at any time subsequent thereto, has been appropriated and dedicated to a public use by the defendants herein, or by any other party, save and except the use of said land for a right of way for a flume or conduit as herein specifically found."

"XXV. That at the date of the commencement of this action, to-wit: April 16, 1924, Ed Fletcher and the estate of James A. Murray were the owners of the property sought to be condemned in this action; that on said date defendant, the Cuyamaca Water Company, a corporation, had no interest in said lands and property sought to be condemned in this action; that on said date the Cuyamaca Water Company, a copartnership, had no interest in said lands and property sought to be condemned in this action; that on said date the La Mesa, Lemon Grove and Spring Valley Irrigation District had no interest in said lands and property sought to be condemned in this action, save an option to buy the same which on said date had not been exercised, and that at the present time said La Mesa, Lemon Grove and Spring Valley Irrigation District has no interest in said property save an executory contract to purchase the same, which said contract has not as yet been executed; and that at the date of the commencement of this action, defendant C. F. Stern had no interest in and to any of the lands and property sought to be condemned in this action; and that at the date of said trial, the 15th day of June, 1925, Ed Fletcher was the sole owner of the property and lands sought to be taken by said plaintiff in this action."

By the conclusions of law filed with the findings of fact, and by the judgment directed to be entered in accordance with said findings and conclusions, the court determined that the use of said lands sought to be taken for reservoir purposes, etc., is a use authorized by law, and that the taking by plaintiff of said land, subject to the reservations and restrictions mentioned in the complaint as amended, is necessary for such use. It was directed that the lands described in the complaint be taken, subject to the stated reservations and restrictions; that the lands so taken may be used by plaintiff and defendant Cuyamaca Water Company, a copartnership, or its successors in interest, in common, and that the use of said lands by plaintiff for the stated purposes is consistent with the use thereof, and the continuance of such use, by said copartnership or its successors in interest "according to the reservations and restrictions herein specifically provided"; that said dam and reservoir is planned and located in a manner which will be most compatible with the greatest public good and the least private injury; "that no part of the lands condemned and taken in this proceeding by plaintiff has ever been dedicated, appropriated or used, or is now dedicated, appropriated or used, for a public use which is inconsistent with the use thereof for dam and reservoir purposes for the impounding, conserving and delivery of water subject to the reservations and restriction herein contained."

On the subject of ownership by defendants of the lands sought to be taken in this action, findings VII and VIII should be read together with finding XXV. From these findings so considered together, it appears that at the time of the commencement of this action, the legal title to the land was vested in Ed Fletcher, but that such title was held by him as the sole surviving member of the copartnership known as the Cuyamaca Water Company. This ownership, however, was subject to a contract giving the intervener an option to purchase this property, which option was exercised, and was succeeded by a formal agreement of purchase and sale subsequent to the time of the commencement of this action. The evidence shows that at all times the Cuyamaca Water Company and its successors were holding the property as a part of the system of water supply and service of that company. This fact (if we correctly understand the effect of the voluminous evidence in the record) is not contradicted by any of the evidence. Nothing is shown to have occurred in connection with the changes in title of the property of the Cuyamaca Water Company which would in any way alter or diminish the public uses of the property owned by that company and constituting its water system, or that could in any way diminish the beneficial uses and rights vested in the cities, communities, and persons who were being furnished with water from that system.

Paraphrasing the facts stated indirectly in findings XIX and XXII, it is in effect found that during the years 1913 and 1914 the land sought to be condemned was used for the purpose of pumping water therefrom "as herein specifically found." Turning to finding XI we learn that during those two years there was pumped from said land approximately 22,000,000 gallons of water by defendant Cuyamaca Water Company, a copartnership, and distributed to its consumers; but that in January, 1916, the pumping plant which had been so operated was completely destroyed by flood waters and had not since been restored. Nevertheless the court found that it is not true that said land is used as a means of conducting waters or impounding waters, or as a reserve storage for periods of drought. In finding XXII, however, there is an indirect recognition of the fact that said land has been appropriated to a public use, when the court found that said land is not now and never has been appropriated to a public use or purpose which is inconsistent with the use sought to be made of said property by said plaintiff. This in effect is a statement that said land has been appropriated to a public use. This being so, that public use must continue to exist unless there is some evidence of its abandonment. The record is utterly devoid of any evidence that the beneficiaries of the use have ever consented to give up any of the rights which had once been conferred upon them in connection with the water service to which they were entitled. And if it be assumed that the water company would have had the power of abandonment or surrender of any such rights to the detriment of their beneficiaries, the evidence on that subject seems to be entirely to the effect that the use of said land for the purposes to which it was dedicated had not been abandoned. The testimony of defendant Fletcher is directly to the point that this land is "part of the ownership of property owned by the public utilities, used and useful and held in reserve for future development, and to draw on the underground supply of water in case of need." He further testified that the reason why they did not rebuild those pumps after the flood of 1916 was that: "We had no necessity for so doing on account of getting a 100 per cent. supply of water from other sources, and it would be only an added expense waiting for a dry period to come when we could utilize these wells as a reserve." We think that under the facts with relation to this particular subject, this case is similar to that presented in City of Santa Barbara v. Gould, 143 Cal. 421, 77 P. 151. The defendant Montecito Valley Water Company in that action was a corporation engaged in the supplying of water for the use of the inhabitants of the village of Montecito. The land sought to be condemned was water-bearing land which had been used as a part of the company's water system. At the time when the action was begun the water so supplied from the source known as Cold Spring branch had diminished so that it would not flow down to the point of diversion maintained by the company, and the company was not at that particular time using the water. The Supreme Court said: "Nor was said water company responsible for the drought. It ceased to use the water because the water had ceased to flow, but this would not deprive it of the use of the water when it should again flow. Said water company had acquired the land for the purpose of preserving the flow of the stream in its natural state. It had the right to a portion of the waters of the stream. It was engaged in supplying water to the public at the time the action was commenced. Its property could not be taken on the theory that it was not devoted to public use at the time this action was commenced, unless it had of its own volition ceased to devote it to public use. * * * If the waters * * * should again flow down to the company's point of diversion, it would be entitled to the amount of water owned by it. It is also entitled to the land for the purpose of preserving the normal and natural flow of the stream."

If we give consideration to the findings of fact according to their entire scope and meaning, it becomes evident that plaintiff's claim of right to condemn has been sustained by the trial court upon the theory that by putting into the decree certain reservations and restrictions upon plaintiff's use of the dam and reservoir proposed to be constructed, the water rights of the defendants which are appurtenant to the land sought to be taken will be fully protected, and that in view of that protection the defendants have no valid defense to the action. This is in effect an attempted application of the right of concurrent use for public purposes, of property sought to be condemned for some use not inconsistent with an existing public use. This right to take such property for a concurrent public use which is consistent with continuance of the use of such property for an existing public purpose is recognized by the statute which governs in eminent domain proceedings. Code Civ. Proc., § 1240, subd. 4. The right so given, however, is subject to an exception which is vitally important in this case. "But property appropriated to the use of any county, city and county, incorporated city or town or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated." A very thorough discussion of these Code provisions, including the stated exception, is to be found in Mono Power Co. v. County of Los Angeles, 284 F. 784. In that decision by the Circuit Court of Appeals, Ninth Circuit, the same kind of conflicting interest was involved that is exhibited by the facts in the present case. In that case the city was seeking to condemn land of the power company, and it was admitted that the use intended by the city, if permitted to take the property, was inconsistent with the public use then existing under beneficial rights vested in other cities and communities served by the power company. The court held that by reason of the final clause of subdivision 4, quoted above, the demand of the city of Los Angeles must be denied. The Mono Power Co. Case is referred to in East Bay Municipal Utility District v. Railroad Commission, 194 Cal. 603, at page 621 et seq., 229 P. 949, 955. The opinion is there expressed that where there is to be no change or interruption of the use of water by the inhabitants of a city, and where the condemning municipal agency is merely proposing to take over from a water company its property subject to the same use to which it was dedicated, such declared purposes do not bring the plaintiff within the prohibitions of the cited Code provisions. The Supreme Court said: "It is here proposed to continue the use of the water to the same territory to which it has heretofore been appropriated. The territory and the peoples thereof are not to be disturbed in the use to which the water is now put and are to enjoy an uninterrupted use thereof, if the petitioner succeeds in its purpose. In other words, the change will result not in the disturbance of the use or appropriation of the water but in the agency authorized by law to administer the trust. We find nothing in the sections referred to which would prohibit such a change."

In that case the petitioner was seeking a writ of mandate to compel the Railroad Commission to make a valuation of certain properties in contemplation of the acquisition of the same under condemnation or other proceedings. The question relating to the right to condemn was not directly or necessarily presented. In the case at bar we meet that question face to face, and under circumstances which are materially different from those considered in the East Bay Case. Notwithstanding the studied effort shown by the findings and judgment herein, to make a decree of condemnation which will enable plaintiff to take the land without in any way disturbing or interrupting the use to which the property is now put by the defendants for the benefit of the two incorporated cities and several unincorporated towns to which water is supplied, we think that the construction and maintenance of the dam and reservoir as proposed necessarily includes a disturbance, change, and probable interruption of the use. It is not here proposed to substitute the plaintiff for the present owners of the property, and make the plaintiff directly accountable as the agency in charge of the use. The intervener, after the condemnation, will continue to be the agency administering the use and supplying water to its consumers, but will be subjected to new conditions, and to the will of others, in the management of that part of its property which will be transferred to the possession and control of the plaintiff. Instead of an underground supply of pure water taken out by pumping from the land, and instead of water percolating into El Monte basin, the beneficiaries of the use in charge of the defendants will be compelled to submit to the risks and inconveniences of a substituted supply drawn from an open reservoir replenished by storm water, and delivered by the hands of a stranger. The injury to the rights of the defendants and their beneficiaries may be seen, without taking into consideration the disputed claim of appellants that they also intended to use the condemned property as a dam site by means of which they would be able to increase their supply of water in El Monte sands.

Since the conclusions above stated upon questions which are determinative of the appeal require a reversal of the judgment, we find it not necessary to express an opinion upon the other grounds of appeal which have been presented in the briefs for appellants in support of their objections to the judgment.

The application of appellants wherein they request that this court receive and take additional evidence of facts occurring subsequent to the decision appealed from, and to reconsider and review certain of the evidence produced before the trial court, and to make findings of fact based upon such evidence contrary to and in addition to those made by the trial court, is denied. The order granting plaintiff's motion for a new trial of that portion of the case decided by the jury, and setting aside the verdict of the jury, is affirmed. That portion of the judgment made and rendered in said action on the 22d day of August, 1925, which adjudges that the plaintiff is entitled to condemn the lands described in its complaint as amended, subject to the reservations and restrictions contained therein and the further restrictions in the findings of fact and conclusions of law specified, is reversed.

I concur: YORK, J.

Mr. Justice HOUSER, deeming himself disqualified, takes no part in this decision.

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98 Cal. App. 610

KNIESE v. FAIRFAX INCLINE R. CO.★
(Civ. 6405.)

District Court of Appeal, First District, Division 2, California. May 1, 1929.

Rehearing Denied May 31, 1929. Hearing Denied by Supreme Court June 27, 1929.

1. Appeal and error 🔑996—Appellate court cannot interfere with finding which trial court made in exercise of its power to draw inference on the subject.

In the absence of an abuse of discretion, appellate court cannot interfere with trial court's finding against plaintiff on count pleading stated account; there being no direct evidence thereon, and the power resting with the trial court sitting without a jury to draw an inference on the subject.

2. Appeal and error 🔑1010(1)—Finding against plaintiff cannot be disturbed; there being only slight evidence to support his claim.

There being only slight evidence to support plaintiff's claim that value of labor done was agreed on, appellate court cannot disturb finding against him.

3. Appeal and error 🔑1151(3)—Judgment, as affected by clerical error in failing to find total of undisputed payments, modified on appeal.

The total of payments as shown by books not being disputed, but the court by clerical error finding it $100 less than what it was, judgment, which on that account was $100 less than what it should have been, will on appeal be modified by adding thereto that amount.

4. Witnesses 🔑406—Memorandum of transaction executed by parties at time of sale held some evidence of what was sold to witness and admissible in contradiction of his testimony as to properties included.

Where when witness bought of another they executed a written memorandum of the transaction, that memorandum signed by witness was some evidence as to what the other sold or assigned to witness, and so limited to that purpose, was admissible in contradiction of witness as to what properties were the subject of the sale.

5. Corporations 🔑118—Buyer of stock under executory sale lost title to seller's account for advances to corporation, assigned as incident of subject of sale, when he defaulted and stock was sold at trustee's sale.

Even if statement of R. when making an executory sale to S. of the stock of a corporation, that he would make no claim against the corporation for the advances he had made to it, amounted to an assignment of the account for advances, it was but an incident of the subject of the executory sale, so that, when S. defaulted in his payments for the stock, and his title thereto was sold by R. at trustee's sale, S. parted with all title to all the properties, including the account for advances.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by George J. Kniese against the Fairfax Incline Railroad Company. From a judgment for less than claimed, plaintiff appeals. Modified and affirmed.

Superseding opinion, 274 P. 383.

Wm. T. Eckhoff, of San Francisco, for appellant.

Martin Stevens, of San Francisco, and Geo. H. Harlan, of San Rafael, for respondent.

STURTEVANT, J. This is an appeal by the plaintiff from the judgment which was under consideration in the appeal by the defendant in Kniese v. Fairfax Incline Railroad Co. (No. 6406 Cal. App.) 274 P. 382. All of the stock of the defendant corporation was formerly owned by Rivers Bros., a corporation. While so owned the railroad was operated at a loss. The loss was paid by Rivers Bros. and the deficits were carried on the books of the defendant corporation as deficits and as such were reported to the railroad commission. On August 15, 1921, the defendant owned a block at Fairfax, which was known as a park. It also owned an incline railroad. On the date last mentioned Rivers Bros. sold to G. F. C. Seidel all of the stock in the defendant corporation. The sale was made under an executory contract by which the purchaser received the stock and at once redelivered the same as security for the payments thereafter to fall due. There is no evidence in the record of more than one transfer. That transfer was the sale of the corporate stock which represented the properties

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★Rehearing denied. Hearing denied by Supreme Court.

owned by the defendant corporation. The vendee operated the road from the date he purchased it until August 16, 1923. While so operating the road the block of land known as a park was sold to Rivers Bros. and the proper credits in the sum of $5,000 were entered in the proper accounts. While the vendee was operating the road it was operated at a loss. He paid the losses and such losses were also carried on the books of the defendant corporation as deficits and were likewise reported to the Railroad Commission. Failing to make his payments, the rights of G. F. C. Seidel in the stock of the defendant corporation were sold in payment of his debts, and on August 16, 1923, his management ceased. Thereafter he sued, through this plaintiff as assignee, to recover $4,180.58, that being the total of the deficits incurred during the management of Rivers Bros. and the deficits incurred during the management of Seidel. In making up the account of the deficits incurred during the management of Seidel, the plaintiff entered the salary of Seidel at $200 per month.

[1] Through an abundance of precaution the plaintiff pleaded his case in several different counts. In one count he pleaded a stated account, and he complains because the trial court made findings against him on that count. There was no direct evidence thereon. The power rested with the jury, or court sitting without a jury, to draw an inference on the subject. This court may not, in the absence of an abuse of discretion, interfere, and there is certainly no evidence of abuse of discretion in this case.

The plaintiff contends that the facts in this litigation do not present an instance of a corporate double and that the entity of the defendant corporation should not be ignored, and the plaintiff also claims that the advances made by Rivers Bros. and the advances made by Seidel were not made in payment of a stockholders' liability. We agree with the plaintiff on both contentions, but neither is helpful in determining the rights of the parties on this appeal.

[2] The plaintiff claims that the value of the labor done by Seidel was agreed upon as alleged in the fifth count. The issue was fully tried by the trial court. It found the fact against the plaintiff's allegation. There is slight evidence, if any, in the record to support the plaintiff. Under these circumstances this court may not disturb the finding thereon.

[3] During the trial the court received evidence on each and every alleged expenditure made by Seidel, and as to the reasonable value of the labor done by him while he was operating the road. Thereafter the trial court made a finding that the road became indebted to Seidel in the sum of $4,200. The amounts paid to Seidel while he was operating the road were entered on the books of the defendant. The total of those payments, $3,025.05, was not disputed at the trial. Nevertheless, the court made a finding that the total of the payments so made was $3,125.05. In other words, it made a clerical error against the plaintiff in the sum of $100. Under the findings made by the trial court and the admitted facts the judgment should have been for $100 more than as the judgment was written.

[4, 5] When Seidel bought from Rivers Bros. the vendor and vendee executed a written memorandum of the transaction. That memorandum was introduced by the defendant in contradiction of the witness Seidel as to what properties were the subject of the sale. The memorandum was signed by Seidel, and it was, therefore, some evidence as to what Rivers Bros. sold or assigned to him. Its admission was limited to that purpose. There was no error in receiving it.

As stated above, the plaintiff sought to recover the amount of the advances made by Rivers Bros. In claiming to recover that item, the plaintiff alleged an assignment to his assignor by Rivers Bros. The assignment was denied. The trial court made a finding that the claim was assigned, but as a part of the finding it continued and recited that, when Rivers Bros. made the payments, it did so in payment of its stockholders' liability and that there was nothing to assign. The plaintiff quite properly contends that the latter part of the finding was not sustained by the evidence. He further contends that the latter portion of the finding, not being sustained by the evidence, should be ignored, and that the findings, as so modified, clearly support a judgment in favor of the plaintiff on the alleged assigned claim, and that we should make an order accordingly. We are not at liberty to do so. Taking the evidence most favorably to this appellant, as hereinabove stated, there was evidence that Rivers Bros. executed an executory contract to sell to plaintiff's assignor the park and railroad. There was also evidence that Rivers Bros. made it clear to plaintiff's assignor that Rivers Bros., Incorporated, would not thereafter make a claim against this defendant for the deficit incurred during the management by Rivers Bros. This was the only evidence that can be claimed to be an assignment. If we treat it as an assignment, the assignment was but an incident of the subject of the executory sale. When thereafter plaintiff's assignor defaulted in his payments and his title to the stock in the defendant railroad was sold, he parted with all title to all properties, including the alleged account which he claims Rivers Bros. had agreed to sell him. In other words, there is nothing in the record showing that after the title to the corporate stock was sold by Rivers Bros. at a trustee's sale, plaintiff's assignor retained title to the account for advances theretofore made by Rivers Bros.

The judgment is modified by adding thereto the sum of $100, and, as so modified, the judgment is affirmed. The defendant will recover its costs.

We concur: KOFORD, P. J.; NOURSE, J.

98 Cal. App. 665

GREEN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR COUNTY OF LOS ANGELES (two cases). (Civ. 6401, 6403.)★

District Court of Appeal, Second District, Division 2, California. May 3, 1929.

Rehearing Denied May 31, 1929.

Mandamus ⚯31—Mandamus to compel court to proceed to judgment, notwithstanding appeal in another case, held unwarranted, where cases presented involved and interdependent questions.

Petitioner, who had conveyed his apartment house and furnishings to another under exchange contract, *held* not entitled to writ of mandamus to compel court to proceed to judgment in his claim and delivery and unlawful detainer actions, notwithstanding his appeal from judgment against him in action for rescission of exchange contract, in view of involved and interdependent questions presented by the three cases.

Applications for writs of mandamus by James E. Green to require the Superior Court of the State of California in and for the County of Los Angeles to proceed with trial and to render judgment. Writs denied.

Wm. C. Ring, of Los Angeles, for petitioner.

Harry Lyons, of Los Angeles, for respondent.

CRAIG, J. Prior to the litigation hereinafter mentioned, and from which these proceedings arise, the petitioner, James E. Green, entered into an agreement for exchange of properties with William E. Rhoades and wife, whereby the latter acquired possession of an apartment house, and certain furniture and furnishings. Upon the execution thereof the vendees signed a conditional sale contract by the terms of which they agreed to pay $8,500 for the personal property in monthly installments, and which was dated February 1, 1928. Thereafter Rhoades and his wife instituted a suit for rescission of the exchange contract, alleging fraud and misrepresentation, numbered 250325, in the superior court of Los Angeles county. During the pendency of the suit last mentioned, Green in turn filed in the superior court an action in unlawful detainer, which was numbered 257059, and one numbered 257997, for replevin of the personalty. After certain continuances, the plaintiffs in the case numbered 250325 were awarded judgment for rescission, and for $13,723.58, which was made a lien upon the furniture and furnishings. Green appealed from the judgment, and furnished an undertaking for the purpose of staying execution, to which exceptions were sustained by the court, but it appears that a sufficient undertaking was later substituted therefor, and was accepted. It is alleged by petitioner that the claim and delivery and unlawful detainer actions were thereafter tried together and that the court indicated an intention of deciding in his favor, but that upon motion of the defendants they were continued pending the determination of the appeal of the first action. He prays a writ of mandate in each case requiring the superior court to proceed to judgment, notwithstanding such appeal. The respondent court, through counsel for the defendants Rhoades, denies that the claim and delivery or unlawful detainer actions are ready for decision, and alleges that they were consolidated, and that the defendants during, but prior to the conclusion of, the trial thereof, moved for a continuance pending said appeal and produced the records of the first case, and that the complaint in that action and the answer and supplemental answer in the replevin suit and unlawful detainer suit involve the same property and present similar issues. It is further averred by the respondent that the property in controversy was delivered to petitioner in accordance with a verbal understanding or promise at the time of the filing of petitioner's undertaking upon appeal, and that no evidence as to its value had yet been offered or received when the continuance was granted in the replevin suit numbered 257997.

It appears to have been conceded in the respective briefs that the plaintiffs in the suit for rescission having obtained judgment for $13,723.58, in addition to rescission of their contract of exchange, and the personal property having been surrendered by them, the value and right to possession thereof are no longer in issue. The petitioner contends that the only question before the trial court upon the institution of this proceeding was the amount of damages, if any, to which he might be entitled in the unlawful detainer and replevin suits for possession, use, and occupation of the real and personal properties from the date of an alleged default in payment of installments to the time of such surrender. Respondent represents that the petitioner is insolvent, and could not pay the judgment rendered in the first case, if it should be affirmed; that the question of fraud would not be considered in the consolidated actions for possession; and that the question of value alone remained open for proof and determination, for the purpose of arriving at the amount of rental which the petitioner might in the event of a judgment

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★Rehearing denied.

in his favor be entitled to recover. The merits of neither of said actions are here involved.

The contract of conditional sale, entitled "lease contract," for rescission of which the vendees recovered judgment below, and for breach of which the petitioner herein there sought relief, contains no provisions for remuneration of the conditional vendor for use of, or failure to return, the personal property should default occur in the payment of any installment. We think it immaterial whether, as claimed by the petitioner, the trial court had before it all of the evidence and was about to render a judgment awarding or denying rents for the use of the furniture, or required evidence as to the amount of damage, if any, to which he might be entitled for its retention and use between the dates of default and surrender. If the judgment of rescission rendered during the pendency of the possessory actions be affirmed, it might result that petitioner is not entitled to recover rent or damages. Should it be reversed, it might ultimately develop that a construction of the conditional sale contract is requisite to the determination of that question. In other words, if the exchange contract was in fact obtained by fraud and misrepresentation, and was ineffectual for any purpose, the subsidiary conditional sale contract was without foundation and equally null and void. On the other hand, should the exchange contract eventually be upheld, the conditional sale contract must inevitably furnish the basis of any controversy as to the vendor's right to recover delinquent installments, rent for the withholding and use of the property between the date of default and the time of delivery, or damages (in the event that neither any installments or rent may be recoverable thereunder), for deprivation of the vendor's possession and the wear and tear of his property. It becomes quite obvious, we think, that a determination of this issue in the superior court also involves a consideration of the duties and obligations of the parties, either as a result of alleged fraud, or under the terms and conditions of a binding contract. It seems, as was held by the trial court, that the rights of the litigants may not adequately and fairly be adjudicated in anticipation of an unknown event upon which some judgment must be predicated. The entire record was, presumably, before the court, and the whole transaction must stand or fall accordingly as it shall determine therefrom as to whether or not there was a bona fide exchange and conditional sale.

It may well be that the court in its legal discretion felt compelled to hold the proceedings in abeyance until it could know the amount of liability, if any, or upon whom it should rest, as a result of final determination of the principal issue underlying the entire transaction. In view of the involved and interdependent questions presented by the three cases, we think the writs prayed herein are unwarranted.

The peremptory writs of mandate are denied, and the alternative writs are discharged.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

SUN OIL CO. OF CALIFORNIA v. UNION DRILLING & PETROLEUM CO.★

(Civ. 6212.)

District Court of Appeal, Second District, Division 1, California. April 25, 1929.

Hearing Granted by Supreme Court June 24, 1929.

1. Evidence ⟹129(6)—Evidence showing conduct and understanding of parties under similar contract held relevant to issue of depth required under contract to deepen well to approximately 3,600 feet (Civ. Code, § 1647).

Where defendant agreed to deepen well to depth of approximately 3,600 feet, and issue involved was whether defendant was required to deepen well to actual depth of 3,600 feet or suffer forfeiture, evidence showing conduct and understanding of parties under similar contract was relevant to issue and admissible under Civ. Code, § 1647.

2. Evidence ⟹99—Evidence showing probability or improbability of issue of fact is relevant to issue.

Any evidence showing probability or improbability of issue of fact is relevant to issue.

3. Appeal and error ⟹1056(1)—Error in excluding evidence held prejudicial, where appellate court could not say different decision might not have been reached, if evidence had been received.

Where Court of Appeals could not hold that different decision of case might not have been reached if evidence erroneously excluded by trial court had been received, error in excluding evidence was prejudicial.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by the Sun Oil Company of California against the Union Drilling & Petroleum Company. Judgment for plaintiff, and defendant appeals. Reversed in part.

Newby & Newby and Nathan Newby, Jr., all of Los Angeles, for appellant.

John B. Haas, John D. Home, and Oliver O. Clark, all of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Defendant appeals from a judgment granting a permanent injunction restraining defendant from entering upon the land of plaintiff and from interfering with, operating, or drilling a cer-

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★Hearing granted. 280 P. 535.

tain oil well located on said premises, except a portion of said judgment awarding defendant the sum of $5,000, the value of casing placed in said well.

On February 7, 1924, plaintiff and defendant entered into a written contract whereby defendant agreed to deepen an oil well 2,914 feet in depth, and owned by the plaintiff, to an approximate depth of 3,600 feet. The defendant deepened the well to 3,300 feet, and on or about July 15, 1924, made a production test, resulting in an aggregate production in two months of approximately 1,322 barrels of oil, which the plaintiff received and sold, paying the defendant 50 per cent. of the sale value as provided in the contract. The well did not produce much oil; it repeatedly sanded up and was repeatedly cleaned out by the defendant. Defendant never drilled the well to 3,600 feet. On or about December 8, 1924, a restraining order was served upon defendant, restraining defendant from further operating or drilling said well; and on December 24, 1924, a temporary injunction was granted, restraining defendant from operating or drilling the said well, which injunction was made permanent on April 9, 1926.

A dispute arose between the parties as to the meaning of the word "approximately," as used in the contract, and also as to whether defendant was required by the terms of the contract to pay for the cost of an additional string of casing required to deepen the well to an actual depth of 3,600 feet. Appellant claims that, in the event a satisfactory production of oil was not secured at a depth of 3,300 feet, the defendant was at all times willing to deepen the well to an actual depth of 3,600 feet, provided plaintiff would pay for the additional string of casing; but that, at all events, defendant was denied the opportunity to recoup its expenses by deepening the well to 3,600 feet, the well having failed of production at 3,300 feet. Appellant contends that it was error for the trial court to exclude evidence showing the conduct and understanding of the parties in regard to the deepening of another well under a similar contract in the same field. Defendant offered to show that prior to entering into the contract concerned in this case the parties discussed the deepening of an adjoining well known as No. 6, and that Mr. Mellon, president of the plaintiff company, stated they would be liberal in the interpretation, just as they were in No. 6, in which there was a variation of 230 feet from the stipulated depth. Defendant further offered to show that defendant, with the approval of the state mining bureau, placed in well No. 6 one combination string of 4¾ inch casing, as provided in the present contract, and that was what the parties had in mind when they executed the present contract. Defendant also offered to prove the circumstances surrounding the transaction, including a statement of the condition of the well furnished by plaintiff as to the requirements for casing materials.

[1-3] A contract may be explained by reference to the circumstances under which it was made and the matter to which it related. Civ. Code, § 1647. According to the terms of the contract, the defendant agreed to deepen the well "to a depth of approximately 3,600 feet." In Ross v. Keaton Tire & Rubber Co., 57 Cal. App. 50, 206 P. 645, the trial court was directed to take evidence of the surrounding circumstances of the transaction in order to determine the meaning of the parties in using the word "approximately." The court said, at page 56 (206 P. 648): "The judgment is reversed and a new trial ordered, if the parties are so advised, wherein, if had, the trial court is directed to construe the clause specifying a building 'to cost approximately $21,000' as an agreed estimate of such cost, the variation from which should be determined upon proper and competent evidence received touching the surrounding circumstances of the transaction; practical construction of the lease by the parties, if any; amount of increased cost of the building due to defendant's acts in changing the plans and specifications, if any, and for which, under the circumstances made to appear, it should be required to respond, and such other evidence as the court may deem proper." One of the issues in the instant case is whether the defendant was required by the terms of the contract to deepen the well to an actual depth of 3,600 feet or suffer forfeiture. Evidence showing the conduct and understanding of the parties under a similar contract was relevant to the issue. Lobree v. White Lumber Co., 53 Cal. App. 85, 199 P. 821. Any evidence showing the probability or improbability of an issue of fact is relevant to the issue. Moody v. Peirano, 4 Cal. App. 411, 420, 88 P. 380. If the evidence excluded by the trial court had been received, we are not prepared to hold that a different decision of the case might not have been reached and the injunction denied. Having reached the conclusion that this error was prejudicial, it becomes unnecessary to discuss other questions raised on the appeal.

The judgment is reversed, except that portion thereof awarding defendant the sum of $5,000 for casing.

We concur: HOUSER, J., Acting P. J.; YORK, J.

CONSUMERS' SALT CO. et al. v. RIGGINS.★
(Civ. 6143.)

District Court of Appeal, Second District, Division 2, California. April 19, 1929.

Hearing Granted by Supreme Court June 17, 1929.

1. Mandamus 🔑10—Legal right of petitioner to mandamus must be clear, and every fact forming basis of claim to writ must be proved.

To secure a writ of mandate, the legal right of petitioner must be clear and complete, and he must prove every fact which forms the basis of his claim to the issuance of the writ.

2. Mandamus 🔑23(1)—Petitioners for writ of mandate to require delivery of corporate records can prevail only on strength of their own title.

Petitioners for writ of mandate to require delivery of corporate records can prevail only on strength of their own title, not by merely questioning right of adversary.

3. Mandamus 🔑129—Mandamus lies to compel delivery of corporate seal, books, etc., to newly elected secretary.

Mandamus is the proper remedy to compel delivery of corporate seal, books, etc., by former secretary to newly elected secretary of corporation.

4. Appeal and error 🔑437—Judgment requiring issuance of new stock certificate to adjudged owner is not vacated by appeal and deposit of certificate to stay judgment (Code Civ. Proc. §§ 944, 946).

Judgment requiring cancellation of stock certificate and issuance of new one to person adjudged rightful owner is not vacated by appeal and deposit of new certificate with clerk of court on condition that judgment be stayed, under Code Civ. Proc. § 944, but is held in abeyance pending appeal, under section 946, and certificate is ineffective for any purpose, since reversal of judgment would render it a nullity.

5. Mandamus 🔑5—Corporation secretary, elected by vote of holder of majority stock certificate issued under suspended judgment, from which appeal was pending, held not entitled to mandamus to deliver corporate seal, books, etc., pending determination of such appeal (Code Civ. Proc. § 944; Civ. Code, § 312).

Corporation and one elected secretary by vote of one adjudged rightful owner of certificate for majority of stock issued under stayed judgment, from which appeal was pending, will not be granted writ of mandate, requiring former secretary to deliver corporate seal, books, etc., to new secretary, pending appeal from such judgment, on theory that one may not go behind legal title to stock, as disclosed by corporate books, to determine ownership thereof for voting purposes, under Civ. Code, § 312, where such books showed that new stock certificate, required to be issued by such judgment, was issued and deposited with clerk to stay judgment under Code Civ. Proc. § 944.

Works, P. J., dissenting.

Application by the Consumers' Salt Company and C. L. Mullholand for writ of mandate requiring J. R. Riggins to deliver the corporate seal, books, etc., to petitioners. Writ denied.

Superseding former opinion in 270 P. 392.

Harry M. Irwin, of Los Angeles, for petitioners.

Newby & Newby and Dee Holder, all of Los Angeles, for respondent.

CRAIG, J. The petitioners are a corporation organized under the laws of this state and a stockholder claiming to be the newly elected secretary, who pray a writ of mandate requiring the respondent Riggins, Mullholand's predecessor, to deliver to them the corporate seal, books, papers, etc., of said corporation. Respondent contends that his alleged successor was not legally elected, and is therefore not entitled to hold the office of secretary, or to demand possession of its records.

It appears that prior to said election and on September 16, 1927, in a suit involving the ownership of certificate No. 40, for 225,000 shares of a total of 300,010 shares outstanding of the capital stock of the corporation, judgment was rendered decreeing that one B. D. McAlvay was the rightful owner thereof, and that said certificate be canceled and a new one issued to him therefor. On November 15, 1927, the defendants in that proceeding, petitioners herein, appealed from such judgment, and respondent alleges that, solely for the purpose of staying execution pending the appeal, said certificate was canceled, a new one numbered 47, for the same number of shares, was issued in the name of McAlvay, and deposited with the clerk of the superior court. It is also alleged that the new certificate bore a statement in writing that it was issued only upon condition that judgment be stayed under the provisions of section 944 of the Code of Civil Procedure to abide its final determination, and that the same conditions were entered in writing upon the stock books of the corporation. Thereafter, and on July 16, 1928, at a stockholders' meeting, which was regularly called, Mullholand and McAlvay and three other stockholders were declared directors, for each of whom the latter voted 225,000 shares. A meeting of directors was then called for the election of officers, whereupon the petitioner Mullholand was declared elected secretary. He thereafter demanded of respondent, Riggins, the former secretary, possession of the office and its paraphernalia, which was refused.

[1, 2] It has been suggested that, since neither of the claimants of the disputed shares is contesting the right of McAlvay to have voted them, and since Riggins is merely a stockholder, he is not in a position to resist the application for this writ. This argument involves the assumption that the only person who could be heard to complain of McAlvay

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★Hearing granted. 282 P. 954.

having voted the shares is the other claimant of their ownership, Stockwell. It is an invariable rule that to secure a writ of mandate the legal right of the petitioner to the performance of the act sought to be compelled must be clear and complete. 38 C. J. p. 582, and cases therein cited. In such a proceeding the petitioner must prove every fact that forms the basis of his claim to the issuance of the writ. 10 Cal. Jur. p. 869. The test by which the right of one applying for a writ of mandate is weighed is to inquire as to whether the right is clear. 10 Cal. Jur. p. 797. Hence the petitioners cannot prevail here by merely questioning the right of the respondent. They must prevail if at all through the strength of their own title, and a showing of a clear, convincing, and conclusive character of their own rights in the premises.

The petitioners contend that, notwithstanding the appeal, certificate No. 40 was canceled and a new one issued by action of the corporation; that the sole test of the right to ownership of stock is the entry thereof in the corporate books, and that the judgment was self-executing. Respondent insists that by appeal and deposit of said certificate the judgment was stayed, and, hence, that it was of no force or effect; that McAlvay was not the owner of the 225,000 shares which he voted for the election of Mullholand as director; and that the latter was therefore not legally qualified for the office of secretary or entitled to possession of the records demanded, the by-laws requiring that the secretary must be a director. Riggins contends that he still is secretary as a hold-over, upon the theory that a majority of the stock did not vote at the election for directors, and hence that Mullholand was not eligible to be secretary. The provisions of the Code of Civil Procedure applicable to the instant controversy are as follows:

Section 943 of the Code of Civil Procedure recites, in part, as follows: "If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into. * * *"

Section 944 provides that: "If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court."

Section 946 further provides: "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein. * * *"

[3, 4] If the petitioners are entitled to the relief prayed, we think it settled beyond question that mandamus is the proper remedy. Potomac Oil Co. v. Dye, 10 Cal. App. 534, 102 P. 677. However, the petitioners' interpretation of section 312 of the Civil Code, and decisions construing the same, that "every person * * * having stock in his own name on the stock books of the corporation at least ten days prior to the election" is entitled to vote under all circumstances, is not supported by the authorities cited. Petitioners' argument is founded upon the theory that one may not go behind the legal title of stock as disclosed by the corporate books to determine ownership for voting purposes. However, the certificate in question was issued and deposited with the clerk for the purpose of staying the operation of a judgment declaring B. D. McAlvay to be the owner, and the *face of the corporate books* definitely shows that fact. The judgment is not vacated by such appeal and deposit, but it is held in abeyance pending appeal, and the certificate is ineffective for any purpose, since a reversal of the judgment would render it a nullity. Di Nola v. Allison, 143 Cal. 106, 76 P. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84; U. S. Oil & L. Co. v. Bell (C. C. A. 9th Cir.) 219 F. 790. This question was presented under a similar statute in Durfee v. Harper, 22 Mont. 373, 56 P. 589, wherein it was said: "The object of the law in requiring an executed certificate to be deposited with that official was to preserve the rights of parties until it might be determined by this court who owned the stock; and until such determination there could be no delivery of it, and no exercise of ownership by using those incidental rights dependent upon the decision of this court as to the ownership. A contrary ruling would oftentimes make a stay of execution by appeal valueless; for it would not stop the doing of acts to prevent which the suit may have been brought, and which, if done, are equivalent to the possession of all that the lower court may have awarded the successful party."

[5] That B. D. McAlvay is even a legal stockholder is a question depending upon a judgment which is temporarily suspended; hence the official capacities of C. L. Mullholand as director and secretary are likewise contingent upon McAlvay's title to the stock. To decide the question presented by this proceeding would require anticipation of an affirmance of the judgment upon appeal, which involves issues not before us.

The writ of mandate is denied.

I concur: IRA F. THOMPSON, J.

WORKS, P. J. (dissenting). I dissent. Both McAlvay and Stockwell have an inchoate interest in the shares of stock which the former voted at the election, which happens to be more than two-thirds in amount of the total stock outstanding. Of the two, the one who shall finally triumph on the appeal mentioned in the majority opinion has now an immense interest in the personnel of the board of directors of the corporation. It would be entirely proper if McAlvay and Stockwell have agreed that the former shall vote the stock at all stockholders' meetings until the appeal is determined. No other stockholder, if there is such an agreement, can question the right of McAlvay to act under it. It would seem, as well, that in the absence of such an agreement, if none is in existence, McAlvay would have the right to vote the stock at any meeting in default of an attempt on the part of Stockwell to do so, and thus protect his interest in the corporation in the event that the judgment in his favor shall be affirmed.

The meeting was held, McAlvay voted the stock without objection on the part of any one, the result of the election thus consummated was declared, and the meeting was adjourned. I think, on the whole, that the matter is a closed incident so far as Riggins is concerned, and that a peremptory writ of mandate should issue.

Upon the other question presented by the case I must say, also, that I am not sure that Stockwell could have voted the stock if he had come forward to do so. As what I have said above concludes the controversy, in my opinion, I am not ready to express a conclusion upon this latter point.

98 Cal. App. 523

MERCHANTS' NAT. BANK OF LOS ANGELES v. CONTINENTAL NAT. BANK OF LOS ANGELES. (Civ. 5170.) ★

District Court of Appeal, Second District, Division 2, California. April 26, 1929.

Rehearing Denied May 24, 1929. Hearing Denied by Supreme Court June 24, 1929.

1. **Banks and banking ⇨175(3)—Evidence held to sustain finding that drawee suing collecting bank on check agreed to refund amount to maker and attempted to collect it from defendant.**

In action by drawee bank against collecting bank to recover amount of check containing forged indorsement paid by former in reliance on latter's clearing house indorsement, evidence *held* sufficient to sustain finding that plaintiff agreed to refund amount of check to maker and attempted to collect amount thereof from defendant.

2. **Banks and banking ⇨119—"Depositor" is one paying money into bank to be placed to his credit and subject to his check, or beneficiary of fund held by bank as trustee.**

A "depositor" is one who pays money into the bank in usual course of business, to be placed to his credit and subject to his check, or the beneficiary of a fund held by a bank as trustee.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Depositor.]

3. **Banks and banking ⇨175(½)—Action by drawee bank against collecting bank based on latter's clearing house indorsement held not one by depositor against bank for payment of forged or raised check.**

Action by drawee bank against collecting bank to recover amount paid by drawee on check containing forged indorsement was not one by a depositor for payment of a forged or raised check, but was based on collecting bank's clearing house indorsement.

4. **Limitation of actions ⇨46(6)—Limitation against action by depositor against bank for payment of forged or raised check runs from date depositor receives canceled check (Code Civ. Proc. § 340, subd. 3).**

The one-year period of limitation under Code Civ. Proc. § 340, subd. 3, applicable to action by depositor against bank for payment of forged or raised check, commences to run from date depositor receives his canceled check.

5. **Statutes ⇨231—Provisions of Codes must be construed as single statute.**

The provisions of the various Codes of California are to be construed with relation to each other as though all such Codes had been passed at the same moment of time and were parts of the same statute, in view of Pol. Code, § 4480.

6. **Banks and banking ⇨154(2)—Rule that express exception is not to be extended beyond its fair import held applicable to statute limiting action by depositor against bank for payment of forged or raised check (Code Civ. Proc. § 340, subd. 3; § 348).**

Rule of statutory construction that express exception is not to be extended beyond fair import of its terms applies in considering effect of Code Civ. Proc. § 340, subd. 3, limiting time within which action by depositor against bank for payment of forged or raised check may be brought, which is an exception to general rule laid down by section 348 that no limitation shall apply to action brought to recover money deposited with bank, and it must be presumed that Legislature, in enacting amendment to section 340, intended to create no exception other than that therein in terms specified, since an express exception excludes all others.

7. **Statutes ⇨228—An exception in statute should be strictly construed.**

It is a rule of statutory construction that an exception should be strictly construed, which rule does not conflict with requirements of Code Civ. Proc. §§ 4, 1859.

8. **Banks and banking ⇨154(2)—Check bearing forged indorsement held not "forged or raised check" within one-year limitation as to action for payment thereof (Code Civ. Proc. § 340, subd. 3; § 348).**

Presence of forged indorsement on check otherwise unaltered and bearing genuine signature of maker, *held* not, in view of Civ. Code, §§ 3112, 3207, 3265a, a "forged or raised check" within meaning of Code Civ. Proc. § 340, subd. 3, placing one-year limitation on action against bank for payment of forged or raised check,

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★Rehearing denied. Hearing denied by Supreme Court.

which limitation is exception to general rule laid down in section 348.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Forged Check.]

9. Equity ⚷84—Laches is defense ordinarily peculiar to equitable actions.

Laches is a defense ordinarily peculiar to actions in equity.

10. Banks and banking ⚷175(3)—Finding that drawee bank suing collecting bank for amount paid on check bearing forged indorsement was not guilty of laches, held sustained by evidence.

In action by drawee bank against collecting bank to recover amount paid on check bearing forged indorsement in reliance on collecting bank's clearing house indorsement, evidence *held* to sufficiently support court's finding that drawee bank was not guilty of laches in not ascertaining true status of check until over year after its payment.

11. Banks and banking ⚷319—Banks associated together may bind themselves by rule governing effect of their indorsements, which rules will supplant law.

With respect to general effect of clearing house rules upon obligation of member banks with regard to transactions between themselves, it is perfectly competent for banks associated together to bind themselves by rules governing, as between themselves, the effect of their indorsements, and such rules as to them will supplant the law.

12. Banks and banking ⚷320—Collecting bank held liable under its clearing house indorsement to drawee bank paying check bearing forged indorsement; "valid;" "regular;" "sufficient."

Under clearing house rule providing that clearing house indorsement guarantees validity, regularity, and sufficiency of all prior indorsements, *held* that collecting bank was liable to drawee bank for amount paid by drawee bank on check containing forged indorsement in reliance on collecting bank's clearing house indorsement; a "valid" indorsement meaning one having binding force, authority by law, legally efficacious; "regular" meaning duly authorized; and "sufficient" meaning competent or adequate.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Regular; Sufficient; First and Third Series, Valid.]

13. Banks and banking ⚷320—Clearing house rule that clearing house indorsement shall not be construed to supply "missing indorsement" did not apply to forged indorsement.

Forged indorsement held not "missing indorsement" within clearing house rule providing that clearing house indorsement shall not be construed to supply missing indorsement.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by the Merchants' National Bank of Los Angeles against the Continental National Bank of Los Angeles. Judgment for plaintiff, and defendant appeals. Affirmed.

Root & Bettin, of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles, amici curiæ in support of appellant.

Nolan, Rohe & Freston and Page, Nolan, Rohe & Hurt, all of Los Angeles, for respondent.

O'Melveny, Tuller & Myers and Rohe & Freston, all of Los Angeles, amici curiæ in support of respondent.

BURNELL, Justice pro tem. This is an action by respondent bank seeking to recover from appellant bank the amount of a check drawn upon and paid by the former, after indorsement by the latter, under circumstances to be hereinafter related. The trial in the court below was had upon a stipulation as to the facts, which was supplemented by the testimony of but one witness, the assistant cashier of respondent bank. From the findings of the learned trial court, which closely follow said stipulation, the facts are ascertained to be as follows:

On October 14, 1921, the Title Guarantee & Trust Company drew its check upon respondent bank, with which it had deposits ample to cover payment thereof, in the sum of $1,651.60, payable to Camille Sentous, administrator of the estate of Mary Billings, and handed said check to one Carroll E. King for delivery to Mr. Sentous. King was at that time a practicing attorney at law, and was attorney of record for the administrator, continuing as such until September, 1922. Instead of delivering the check to the administrator, King, without right or authority from any one, and some time between the 14th and the 20th of October, indorsed the check as follows:

"Camille Sentous Administrator of the estate of Mary Billings by Carroll E. King his attorney

"Carroll E. King Special"

King at this time, and for some time prior thereto, had carried an account with appellant bank under the name of "Carroll E. King, Special." On October 19, 1921, King deposited four checks with appellant bank, of which the check above referred to was one, making a total deposit of $1,799.96, and up to the 25th of October, 1921, King had on deposit in said bank $2,400. From the 26th of October, 1921, to the 18th of November, 1921, his deposit balance exceeded $1,000, and from the latter date to the 28th of November it exceeded $800. The check in question was accepted by appellant bank without requiring any proof or indentification as to the truth or character of the indorsement above set forth, or of any authority on the part of King to receive payment on the check or credit upon its deposit, and the amount of the check was placed by the appellant to the credit of King in his special account, and no part of the sum called for therein was paid by appellant bank to the payee.

Both banks were members of the Los Angeles Clearing House Association, which is an association of banks having a constitution, by-laws, rules, and regulations, among the purposes of which is to settle from day to day the mutual banking demand of its members through the ascertaining, striking, and liquidations of balances between them, and the effecting of daily exchanges between member banks, which practice is known as "clearing." The rules of the clearing house, in so far as such rules have application to the instant case, provide as follows:

"All negotiable paper deposited for clearance by the members of this association shall bear the stamp of the depositing member, which shall clearly indicate the name of the member, its Clearing House number and the date of clearance. The stamp shall be for clearing house purposes only, and shall guarantee the validity, regularity and sufficiency of all prior indorsements on all paper so cleared, except the indorsement of an original payee of a Certificate of Deposit, and it shall not be construed to supply a missing indorsement. * * *"

On October 20, 1921, appellant bank indorsed the check in question as follows, using for that purpose its clearing house stamp:

"Continental National Bank

Pay only through Los Angeles Clearing House

Oct. 20 1921,
Los Angeles, California
78"

—and on the same day the check was cleared by the association, being charged against respondent bank and credited to the appellant bank in the accounts of that day, and in this manner the amount thereof was paid by respondent bank to appellant bank, respondent bank charging the account of the Title Guarantee & Trust Company, the drawer of the check, with the amount thereof, and on or about October 24, 1921, returning the original check to said drawer.

On September 15, 1922, the attention of respondent bank was for the first time called to the irregularity of the indorsement of the check, and respondent on that date made an oral demand upon appellant for the payment thereof upon the ground that the check had been paid by appellant bank without a proper indorsement by the payee named in the check. This oral demand was followed on September 30, 1922, by a second demand upon appellant bank for the payment of the check, which demand was refused. The attention of respondent bank was called to the irregular indorsement by Mr. Sentous on or about September 15, 1922, who then demanded payment to himself as administrator. Mr. Maurer, the assistant cashier of the respondent bank, told Mr. Sentous that he would have to make a demand on the title company, and that "when they made demand on us we would pay them." On September 30, 1922, Sentous presented to respondent a written demand for payment of the amount of the check, together with an affidavit that the indorsement was forged. The affidavit was handed back to Sentous and was again presented to respondent on November 8 by the Title Guarantee & Trust Company and on that date respondent bank paid the amount of the check to said title company. The title company had previous to this, and on the 30th of September, 1922, demanded that respondent credit the account of the payee of the check with the amount thereof. The stipulation as to the facts states that immediately upon receipt of the demand of September 15, 1922, made by the payee upon respondent, respondent "investigated the character and truth or regularity of said indorsement, and of the right of the said Carroll E. King to make the same, and found the said indorsement to have been made without the authority of the maker or payee of said check." On December 13, 1922, respondent commenced the present action.

In seeking a reversal of the judgment, appellant makes a number of points, having to do with alleged insufficiency of the evidence to support certain of the findings. It is also contended that respondent bank is barred by laches; that payment of the check by respondent bank was a voluntary payment for which no recovery can be had; also that both banks were equally at fault and respondent was not entitled to recover upon the theory of money paid by mistake, and that recovery should not have been had upon the theory that appellant bank was liable by reason of its indorsement of the check, since, as it is claimed, the forged indorsement was in legal effect a "missing indorsement," and under the clearing house rules appellant bank's indorsement could not be construed to supply a missing indorsement, and was therefore of no binding effect.

[1] Taking up first the objections made to the findings, appellant contends that the court erred in finding that on September 30, 1922, respondent agreed to refund the amount of the check to the Title Guarantee & Trust Company, and, by proceedings initiated on the 15th of September, 1922, the plaintiff attempted to collect the amount thereof from the appellant. The agreed statement of facts recites that on or about September 15, 1922, the payee (Mr. Sentous, administrator) demanded of respondent that it credit him with the amount of the check upon the ground that it had been paid by respondent without proper indorsement and that on the 30th of September, 1922, the title Guarantee & Trust Company, the maker of the check, likewise demanded that the respondent credit the account of Mr. Sentous as administrator with the amount of the check; that on September 15, 1922, respondent advised appellant of these demands for payment and in turn demanded payment from the appellant.

The testimony of Mr. Maurer is that on September 15, 1922, Mr. Maurer, who was the only officer of respondent bank who handled the transaction, stated to Mr. Sentous "that he had to make demand on the title company and when they made demand on us *we would pay them*." (Italics ours.) He further testified that he did not actually pay Mr. Sentous the money until the 30th of September, which was the day he presented the affidavit. With reference to the demands made by respondent bank upon appellant bank, the stipulation as to the facts states: "That also on September 15, 1922, plaintiff herein advised defendant that demand had been made upon the plaintiff herein for the payment of said sum of $1,651.60 for the reasons aforesaid, and made demand upon the defendant herein for the payment to the plaintiff by the defendant of said sum of $1,651.60." This evidence, we believe, is amply sufficient to sustain the finding complained of.

It is next argued that the court erred in making its thirteenth finding of fact. This finding may be thus separated into its component parts:

(a) "That this action is not one by a depositor against a bank for the payment of a forged or raised check;"

(b) "That it is not true that the plaintiff paid the claim upon which this action is based after the statute of limitations (sec. 340, subd. 3, Code Civ. Proc.) had barred the same;"

(c) "That it is not true that the payment by respondent to the maker of the check was without right or authority and contrary to statute and that it is not true that it was a mere voluntary payment."

The above findings, while directly responsive to issues tendered by the appellant's answer, are really conclusions as to the law rather than statements of ultimate facts, but, inasmuch as the questions involved, which are also presented by some of appellant's other points, are of extreme importance to the solution of the problems presented on this appeal, they may as well be taken up under a discussion of appellant's objections to the findings.

[2, 3] As to the first portion of the findings, appellant has furnished us with no authority for its position that the present action is one by a "depositor" against a bank. There is nothing in the record to indicate that respondent bank was at any time a depositor of appellant bank.

A "depositor" is one who pays money into a bank in the usual course of business, to be placed to his credit and subject to his check (State v. Corning State Savings Bank, 136 Iowa, 79, 113 N. W. 500; Anheuser-Busch Brewing Ass'n v. Clayton (C. C. A.) 56 F. 759; Com. v. Sponsler, 16 Pa. Co. Ct. R. 116), or the beneficiary of a fund held by a bank as trustee (Kimball v. Norton, 59 N. H. 1, 47 Am. Rep. 171). See, also, Murphy v. Pacific Bank, 130 Cal. 542, 62 P. 1059.

Tested by this definition, it is evident that this portion of the finding was correct.

The action is by a drawee bank against a collecting bank to recover money paid by the former in reliance upon the latter's clearing house indorsement.

We next come to the question of the application of the statute of limitations (section 340, subd. 3, Code Civ. Proc.) to the respondent's cause of action. It is not claimed that respondent's cause of action is itself barred by the provisions of the statute, but that the Code section in question would have been a bar to any action by the maker of the check against respondent, and hence that respondent's payment of the amount thereof to Mr. Sentous, the payee named therein, upon the demand of the maker, Title Guarantee & Trust Company, not being a payment under compulsion, was a mere voluntary payment for which no recovery can be had. A discussion of these points involves two lines of inquiry: First, does section 340, subd. 3, of the Code of Civil Procedure apply to the sort of action which the Title Guarantee & Trust Company would have been compelled to bring to enforce its demand had respondent bank refused to make the check good? Second, if that section was applicable, did the promise made by respondent bank to refund the amount of the check to the maker take the claim of the latter out of the statute?

Appellant's contention that respondent's payment of the amount of the check to the payee (on demand of the maker) was a voluntary payment, on account of which no recovery can be had, is based entirely on the premise that section 340, subd. 3, of the Code of Civil Procedure, would have applied as a bar to any action which the maker might have brought to enforce such payment. The argument is that a payment made after the period of limitations has passed is one not resting upon any legal obligation or made under any legal necessity. Stone v. Hammell, 83 Cal. 547, 23 P. 703, 8 L. R. A. 425, 17 Am. St. Rep. 272; Schlitz v. Thomas, 61 Cal. App. 635, 216 P. 51. Section 340, subd. 3, of the Code of Civil Procedure, relating to the time within which certain actions must be commenced, in so far as it is here involved, is as follows: "Within one year. * * * 3. An action * * * by a depositor against a bank for the payment of a forged or raised check."

[4] The period under this section commences to run from the date the depositor receives his canceled check (Union Tool Co. v. Farmers' & Merchants' Nat. Bank, 192 Cal. 40, 52, 218 P. 424, 28 A. L. R. 1417; Glassell Development Co. v. Citizens' Nat. Bank, 191 Cal. 375, 385, 216 P. 1012, 28 A. L. R. 1427), which in this case was found by the trial court to be on or about October 24, 1921. Actual payment was made by respondent to the payee of the check on November 8, 1922, or about two weeks after the year had elapsed;

hence, if section 340, subd. 3, Code of Civil Procedure, applied, the cause of action of the maker against respondent bank would have been barred on October 24, 1922.

By the express provisions of section 348, Code of Civil Procedure, there is no limitation to the time within which an action may be brought to recover money deposited with a bank. This was the law in California from 1873, when this section in its original form was added to the Code, until 1905, when, by an amendment to section 340 of the same Code, which up to that time had contained no reference to actions by depositors against banks, the Legislature made an exception to the general rule laid down in section 348, taking from its purview but one class of actions by depositors against banks, namely, those "for the payment of a forged or raised check," and leaving all other classes of actions by depositors still without time limitation.

[5, 6] The provisions of the Code—indeed of all the Codes—are to be construed with relation to each other "as though all such codes had been passed at the same moment of time and were parts of the same statute." Pol. Code, § 4480; People v. Central Pac. R. R. Co., 83 Cal. 393, 23 P. 303; and Miller v. Engle, 3 Cal. App. 325, 85 P. 159. That is to say, the Codes must be construed as a single statute. McKay v. McKay, 125 Cal. 65, 57 P. 677. Hence the rule of statutory construction that an express exception is not to be extended beyond the fair import of its terms (Perry v. Ames, 26 Cal. 372; Mordecai v. Board of Supervisors, 183 Cal. 434, 192 P. 40) applies in considering the effect of section 340, subd. 3, as an exception to the general rule laid down by section 348, and it must be presumed that the Legislature in enacting the amendment to section 340 intended to create no exception other than that therein in terms specified (Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152), since an express exception excludes all others. "The expression of one thing is the exclusion of another; and consequently no further exception was intended." Brocket v. Ohio etc., R. R. Co., 14 Pa. 241, 53 Am. Dec. 534; Lewis' Sutherland on Statutory Construction, § 494.

[7] It is another rule of statutory construction that an exception should be strictly construed (Id.), and this rule is in no way opposed to the requirement for liberal construction of the Code (section 4, Code Civ. Proc.) or to the rule that in the construction of a statute a particular provision, inconsistent with a general provision, is paramount to the latter (section 1859, Code Civ. Proc.).

[8] With these principles in mind, the next question to be answered is this: Had respondent bank refused payment to the Title Guarantee & Trust Company or order, and had the latter been compelled to resort to the courts for redress, would its action have been an action by a depositor against a bank for the payment of a *forged or raised* check? We have italicized the words "forged or raised," for there is no question but that the action would have been one by a depositor against a bank since as the trial court found "* * * said Title Guarantee and Trust Company, the maker of said check had and maintained an account and funds on deposit with the plaintiff bank. * * *" The only question in this connection is whether such action would have been for payment of a "forged or raised check."

There is neither proof nor contention in the record that the face of the check when presented was in any way altered as to amount, name of payee or of maker, or otherwise. The sole defect was the forged indorsement written on the reverse side of the paper.

A check is defined as "a bill of exchange drawn on a bank payable on demand" (section 3265a, Civ. Code), and "a bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or bearer" (section 3207, Civ. Code). The instrument involved in this case was therefore complete in itself without any indorsement. First Nat. Bank v. U. S. Nat. Bank, 100 Or. 264, 197 P. 547, 14 A. L. R. 479. An indorsement is not, under the above definition, an essential part of a check; it need not even be written on the instrument, itself, but may be "upon a paper attached thereto." Section 3112, Civ. Code. "The forgery of the indorsements was entirely distinct from the issuance of the checks on false demands, and there was no relation between them." Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 610, 182 P. 293, 297 (5 A. L. R. 1193).

We are of the opinion that the presence of a forged indorsement does not make an otherwise unaltered check, bearing the genuine signature of the maker "a forged or raised check" within the meaning of section 340, subd. 3, of the Code of Civil Procedure, and that, had the Legislature intended to extend the exception to the general rule laid down in section 348 of the same Code, it would have so indicated by apt words. In this opinion we are fortified by the reasoning of the District Court of Appeal for the First Appellate District of this state, as well as by well-considered cases from other jurisdictions.

In the very recent case of Atwell v. Mercantile Trust Co. (Cal. App.) 272 P. 799, the action was by a depositor against a bank to recover the amount of checks issued by the depositor and paid by the bank upon forged indorsements. The bank pleaded the bar of section 340, subd. 3, of the Code of Civil Procedure. The point presented for decision was thus identical with the question here under discussion. The court noted that section 340 "covers a special class of cases and is an exception to the general rule" promulgated by section 348 and proceeded to discuss the development of the law relating to the duties and obligations existing as between banks and their depositors as throwing light upon the question of the legislative intent in adopting this exception to the rule. The court further said:

"The execution of a check and the execution of an indorsement are distinct. The first is the act of the maker and the second is the act of the payee. A check is complete as a check without an indorsement. A check is defined as a 'bill of exchange * * * payable on demand.' Section 3265 (a), Civil Code. An indorsement 'must be written on the instrument itself or upon a paper attached thereto.' Section 3112, Civil Code. The history of the development of the law relating to the duties and obligations between banks and depositors, briefly referred to in the above decisions, leads to the conclusion that the words 'forged or raised' check, as used in these statutes and in our own statute, do not refer to a 'forged indorsement.' * * *

"Counsel for appellant urges that the unauthorized indorsement and cashing of the checks in this case constituted forgery under the provisions of sections 470 and 476 of the Penal Code. That the indorsements were forged is conceded by respondent, and the trial court made findings to that effect. The question, however, is not whether forgery was committed in the indorsing and cashing of the check, but rather whether this is a case of a 'forged or raised' check within the meaning of subdivision 3 of section 340 of the Code of Civil Procedure."

In Kleinman v. Chase Nat. Bank, 124 Misc. Rep. 173, 207 N. Y. S. 191, the Supreme Court of New York, Appellate Term, had the same question before it. Section 326, Negotiable Instruments Law of New York (Consol. Laws, c. 38), provided: "No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised."

The court there said:

"It is conceded that the bank received no notice of the forged indorsement from plaintiff until some two years after the bank's cancelled checks or vouchers were returned to him. Obviously, therefore, if section 326 comprehends within its scope forged indorsements, the plaintiff is estopped from now asserting his claim against the bank. Our view, however, is that the notice required to be given in section 326 is limited to cases where payment is made of a check upon which the maker's signature is forged or the check is raised.

"The commonly accepted meaning of the words 'a forged check' in the commercial world is a check upon which the maker's name is forged. It is manifest by a consideration of the reason for the enactment of section 326 of the Negotiable Instruments Law, as well as the commonly accepted meaning of the words 'forged check,' that the legislature intended to limit the requirement to give notice to cases where payment is made on a check upon which the maker's signature is forged and did not intend to extend the statute to include forged indorsements. Before the enactment of section 326, our common-law rule was that the depositor as maker owed the bank the duty to make a reasonably careful examination of his cancelled checks or vouchers and notify the bank within a reasonable time thereafter. The time of notice thus was flexible, depending upon the circumstances in each case. (See Morgan v. U. S. Mort. & Trust Co., 208 N. Y. 218, 101 N. E. 871, L. R. A. 1915D, 741, Ann. Cas. 1914D, 462).

"A check possesses the attributes of a contract and certain characteristics of property. It is essentially a commercial paper. It was the legislative purpose in enacting section 326 in response to the needs of business stability to make definite and inflexible the time when the drawee bank must be notified by the maker of its payment of a check upon which his name is forged. The act is in derogation of the common law, hence must be strictly construed. At common law the maker depositor owes no duty to the bank to make inquiry or examine as to any forged indorsement upon his returned voucher because as to indorsements he has ordinarily no greater knowledge or information than the bank. (Prudential Ins. Co. v. Nat. Bank of Commerce, 227 N. Y. 510 [125 N. E. 824, 15 A. L. R. 146]; Critten v. Chemical Nat. Bank, 171 N. Y. 219 [63 N. E. 969, 57 L. R. A. 529]; [Welsh] v. German-Am. Bank, 73 N. Y. 424 [29 Am. Rep. 175]). If the legislature intended to modify this common-law maxim to the extent of imposing upon the depositor the onerous and unreasonable duty to detect within a year forged indorsements, it would have stated it explicitly. Such intended modification cannot be found in the express words of the statute nor can it be fairly implied from the text. (North British & Mercantile Ins. Co. v. Merchants' Nat. Bank, 161 App. Div. 341 [146 N. Y. S. 720]). We are thus in accord with the view of the court below that section 326 had no application to payments made by a bank upon a forged indorsement and the judgment against the defendant Chase National Bank is affirmed."

An Iowa statute (section 9266, Iowa Code of 1924), identical in wording with the New York statute quoted above, except that it provided a six months' limitation, was involved in the case of McCornack v. Central State Bank, 203 Iowa, 833, 211 N. W. 542, 52 A. L. R. 1297. The court there said:

"This section was in force at the time the check in question was cashed as section 1889a, Code supplement of 1913. It is claimed appellee's cause of action is barred under this statute. Prior to the enactment of the statute, we had held, in German Savings Bank v. Bank, supra [101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399], that a depositor was under no duty to the bank as to the genuineness of an indorsement. We said:

" 'The check was returned with an apparent genuine indorsement of Quinlan. The fact that intervener had paid the money thereon, and presumably had satisfied itself that the indorsement of Quinlan was genuine, as it was in duty bound to do, was a further reason why plaintiff should not, in the absence of knowledge to the contrary, have concerned itself as to the genuineness of the indorsement of Quinlan's name thereon. Furthermore, the plaintiff owed no duty to the defendant, or to the intervener, as to the genuineness of the indorsement of Quinlan.' [Citing many authorities.] * * *

"The statute does not, we think, change this rule in respect to the genuineness of the signature of indorsers. The indorsement is no part of the check as made by the drawer, although it is, of course, contemplated that the payee must indorse it. But, since the maker is not required to know the signature of the payee, and has a right to issue the check payable to the order of one unknown to him, relying on the bank to pay only in accordance with his direction, a forged indorsement does not make the check a 'forged check' within the meaning of the statute. In Union Tool Co. v. Farmers & Mer. Nat. Bank, 192 Cal. 40 [218 P. 424, 28 A. L. R. 1417] cited by appellant, there was, in addition to a forged indorsement, an alteration on the face of the check. We are of the opinion the action is not barred by the statute in question."

A case somewhat analogous, although not precisely in point, is State v. Merchants' Nat. Bank, 145 Minn. 322, 177 N. W. 135. The state had sued a bank which had cashed certain voucher warrants upon forged indorsements and later presenting the same to the state treasurer for redemption, who had thereupon redeemed them. The bank invoked section 6378, General Statutes of Minnesota 1913, which was identical with the Iowa statute quoted hereinabove. While holding that the instruments in question were not checks nor were they charged to a depositor's account, the court said of the statutory provision referred to: "By its terms, it applies only to forgery of the name of the depositor to a check purporting to have been drawn on a bank by a depositor, and paid by the bank, and charged to the depositor's account."

Appellant, in contending for the application of section 340, subd. 3, Code of Civil Procedure, to the cause of action which the Title Guarantee & Trust Company would have had against respondent bank, relies strongly upon Union Tool Co. v. Farmers & Merchants Nat. Bank, supra, in which the Supreme Court held that, "Where the action is one to recover money deposited with a bank and not paid out by it on a check claimed to have been forged or raised, the provisions of section 348 apply. To the special case where the action arises because of payment on a check which the plaintiff asserts was forged or raised, the special provision of subdivision 3 of section 340 applies." The Union Tool Company Case was also relied upon by the appellant in Atwell v. Mercantile Trust Co., supra, and the court there very clearly distinguished it from the case under discussion. The Union Tool Company Case was considered and the distinction clearly brought out in the case of McCornack v. Central State Bank, 203 Iowa, 833, 211 N. W. 542, 52 A. L. R. 1297.

In view of our holding on the question above discussed, it seems unnecessary to enter into any extended discussion as to the effect of the promise of respondent bank to refund the amount of the check to the maker thereof as taking the latter's claim out of the statute of limitations. It may be pointed out, however, that, if the provisions of section 340, Code of Civil Procedure, *did* apply, such promise, having been verbal, would not have availed to remove the bar of the statute. Section 360, Code Civ. Proc.

[9] Appellant makes the points that the court below erred in finding that respondent "was not guilty of laches in not ascertaining the true status of said check until September 15, 1922; that plaintiff was not careless and negligent in allowing said check to pass through its clearings; that plaintiff was not careless and negligent in allowing one year and eighteen days to elapse without informing himself and the defendant of the alleged true status of said check"; and that in fact and as a matter of law respondent was guilty of laches. Laches is a defense ordinarily peculiar to actions in equity. Suhr v. Lauterbach, 164 Cal. 591, 130 P. 2; Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516. Conceding that this case is an action in equity rather than one at law (Crocker Woolworth Bank v. Nevada Bank, 139 Cal. 564, 73 P. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169), we think these points are not well taken.

[10] We cannot agree that the court's finding of the absence of laches was a mere legal conclusion. The court, in addition to the finding "the plaintiff was not guilty of laches," found as to specific facts upon which the finding above quoted was based, namely, that the check was drawn and delivered to

King for Sentous on October 14, 1921, presented by King to the appellant bank for deposit in King's account between October 14 and 20, 1921, bearing the forged indorsement, indorsed by appellant bank with its clearing house stamp and deposited by it with the clearing house and charged against respondent on October 20, 1921, and on the same day charged by the respondent to the account of the maker; that prior to September 15, 1922, respondent had no notice or knowledge that the check had been improperly paid or that the indorsement was a forgery, and that on September 15, 1922, the payee named in the check demanded of respondent that it credit him with the amount thereof upon the ground that the check had been paid without proper indorsement by said payee; that on the same day the respondent bank advised the appellant bank of Mr. Sentous' demand and made demand upon appellant for payment to respondent of the amount of the check, and that on the 30th of September the maker of the check likewise demanded that respondent bank credit the payee's account with the amount of the check; that on September 30, 1922, appellant bank refused to accede to the demand of the respondent bank to refund the amount of said check and that on November 8, 1922, respondent paid the amount of the check.

Elsewhere in this opinion we will take up the matter of appellant bank's liability upon the clearing house indorsement and of the right of respondent bank to rely thereon. Suffice it here to say that the evidence, including the stipulation as to facts, sufficiently supports the court's finding above referred to, and that it appears therefrom that respondent bank had no actual notice that any indorsement prior to that of appellant bank was defective or forged until its attention was called to that fact by Mr. Sentous on the 15th of September, whereupon respondent bank immediately took the matter up with appellant bank and made demand for reimbursement.

While liable to its depositor, Title Guarantee & Trust Company, respondent bank was not, as to appellant bank, required to look beyond appellant's indorsement and inquire into the validity of prior indorsements, it had no actual notice of any irregularity in regard to the check until its attention was called thereto by the payee, Mr. Sentous, on September 15, 1922, and immediately upon being advised of such irregularity it reported the same to appellant and demanded payment from the latter. What greater degree of promptness it could have been expected to exercise it is difficult to imagine.

Having disposed of these problems, we now come to that of appellant bank's liability on its clearing house indorsement. As to this phase of the case, appellant contends: (a) That the indorsement made by King was void and therefore tantamount to a "missing indorsement," and as such not within the guarantee specified by the clearing house rules; (b) that respondent should not have recovered on the theory of mistake; and (c) that, even assuming the indorsement should not be regarded as a "missing indorsement" no recovery should have been had upon the appellant bank's clearing house indorsement. Inasmuch as the first and third of these contentions involve a construction of the clearing house rules and their legal effect, we shall first consider these points.

[11] We have heretofore quoted the only clearing house rule involved in this controversy, and it will be recalled that it provides that the clearing house stamp shall guarantee (1) the validity, (2) the regularity, and (3) the sufficiency of all prior indorsements, and that it shall *not* be construed to supply a missing indorsement. As to the general effect of clearing house rules upon the obligation of member banks with regard to transactions between themselves, it has been held that "it is perfectly competent for banks associated together to bind themselves by rules governing, as between themselves, the effect of their indorsements, and these rules as to them will supplant the law." Crocker-Woolworth Bank v. Nevada Bank, 139 Cal. 564, 73 P. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169; First National Bank v. United States National Bank, 100 Or. 264, 197 P. 547, 14 A. L. R. 479.

[12] There is a clear distinction between the liability of a collecting bank to a drawee bank upon the former's clearing house indorsement, in the case of a check which is forged as to the name of the drawer or payee or which has been raised, and its liability in the case of a forged indorsement. This distinction is apparent upon a perusal of the cases of Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 P. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169, Union Tool Co. v. Farmers and Merchants Nat. Bank, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417, and First Nat. Bank v. U. S. National Bank, 100 Or. 264, 197 P. 547, 14 A. L. R. 479. In the first named of these cases, the court pointed out that under clearing house rules identical with those involved in this action there is eliminated from the warranty of indorsement the Code provision that the instrument indorsed "is in all respects what it purports to be"; "in other words," the court says, "*the indorsement does not, of itself, import an undertaking that the check has not been altered;* and in proceedings to recover back the amount paid on an altered check *the indorsement could not be made the foundation of the action*, as importing a promise to refund the money, in case it should afterwards appear that the amount in the body of the check had been fraudulently altered." Crocker-Woolworth National Bank v. Nevada Bank, quoting from Redington v. Woods, 45 Cal. 428, 13 Am. Rep. 190. (Italics are those

appearing in the opinion quoted from.) The facts in the Crocker-Woolworth National Bank Case were as follows: On December 9, 1895, the Bank of Woodland, in Yolo county, drew its check upon the Crocker-Woolworth National Bank in San Francisco for $12 to the order of one Dean; Dean was a depositor of the Nevada Bank; he fraudulently altered the check by changing its date to December 13 and raising its amount from $12 to $22,000, and on December 17 he indorsed the check and deposited it with the Nevada Bank, which thereupon credited his account with the amount of the check; on the same day the Nevada Bank put its clearing house stamp on the check, which found its way in regular course from the clearing house to the Crocker-Woolworth National Bank, which was the San Francisco correspondent of the Bank of Woodland, and had funds of the latter on deposit; the check was honored under the clearing house rules by the payment to the clearing house of the balance found due, the Nevada Bank receiving the credit due it; the next day Dean drew $20,000 from his account at the Nevada Bank and absconded; on January 3, 1896, the Crocker-Woolworth Bank informed the Bank of Woodland of the payment of the check, which promptly notified the Crocker-Woolworth Bank that no such check had been drawn; the Nevada Bank was immediately notified, and repayment was demanded therefrom. We recite these facts in order that it may be clearly understood that in reversing a judgment in favor of the Crocker-Woolworth National Bank, which sued to recover from the collecting bank, the court had before it a case differing from the instant case in this very important particular, to wit, that, as clearly pointed out by the Supreme Court in its opinion, the banking house rules did not purport to make the clearing house indorsement a guaranty of anything other than that stated in the clearing house rules, namely, the validity, regularity, and sufficiency of all prior indorsements. The court there pointed out that a clearing house indorsement under the rule of the clearing house is not such indorsement as is specified in section 3116 of the Civil Code as it then stood, and that the clearing house rule is an express limitation of the effect of the indorsement. The fact must not be overlooked that Dean was the payee named in the originally valid check, and that the indorsement was a genuine indorsement by himself.

In Union Tool Co. v. Farmers' & Merchants' National Bank the situation was different. The checks there involved and which were drawn against the Union Tool Company's account in the Farmers' & Merchants' National Bank were, after altering the name of the payee, indorsed with the name of the altered payee and again indorsed by the forger by writing his own name thereon, and thereafter deposited by him with the Hellman Commercial Trust & Savings Bank. The latter placed its clearing house indorsement upon the checks in question. In the suit by the maker of the checks against the bank upon which they were drawn, the Hellman Bank intervened. The latter bank was in the same position with regard to the transaction as is appellant bank in the present case. The judgment of the trial court was in favor of the plaintiff and against the drawee, Farmers' & Merchants' National Bank, and in favor of the latter bank and against the intervening Hellman Bank. In other words, the court there held that the maker of the checks was entitled to recover as against the bank upon which he had drawn, and that the latter bank was entitled to recover as against the collecting bank. After adverting to the well-settled rule that, as between a bank and its depositor, the bank is only warranted in paying out the money of the depositor on his genuine order and in accordance therewith, and that no degree of care upon the part of the bank will excuse it from liability, the court went on to hold that the Farmers' & Merchants' National Bank was guilty of negligence by reason of which the maker was entitled to recover, and said:

"The intervener, Hellman Commercial Trust & Savings Bank, can be in no better position with respect to the defenses pleaded than can the Farmers and Merchants Bank; they both rest upon the same facts and the same law with reference thereto. In a case involving a similar principle it was said: 'The defendant bank is in no better attitude to defend against the government's demand than would have been the banks which advanced the money to McCoy upon his forged indorsements. Those banks had the opportunity to discover the facts that it was their duty to do so. Had they investigated, they would have discovered that the holder of those checks had no legal title to them, and was not an authorized payee." (United States v. National Bank of Commerce of Seattle, 205 F. 433, 437, 123 C. C. A. 501. See, also, Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 116 N. W. 617, 17 L. R. A. [N. S.] 514, 126 Am. St. Rep. 467.) The evidence shows that the intervener, Hellman Commercial Trust & Savings Bank, failed to exercise proper care to ascertain whether or not C. H. Mueller had indorsed any of the checks here involved. It in effect, took the word of the forger, paid him the money, guaranteed all indorsements on the checks, and forwarded them through the clearing-house for the collection from the Farmers and Merchants Bank. Referring again to the case of United States v. National Bank of Commerce of Seattle, supra, it is there held that where a forged check was cashed by a bank other than that on which it was drawn, such bank was negligent in failing to discover the forgery and in not requiring identification of the payee, and could not urge in defense of its liability to refund the money that the drawer of the check was negligent in failing promptly to discover the fraud. To quote from the opinion in that case, it was said: 'It was their duty to ascertain whether there was such a person as the payee named in the checks, and to know that the person who presented the checks was entitled to receive the payment thereof. They made no investigation, required no identification, and took no precaution. They paid the money negligently, and at their own risk, and the defendant bank in choosing to rely upon the identification of the payee by the banks which cashed the checks did so at its own risk.' And in this respect The Farmers and Merchants Bank was also guilty of negligence, for, although thoroughly equipped to do so, it took no pains to learn if the indorsements on the checks were genuine, depending, according to the custom of banks, where checks have passed through clearing houses, upon the responsibility of the preceding indorsements."

In First National Bank v. U. S. National Bank, supra, the situation was very similar to that in this case. Blank checks of the form used by the Willamette Iron & Steel Works had been stolen. They were filled out by the thieves and were signed with a forged signature purporting to be that of the officer of the steel works whose duty it was to sign pay checks. These checks were drawn upon the First National Bank with which the steel works was a depositor. They were passed on various merchants in Portland who had accounts with the United States National Bank and who in due course deposited them there in their respective accounts. The United States National Bank stamped on each of the checks an impression of its clearing house stamp, and they were presented by the Portland Clearing House to the First National Bank for payment and paid in the usual manner. Thereafter, the First National Bank being notified that the checks were forgeries and that the *indorsements thereon were likewise forged*, credited its depositor, the steel works, with the amount thereof which it had previously charged against its account, and demand for repayment by the United States National Bank being refused, brought suit to recover. The Supreme Court of Oregon delivered a long and well-considered opinion, too long to be here quoted, and held that, under the general principles of the law relating to payment by mistake, the First National Bank would not have been entitled to recover, and that a clearing house indorsement (clearing house rules identical with those here involved) does not guarantee the genuineness of the drawer's signature, and that the First National Bank was not entitled to recover, for the reason that the checks in question were never at any time valid. In so holding, however, the court recognized the rule that, where the defect consists in a forged indorsement, recovery can be had under the clearing house guaranty. In summing up, the court used this language, which we think bears out the above statement:

"We may summarize the foregoing decision as follows: The doctrine of Price v. Neal [3 Burr. 1354, 97 Eng. Reprint 871], is adopted by the Negotiable Instruments Law; and consequently a drawee who pays bears the risk of the drawer's signature being a forgery. If, however, the drawee is innocent of actual fault, and the holder is chargeable with bad faith or negligence, the drawee's hands are untied and he can compel the holder to refund. It cannot be said, as a matter of law, that the defendant was guilty of negligence on account of its failure to detect the forgery of the signature of the drawer, even though the defendant had among its files the genuine signature of the drawer. If the checks are considered alone, and the rules of the clearing house are for the moment eliminated, we find that the act of presenting the checks for payment is neither a representation nor a warranty made by the holder to the drawee that the signature of the drawer was genuine, and we further find that the indorsements placed by the holder upon the back of the checks did not constitute representations or warranties of the genuineness of the drawer's signature. The holder must refund where he has received payment on a forged indorsement of the check, if the check bore the genuine signature of the drawer. *The obligation to refund payment received on a forged indorsement exists whether the checks are considered alone or in connection with the clearing house rules.* If the checks are considered alone, the rules of the common law enable the drawee to recover; if the checks are considered in connection with the clearing house rules, *the drawee can recover on the guaranty which the clearing house rules attach to the indorsement of the holder.* But the rule which permits a drawee to recover payment made on a forged indorsement is not available to the plaintiff, because the signature of the drawer was forged and the instrument was never at any time valid, but from the very beginning was an invalid order in its entirety. The plaintiff did not pay *on a genuine instrument bearing a forged indorsement;* but payment was made on a paper to which the name of the drawer was forged, and, since the plaintiff is bound to know the signature of the drawer, it paid at its peril." (Italics ours.)

In State v. Merchants' National Bank, supra, the state warrants in question were deposited by the party who had stolen them and had forged the indorsement of the payee upon them, to his own account in the Exchange Bank, which thereupon indorsed them in the usual manner and presented them through the clearing house to the Merchants' Bank for payment, which thereupon paid them to the clearing house and presented them to the state treasurer for redemption. The trial court had held that both banks were liable to the state, but that the Exchange Bank was primarily liable, and that, if the Merchants' Bank were obliged to pay, it would be entitled to recover from the Exchange Bank. The court said:

> "We agree with the trial court. The Exchange Bank simply cashed or purchased these voucher warrants. Under familiar principles of law, when that bank transmitted them, with its indorsement, to the Merchants' Bank, it guaranteed that all previous indorsements were genuine and that it had good title to the paper. 3 Ruling Case Law, 1148; G. S. 1913, § 5877; Youngberg v. Nelson, 51 Minn. 172, 53 N. W. 629, 38 Am. St. Rep. 497; Brown v. Ames, 59 Minn. 476, 482, 61 N. W. 448."

We are of the opinion that appellant bank was liable to respondent bank under its clearing house indorsement.

As to recovery upon the ground of mistake, we are of the opinion that, if this were the sole ground upon which the appellant could rely, it would be compelled to bear its loss. Inasmuch as we have determined that it is entitled to an affirmance of the judgment upon the ground just discussed, no useful purpose would be subserved by a lengthy discussion of the principles and authorities relating to recovery by reason of mistake. Suffice it to say that this subject is discussed at great length in the opinion in Crocker-Woolworth National Bank v. Nevada Bank, supra, and also in the case of First National Bank v. U. S. National Bank, supra, and it was held in the former, under the facts which have already been adverted to, that, where equally innocent parties have dealt with one another under a mistake, the burden of loss resulting from the common error will ordinarily be left where the parties themselves have placed it, and that recovery can only be had where in equity and good conscience the defendant should be called upon to refund.

[13] With respect to the contention that the indorsement in question must be construed as a "missing indorsement," it is hard to conceive by what mental legerdemain an indorsement, however defective, which is actually written upon a check, can be classed as an indorsement which is missing. Two classes of cases are contemplated by the clearing house rule in question: First, those in which an indorsement actually on a check is considered in regard to (a) its validity, (b) its regularity, (c) its sufficiency; and, second, those in which a necessary indorsement is missing. A "valid" indorsement means one "having binding force; authority by law; legally efficacious." Anderson; Bouvier. One lacking these elements is still an indorsement, but is an invalid indorsement. "Regular" means duly authorized. Webster. An indorsement which is not duly authorized—a forged instrument—may not be regular, or operative (section 3104, Civ. Code), but it is still an indorsement. "Sufficient" means competent or adequate. An indorsement lacking the initials or first name of the payee or his title, such as "treasurer" or "trustee" would be insufficient, but it would still be an indorsement. It is obvious that the clearing house rule, in so far as it related to missing indorsements, had reference, not to those cases in which an indorsement on a check was invalid, irregular, or insufficient, but those in which it was not there at all.

We have carefully examined and considered all of the contentions urged by appellant, and, while we have omitted discussion of some of them, we feel that the legal principles involved therein have been sufficiently discussed hereinabove.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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98 Cal. App. 579

PODESTA et al. v. DELUCCHI et al.

(Civ. 6819.)

District Court of Appeal, First District, Division 2, California. April 29, 1929.

Appeal and error ⚿643(4)—Delay of nearly year after settlement of bill of exceptions before moving for order for diminution of record required denial of motion.

Delay of nearly one year after settlement of bill of exceptions and filing of briefs on appeal before moving for order for diminution of record required a denial of motion, regardless of whether appellate court had jurisdiction to amend and supplement a bill of exceptions settled by trial court.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Anthony Podesta and another against Eugene Delucchi and others, copartners doing business under the name and style of the Stockton City Realty Company, and others. Judgment for defendants, and plaintiffs appeal. On motion for diminution of record. Motion denied.

A. D. Schaffer, of San Francisco, for appellants.

Gumpert & Mazzera, of Stockton, for respondents.

NOURSE, Acting P. J. The appellants have moved for an order for diminution of the record asking that they be permitted to file a modified bill of exceptions for the purpose of including therein instructions requested by either party to the action whether given or not given and all instructions given by the trial court of its own motion.

The appeal was taken on a bill of exceptions which was settled after hearing of proposed amendments thereto on April 20, 1928. At the time of the settlement of this bill the instructions which are now sought to be included were expressly omitted and the parties stipulated that the appeal could be heard upon the bill of exceptions as settled. The motion for diminution of the record was made on April 17, 1929, nearly one year after the settlement of the bill of exceptions and after the appellants' and respondents' briefs had both been filed on this appeal. In opposition to the motion respondents insist that appellants are guilty of laches in making the motion and in their failure to apply to the trial court for relief in the settlement of the bill of exceptions. Without assuming that this court would have any jurisdiction to amend and supplement a bill of exceptions settled by the trial court, we are satisfied that the motion must be denied because of the unexcused delay of the appellants in seeking this relief.

Motion is denied.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

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98 Cal. App. 598

CAMBOU et ux. v. MARTY et al.★

(Civ. 6752.)

District Court of Appeal, First District, Division 1, California. April 30, 1929.

Rehearing Denied May 29, 1929. Hearing Denied by Supreme Court June 27, 1929.

1. Automobiles 🔑155—Visitor at plaintiff's home who ran over child with automobile was not a trespasser.

Defendant, visiting plaintiffs' family home as a relation and friend on a neighborly errand, and who ran over plaintiffs' child with his automobile, was not a trespasser.

2. Automobiles 🔑244(3)—Evidence supported finding that defendant running over plaintiffs' child with automobile as he was leaving their home was negligent.

Evidence *held* sufficient to justify finding that defendant, who was relative and friend of plaintiffs and had seen child playing around yard, and who ran over child with his automobile as he was leaving plaintiffs' home after visit, was guilty of negligence.

3. Automobiles 🔑155—Where defendant visiting plaintiffs' home knew child was playing about yard, he had duty to use care before starting automobile.

Where defendant visiting plaintiffs' home on errand saw child playing about yard, it became his duty to use vigilance and care before starting his automobile.

4. Death 🔑103(3)—Mother held not negligent as matter of law in permitting child, struck by defendant's automobile when he was leaving yard, to play around yard.

Where plaintiffs' child was struck by automobile of defendant, a relative and friend, as he was leaving yard, mother was not guilty of contributory negligence as matter of law in permitting child to play around yard.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action for damages for the death of a minor child by John Cambou and wife against J. Marty and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Alfred C. Skaife and H. W. B. Smith, both of San Francisco, and L. R. Lambert, of Santa Rosa, for appellants.

W. F. Cowan, of Santa Rosa, for respondents.

PARKER, Justice pro tem. This is an appeal by defendants from a judgment in favor of plaintiffs in an action for damages. Plaintiffs are husband and wife, and the cause upon which the action rests is the negligence of defendants through and as a result of which a minor child of plaintiffs was killed. No questions are presented which involve the joinder of parties or the amount of the judgment. The facts are not in dispute. The appellants' contentions are twofold. First, they contend that there is no negligence chargeable to defendants or either of them; and, secondly, that if negligence is chargeable to them, the negligence of plaintiffs, proximately contributing to the injury of the child, is sufficient to preclude a recovery. It thus becomes necessary to review the facts. Plaintiffs are husband and wife and were the parents of two minor children. One of these children was a boy named Ernest, aged seven, and the other was a boy named Jackie, age about eighteen months at the time of his death. The plaintiffs lived upon a small ranch in Sonoma county. Incidental to or in conjunction with the ranch, the plaintiffs, at certain seasons of the year, maintained a small resort and catered to summer guests. It is admitted, however, that at the time in question here the season was ended and that there were no guests on the ranch, nor was the ranch in any sense or manner open to or soliciting public patronage. The ranch house is situated some short distance from the main road and is reached only by leaving that road and entering upon the lands of plaintiffs. The defendants Marty are father and son, Seraphin being the son. It may be here noted that the Cambou family and the Marty family are close relatives, Marty, Sr., being the uncle of the older Cambou. Nothing in the record discloses any breach in the friendly contact incident to the relationship. The home of each was always

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★Rehearing denied. Hearing denied by Supreme Court.

open to the other and the various members of the respective families were on terms of social intimacy. At about 8 a. m. on the morning in question the defendant Seraphin Marty arrived at the Cambou home inquiring for Mr. Cambou. He had come in an automobile described as a two-seated car with the top up. He drove up to the house and parked his car in the driveway and alighted. It is to be noted that the ranch house was built on or into a side hill and the approach thereto was up an incline. The defendant Marty left his car parked in this incline, the front of the car facing the exit from the premises and likewise facing down the hill. The gradient of the incline was such that the car could be thrown in gear and started by its own weight, when the brakes were released. Before alighting defendant Marty put on the brakes and threw the car into reverse gear, with the engine off. He then entered the house, where he found Mrs. Cambou in the kitchen with the baby Jackie. He inquired of her concerning the whereabouts of her husband. She told him the husband was out milking the cow or feeding the chickens, whereupon Marty left in search of Mr. Cambou. It may be noted here that at that time the baby Jackie was dressed and in the presence of Marty and within his hearing told the mother that he (Jackie) was going outside to get an egg. Marty, after leaving the house, went in search of the husband. Finding him and disclosing that the purpose of his visit was to secure the loan of one or two grape pickers, the defendant Marty started back for his automobile. It is undisputed that the errand or business of Marty on the premises was urgent and that great haste characterized his every movement. In his departure from the place where he had conversed with the husband he ran rapidly, as he states, "going fast but not like a wild man." He jumped hurriedly into the auto, and releasing the brakes and disengaging the reverse gear, the auto started up right away, coasting down. The lad had gone but a short distance when he was attracted by the screaming of the other Cambou child, Ernest, and looking back he noticed the baby, Jackie, sitting in the road. Without further elaborating here, he had run over the child, and from the injuries inflicted the child, within a few days, died.

There are many questions of law hinted at which are said to control the liabilities of the parties hereto. At the outset some argument is made as to the character of the premises, with relation to their being public or private, that from a finding of the said character we might definitely fix the status of Marty, whether as an invitee, trespasser, licensee, or guest. We may pass these questions with little discussion. It is not claimed that the premises were such as to constitute the driveway a public highway, and all sides seem willing to concede that the said driveway and the premises in and about the house were private premises constituting the yard and home of Cambou's family. Nor is the status of defendant Marty seriously questioned. As a relation and friend on a neighborly errand he was invited at all times and welcomed. Quoting from Cooley on Torts, p. 303: "Every man, by implication invites others to come to his house as they may have proper occasion either of business or courtesy or information, etc. Custom must determine in these cases what the limit is of that implied invitation."

[1-3] Without developing this thought we may at once conclude that Marty was not a trespasser. In fact, without attempting to label his technical status, he was there, charged with no legal or other restrictions other than that he should exercise ordinary care. The trial court found as a fact that defendant Marty did not exercise ordinary care. We are thus brought to the question of the sufficiency of the evidence to justify the finding. Negligence remains, as it has always been, relative to time, place, and circumstances. Text-writers are at a loss to give any fast and rigid definition of the term, and the courts have abandoned any attempt to frame such a definition. As new conditions develop, new situations arise. Custom and habit build up practices universally recognized as prudent. Some few years ago it would have been deemed negligent per se for a person to attempt to drive a machine claiming that it operated through an auto power. In fact, negligence would have been a mild term. Therefore, in determining the nature of defendant's conduct in the instant case we confine ourselves to the facts before us. In addition to the general facts as stated, we have other facts to consider and which aid our inquiry. The defendant Marty had been a frequent visitor at the Cambou home. He knew the family and the individual members thereof. He knew that the baby, Jackie, was a child of walking age. On different occasions he had seen him playing around the yard and the premises, and on some occasions had seen him playing around the place where the automobile had been left standing. In fact, he had seen the baby playing out in the yard the day before this fatal occurrence. There is also the additional fact, testified to by defendant Marty, that if he had looked he could have seen the baby, but that he did not look before starting the auto in motion. Another significant fact disclosed from the testimony of the defendant Marty is that when the boy Ernest shouted to him, to use his own language, "I stopped the machine right away and I figures, I said to myself, I wonder if Jackie was around there playing." We conclude from all of these facts that the trial court's finding of negligence was supported. As is urged, it may be what counsel is pleased to term "a close case." The fact is that defendant Marty forgot all about the baby. In his haste to return home he had in mind noth-

ing but a hurried exit. Whatever might be the general rule concerning the caution or degree of care required in and about public places where children are known to congregate, the situation here is different. From all of the facts the defendant here was charged with a duty while in these premises, and that duty was to be ever watchful. His own admission that if he had looked he could have seen the child indicates that the child was not under the car or concealed. It would have taken but a second or two to have looked around the car. Any reasonable man can be charged with knowledge that a child is apt to be found at any place about the family yard. Charged with that knowledge it becomes his duty to use vigilance and care before setting in motion a dangerous instrumentality in that locality. Failing in the duty he is negligent. We cannot concede that it is a harsh burden to place upon a visitor at a family home. Where a life may be jeopardized by a failure to make certain a clear path it surely is not unreasonable, as a matter of law, to insist that ordinary care demands some precaution before starting an automobile. Nor is it unreasonable to include within the required precaution the duty here announced. In the annotation to 44 A. L. R. at page 434, it is said: "The tendency of the later cases would seem to indicate that the courts are requiring a higher degree of care on the part of the operators of automobiles towards children playing on or in proximity to their automobiles, * * * particularly in those cases in which the driver had notice of the children's presence on or about the machine."

[4] At this stage of our economic progress all the best thought is being directed toward child welfare and the promotion of the physical, mental, and moral welfare of the generation to succeed the present. A logical following out of the idea would suggest that in all contact with children a higher standard of care be established as necessary to meet the law's requirement of ordinary care under the circumstances. Concluding the present inquiry, it is obvious that a course of conduct which indicates no care at all and a complete disregard of any caution will not measure up to such a standard or to any standard of ordinary prudence. Coming to the defense of contributory negligence little may be said. The home is a place of refuge, a sanctuary. The yard surrounding is the same. It is the human instinct to segregate from the rest of the world one little spot in which the family may be safe and secure. The chief reason for a home, with its yard, is that there may be such a place. Under all of the circumstances we cannot say, as a matter of law, that it is negligence for a mother to permit a child of the age and strength of the baby Jackie to play around the private yard and walks of her home. The defendant Marty was a relative and friend, and surely his presence upon the premises did not furnish a source of danger which the mother, in the exercise of ordinary care, was charged to anticipate and guard against. As stated hereinbefore, no other issues are presented. The liability of the older Marty is admitted under the conclusions here reached.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 563

FORISTIERE v. ALONGE. (Civ. 6528.)

District Court of Appeal, First District, Division 1, California. April 27, 1929.

1. Limitation of actions 🔑151(2)—Acknowledgment of debt, made after statute has run, gives new cause of action for which old debt is consideration (Code Civ. Proc. § 360).

Acknowledgment of debt, made after statute of limitations has run, gives new cause of action for which old debt is consideration, under Code Civ. Proc. § 360, while acknowledgment or promise, made before statute has run, vitalizes old debt for another statutory period, dating from the acknowledgment.

2. Limitation of actions 🔑148(2)—Debtor's promise to pay, taking debt out of operation of statute, may be implied from written acknowledgment, which treats indebtedness as subsisting (Code Civ. Proc. § 360).

There need be no express promise to pay to constitute written acknowledgment of debt necessary to take case out of operation of statute of limitations, under Code Civ. Proc. § 360, provided the debtor treats the indebtedness as subsisting, and as one which he is liable and willing to pay; promise to pay being implied from such acknowledgment.

3. Limitation of actions 🔑149(1)—To take debt out of statute, acknowledgment thereof must directly and unconditionally admit debt (Code Civ. Proc. § 360).

Written acknowledgment of indebtedness, to take debt out of statute of limitations, under Code Civ. Proc. § 360, must be direct, distinct, unqualified, and unconditional admission of debt, which party is liable and willing to pay.

4. Limitation of actions 🔑149(1)—Cross-complaint, alleging that defendant had made payment on mortgage and had offered to pay debt if proper credit was given, held not to take indebtedness referred to out of statute (Code Civ. Proc. § 360).

In action for foreclosure of mortgage, cross-complaint by mortgagors against codefendant holding another mortgage, which alleged that they had paid certain sum thereon, which codefendant refused to apply on mortgage, and that defendant had offered to pay the balance due, if credited with the sum heretofore paid, but that codefendant refused to accept payment, *held* not to constitute valid acknowledgment, taking such debt out of operation of statute of limitations, under Code Civ. Proc. § 360, because not evidencing direct, distinct, unqualified, and unconditional willingness to pay.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by A. Foristiere against Paolo Alonge. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Kauke, of Fresno, for appellant.

George G. Graham, of Fresno, for respondent.

PER CURIAM. The defendant, Paolo Alonge, appeals from an adverse judgment in an action to quiet title, the real purpose of which was to cancel a mortgage standing of record against the property in defendant's name, and which the plaintiff Foristiere, claimed was barred by the statute of limitations at the time he acquired the property.

It appears that plaintiff's predecessors in interest, Santo Catania and wife, during their ownership of the property, incumbered the same with two mortgages, the first of which was given to the Bank of Italy. The second was given to the defendant Alonge to secure the payment of a note for $2,000, both the note and mortgage being made payable on February 5, 1921, and the mortgage being recorded on February 10, 1920. The mortgage debt was never paid, and consequently the mortgage was never released or satisfied of record. Several months prior to the running of the statute of limitations against Alonge's mortgage, the Bank of Italy brought suit to foreclose its mortgage, Catania, his wife, and Alonge being made parties to that suit. In September, 1924, which was approximately five months before the running of the statute against the Alonge mortgage, Catania and his wife answered the foreclosure complaint by admitting the allegations thereof, and added a cross-complaint, which was verified by Catania and was served personally on Alonge before filing. Alonge now claims that the contents of this cross-complaint constituted a statutory acknowledgment of the debt (Code Civ. Proc. § 360), which operated to extend the period of the statute of limitations beyond the date on which plaintiff acquired the property. It further appears that the cross-complaint was later dismissed by the court on motion of the Bank of Italy and on October 21, 1925, a decree of foreclosure was entered and the property sold at commissioner's sale to the Bank of Italy; that during the pendency of the foreclosure action Mrs. Catania conveyed her interest in the property by quitclaim deed to her husband and on March 1, 1926, before the period of time allowed by law for the redemption of the property had expired, Foristiere acquired the property from Catania by quitclaim deed. Two weeks later he commenced this suit to quiet title, and on September 4, 1926, Catania redeemed the property from the foreclosure sale by paying to the commissioner the amount due the Bank of Italy.

The evidence further shows that plaintiff knew of the existence of Alonge's unpaid mortgage at the time he acquired the property. The cross-complaint reads as follows: "Comes now the above-named defendants Santo Catania and Elizabetta Catania, his wife, and for a cross-complaint against the defendants Paolo Alonge and John Doe and Mary Roe and Annie Roe, allege and state that on or about the 1st day of March, 1920, these cross-complainants executed and delivered to the said Paolo Alonge and others, their said mortgage on the real estate mentioned in Plaintiff's complaint, to wit: Lots 31 and 32 in block 14 of the town, now city, of Fresno, California, as per map thereof on file, to secure the payment of $2,000 principal and interest thereon at the rate of 7 per cent. until paid. That these cross-complainants have paid to the said Paolo Alonge the sum of $675, which should be applied upon said mortgage obligation, and the said Paolo Alonge refuses so to do. These cross-complainants have heretofore offered to pay the balance due, if credited the aforesaid sum of $675 heretofore paid, and the said Paolo Alonge refused to accept said payment, or to settle said accounts, or to relieve said premises from the burden of the said second mortgage and all of which casts a cloud on the title of the cross-complainants in and to said premises, and prevents the said cross-complainants from obtaining money with which to pay the plaintiff in this case. Wherefore these cross-complainants pray that said Paolo Alonge, or the person holding said second mortgage, be cited to appear in this court, and that this court adjudge the amounts that may be due said Paolo Alonge by virtue of said mortgage and the amount the cross-complainants shall pay, and upon payment thereof shall cause said premises to be released from said second mortgage, and that this court grant to these cross-complainants such further relief as equity and justice of this case may warrant."

[1, 2] Section 360 of the Code of Civil Procedure provides: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby." And in construing said section it was held in Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145, that "the distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same; from such an acknowledgment

the law implies a promise to pay. Code Civ. Proc., sec. 360; McCormick v. Brown, 36 Cal. 180, 184, 185 [95 Am. Dec. 170]; Biddel v. Brizzolara, 56 Cal. 374; Tuggle v. Minor, 76 Cal. 96 [18 P. 131]; Wood on Limitations, §§ 68, 85."

The only distinction between an acknowledgment of a debt before and one after the statute has run, say the courts, is that an acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period, dating from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action, for which the old debt is a consideration. Southern Pacific Co. v. Prosser, supra; Rodgers v. Byers, 127 Cal. 528, 60 P. 42. In either case there need be no express promise to pay, it being held sufficient if the writing shows that the debtor treats the indebtedness as subsisting and as one which he is liable and willing to pay; and from such acknowledgment the law implies a promise to pay. Foster v. Bowles, 138 Cal. 346, 71 P. 494, 649; Searles v. Gonzalez, 191 Cal. 426, 216 P. 1003, 28 A. L. R. 78; Concannon v. Smith, 134 Cal. 14, 66 P. 40; First National Bank of Park Rapids v. Pray (Cal. App.) 260 P. 933.

[3] In the case of Commercial Mutual Ins. Co. v. Brett, 44 Barb. (N. Y.) 489, some of the earlier decisions bearing upon the essential element of a willingness to pay are summarized as follows: "In Van Keuren v. Parmelee (2 Comst. [N. Y.] 523 [51 Am. Dec. 322]) the same rule was recognized. 'There must at the least be a plain admission that the debt is due, and that the party is willing to pay it.' It was also assented to in Shoemaker v. Benedict, 1 Kern. [11 N. Y.] 176 [62 Am. Dec. 95], where it was said 'that, to continue or revive the debt, there must be an express promise to pay, or an acknowledgment of the existence of the debt, with the admission or recognition of an existing liability to pay it, from which a new promise may be inferred.' * * * From these and many other cases, which might be cited, I think it is clear that an acknowledgment to be sufficient must not only be an admission of the existence of the debt, but in addition thereto a recognition of a liability to pay, in such a mode as well authorize the inference of a new promise."

In any event, however, as held in McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170, "the acknowledgment referred to in the statute is not such as may be deduced by inference from a promise or an offer to pay a part of the debt, or to pay the whole debt in a particular manner, or at a specified time, or upon specified conditions. The acknowledgment, say the cases, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay." The doctrine of the foregoing case has been approved in the later cases of Clunin v. First Federal Trust Co., 189 Cal. 248, 207 P. 1009; Rodgers v. Byers, supra; Southern Pacific Co. v. Prosser, supra.

[4] After analyzing the contents of the cross-complaint in question in the light of the foregoing legal rules, we have reached the conclusion that it amounts to no more than a qualified and conditional admission of the debt, and a willingness to pay only that particular balance which the Catanias claimed was justly due, and therefore is not effective as a legal acknowledgment. In the fore part of the cross-complaint it is distinctly stated that they have "hereto offered" to pay the debt provided they were given credit for $675, which appellant refused to do; and the latter part of the cross-complaint fairly implies only that they were still willing to pay the balance provided they were allowed the credit of $675. Therefore, even though it be conceded that the statute may be tolled by an acknowledgment embodied in a pleading, there is not present here the essential element of a direct distinct, unqualified, and unconditional willingness to pay, which the law demands in order to constitute a valid acknowledgment. McCormick v. Brown, supra; Clunin v. First Federal Trust Co., supra.

The judgment is affirmed.

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98 Cal. App. 629

LANDTBOM v. BOARD OF FIRE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6342.)

District Court of Appeal, First District, Division 2, California. May 3, 1929.

1. **Municipal corporations ⚷198(4)—One challenging sufficiency of evidence to warrant his dismissal as fireman had burden of producing all evidence.**

Burden was on one challenging sufficiency of evidence, taken before board of fire commissioners, to warrant order dismissing him from fire department, to produce all the evidence, in order that trial court might see wherein it was insufficient.

2. **Municipal corporations ⚷198(4)—Court cannot say that fire commissioners acted irregularly in dismissing fireman not applying for further return to writ of review including all evidence (Code Civ. Proc. §§ 1074, 1075).**

Where one applying for writ of review to review board of fire commissioners' order dismissing him from fire department failed to apply for further return, as authorized by Code Civ. Proc. § 1075, when return, showing on its face that it did not include all evidence taken by board, was made, record did not show affirmatively that any element of charge was not proved by competent evidence, and court cannot say that board did not regularly pursue its authority under section 1074.

3. Municipal corporations ⚷198(4)—Appellate court cannot assume, from fire commissioners' return to writ for review of order dismissing fireman, that competent evidence not shown thereby was not introduced.

Where board of fire commissioners' return to writ of review to review its order dismissing member of fire department showed on its face that it did not include all evidence taken by it, District Court of Appeal may not assume therefrom that other competent evidence than that shown thereby was not introduced.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Application by Arthur J. Landtbom for a writ of review to review an order of the Board of Fire Commissioners of the City and County of San Francisco dismissing applicant from the fire department. Judgment for applicant, and defendants appeal. Reversed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellants.

William A. Kelly, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff was a member of the fire department of San Francisco. He was served with written charges of misconduct and with a notice of the trial of the charges before the defendant board. A trial was had. Witnesses were called, sworn, and examined, and later the defendant board rendered its decision, finding the plaintiff guilty as charged, and entered an order dismissing him from the department. On September 24, 1917, the plaintiff applied to the trial court for a writ of review. A return on said writ was not filed until August 30, 1927. Shortly after the return was filed the plaintiff made a motion for judgment based on the return. The motion was granted, and a judgment in favor of the plaintiff was entered. From that judgment the defendants have appealed, and have brought up a typewritten record.

[1-3] The plaintiff claims that the charge placed against him was not proved by competent evidence. The return purports to contain a copy of "the journal of the proceedings of the board of fire commissioners," which purports to contain some of the evidence taken by the defendant board, but it likewise appears that it does not contain all of the evidence. When the return was made, it showed on its face that it did not include all of the evidence. When that fact appeared, the plaintiff was at liberty to apply for "a further return." Code Civ. Proc. § 1075. If he had done so, the question would then have arisen as to whether the evidence taken below had been preserved. If it had been, "a further return" would have been ordered. If it had not been preserved, one of two possible situations would have been presented. If "jurisdictional facts" were involved, "a further return" would have been ordered, for a duty rests on the respondent board at all times so to keep its records as to show the existence of "jurisdictional facts." Stumpf v. Board of Supervisors, 131 Cal. 364, 367, 63 P. 663, 82 Am. St. Rep. 350.

Again, if the evidence taken before the defendant board was not preserved and if it involved the guilt or innocence of the petitioner, that is, the fact in issue, the trial court would, in its discretion, have had the power to deny the motion. C. P. R. Co. v. Placer County, 32 Cal. 582, 584; C. P. R. Co. v. Placer County, 34 Cal. 352, 361. When the plaintiff challenged the sufficiency of the evidence taken before the respondent board, the burden rested on him to produce all of the evidence, that the trial court might, from an inspection thereof, see wherein, if at all, it was insufficient. Roe v. Superior Court of San Francisco, 60 Cal. 93; Hagenmeyer v. Mendocino County, 82 Cal. 214, 218, 23 P. 14; Humboldt County v. Dinsmore, 75 Cal. 604, 607, 608, 17 P. 710; Farmers' & Merchants' Bank v. Board of Equalization of Los Angeles, 97 Cal. 318, 325, 32 P. 312; Johnston v. Board of Supervisors, 104 Cal. 390, 394, 37 P. 1046; Imperial Water Co. v. Supervisors of Imperial County, 162 Cal. 14, 25, 120 P. 780. As the record stands it does not show affirmatively that any element of the charge was not proved by competent evidence. Therefore it cannot be said that the respondent board did not regularly pursue its authority. Code Civ. Proc. § 1074. If this is not the rule, then actions in certiorari may be brought within the period of the statute of limitations to review any determination of inferior boards or tribunals and in 95 per cent. of the cases the determination of such inferior board or tribunal must be set aside, because no law requires the evidence to be preserved, and, in fact, it has not been preserved.

The plaintiff asserts that the charges against him were not proved by competent evidence. The return does not show the fact. The most that can be said is that the return shows some competent evidence, and does not show an absolute want of competent evidence. We may not assume, from the return as made, that other competent evidence was not introduced. Hagenmeyer v. Mendocino County, 82 Cal. 214, 218, 23 P. 14.

The defendant board cites Roberts v. Police Court, 185 Cal. 65, 195 P. 1053, and contends that, even though the evidence was insufficient, there is no showing that the defendant board exceeded its jurisdiction. The plaintiff cites Garvin v. Chambers, 195 Cal. 212, 232 P. 696, as laying down a different rule. We do not so read that case. The facts as stated in the majority opinion were these: Garvin, a patrolman, was suspended on a certain charge; he took an appeal from that order;

while that appeal was pending, his chief withdrew the suspension order, and filed an order of discharge on a different ground, and based on facts occurring subsequently; of these latter transactions Garvin had no notice. The defendant board held no hearing of the charges, but entered its judgment affirming the *order of discharge*—an order which Garvin had not appealed from, and on which he had had no hearing. The court held the defendant board exceeded its jurisdiction. Many similar cases could be cited based on the leading case of People ex rel. Whitney v. Board of Delegates of San Francisco Fire Dept., 14 Cal. 479, 503. The latest is probably Baar v. Smith, 201 Cal. 87, 100, 255 P. 827. But it is clear that the facts in the Garvin Case were quite different from the facts in the instant case.

For the reasons stated above, the judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

LOBB v. BROWN et al. (Civ. 6562.)★

District Court of Appeal, First District, Division 2, California. April 30, 1929.

Hearing Granted by Supreme Court May 29, 1929.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

On rehearing. Application for rehearing denied, but opinion modified.

For former opinion, see 276 P. 583.

Hadsell, Sweet & Ingalls, of San Francisco, and Earl Warren and Ralph E. Hoyt, both of Oakland, for appellant.

Byrne & Lamson and Knight, Boland & Christin, all of San Francisco, for respondents.

PER CURIAM. The petitions for rehearing in the above-entitled cause are denied. In directing judgment against the respondent Herbert Brown we did so upon the grounds that the findings of the trial court demanded a judgment in favor of the appellant as against that respondent. Such did not however, preclude the right of this respondent to appeal from the judgment so entered upon new grounds within the rule of Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876, and Lambert v. Bates, 148 Cal. 146, 82 P. 767.

Because of the criticism directed to the statement of facts appearing in the original opinion, we have examined the record and the evidence with additional care. The activities of respondent Frank Brown are accurately stated in the opinion, with the exception that we should have said that he procured and supplied a witness (rather than witnesses) for the contestants. As to the activities of Mr. J. S. Lamson, the attorney for Herbert and Frank Brown during the course of the contest of the will, we were in error in referring to his activities as "encouragement and co-operation with Mr. McWilliams," attorney for contestants, and also in stating that Mr. Lamson aided Mr. McWilliams "in procuring witnesses in support of the contest." But the evidence shows that he was in attendance at the counsel table with Mr. McWilliams during the greater portion of the trial and that, as he testified in this case, he "conferred" with Mr. McWilliams during the examination of the witnesses and aided him in the search for documents which were offered in evidence. The statement of facts appearing in the opinion is accordingly amended as herein indicated and the sentence appearing in the first paragraph on page 589 of the printed opinion (276 P.), and reading as follows, "He admitted in his answer that the defendants (himself and Herbert Brown) paid all the costs and attorneys' fees of the contestants in the contest," is stricken out.

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98 Cal. App. 637

MOCH v. SAVOY et al. (Civ. 5632.)

District Court of Appeal, Second District, Division 1, California. May 3, 1929.

Appeal and error ⟹1010(1)—Findings of trial court supported by evidence will not be disturbed.

Where evidence contained in record is sufficient to support findings of trial court, they will not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Franklin A. Griffin, Judge.

Action by Lew Moch against H. A. Savoy and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Henry E. Carter, of Los Angeles, for appellant.

P. C. Rentfro, of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Action was brought to recover judgment for money loaned and money had and received by the defendant for the use and benefit of the plaintiff, arising out of the sale and financing of automobile trucks. Defendant denied the indebtedness and filed a counterclaim for the construction of a building for the plaintiff. Trial was had without a jury, and judgment was granted for plaintiff in the sum of $2,668.38 and against defendant on his counterclaim. Defendant appeals from the judgment.

Defendant was engaged in the business of selling trucks, and plaintiff financed the deals

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★Hearing granted. 281 P. 1010.

by loaning money to defendant on the sale contracts as collateral. It was stipulated at the trial that at the commencement of the transaction defendant was indebted to the plaintiff in the sum of $2,090. As security for this indebtedness three certain contracts were turned over to the plaintiff by the defendant. Plaintiff testified that these contracts were never assigned and none of the contracts received in evidence showed an assignment thereof, although there were blank forms attached to said contracts for that purpose.

Appellant does not raise any question on the denial of the items in the counterclaim, but contends that the judgment is erroneous in failing to allow certain credits for payments received by plaintiff on the sale contracts of three certain trucks. We have examined the evidence with respect to the credits made for payments and believe the evidence contained in the record to be sufficient to support the findings of the trial court. In such cases the findings will not be disturbed. 2 Cal. Jur. 918. No good purpose would be served in discussing these items in detail. While it is true that defendant Savoy testified that he delivered a truck to one Guthroe and that Guthroe told defendant he was paying $400 for the truck, yet we find no direct evidence that plaintiff ever received $400 or any other sum from Guthroe, and the payment is not included in plaintiff's testimony. Plaintiff testified from his book accounts, while defendant relied on his memory. Furthermore, the defendant testified that plaintiff received only $1,200 on that contract, and we find that defendant is given credit by plaintiff for payments on the contract of $564 by Campbell and $650 by Walker, making a total of $1,214.

Appellant assigns as error the conduct of the trial judge as showing prejudice against the witnesses and attorney for the defendant. Upon examination of the record we find no such prejudice to be shown by the trial court.

Judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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98 Cal. App. 633

In re WRIGHT'S ESTATE. (Civ. 6669.)

District Court of Appeal, First District, Division 2, California. May 3, 1929.

1. Statutes 🔑225—Statutes in pari materia must be read and construed together, each referring to and supplementing the other, though passed at different times.

All statutes which relate to the same general subject-matter must be read and construed together as one act, each referring to and supplementing the other, though they were passed at different times.

2. Homestead 🔑2—Descent and devolution of homestead is controlled by law in force at death of spouse whose property was impressed with homestead character.

Law in force at death of spouse whose property was impressed with homestead character controls descent and devolution of title thereto.

3. Homestead 🔑134—Final decree of divorce having been granted to husband, there was no survivor entitled to homestead on husband's death (Code Civ. Proc. § 1474; Civ. Code, § 1265).

Where husband was granted final decree of divorce from his wife, on his death there was no survivor, within section 1474, Code Civ. Proc., controlling devolution of title to homestead where there is a survivor, and within that part of section 1265, Civ. Code, providing that homestead selected from separate property of spouse making selection, vests in survivor.

4. Homestead 🔑142(1)—Minor children of divorced husband on his death were entitled to have homestead set apart to them for limited period, not exceeding minority (Civ. Code, § 1265).

Where married man declared homestead on his separate property, procured final decree of divorce, and later died, leaving two adult and three minor children, and inventory showed homestead among assets of estate, minor children were entitled to have homestead set apart to them for limited period, not to exceed period of minority, under Civ. Code, § 1265, providing that, on death of owner, homestead shall go to heirs or devisees, subject to power of superior court to assign same for limited period to family of decedent.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Petition by Clara C. Wright, as guardian of the minor children of Oscar J. Wright, deceased, to set aside homestead. From an order granting petition, the administrator of Oscar J. Wright, deceased, appeals. Reversed.

B. M. Benson, of Fresno, for appellant.

Alva E. Snow and Lawrence W. Young, both of Fresno, for respondent.

STURTEVANT, J. Clara C. Wright, as guardian of three minors, filed a petition asking that a homestead be set aside in favor of the decedent's minor children. The trial court made an order granting the petition as prayed for and from that order the administrator has appealed and has brought up the judgment roll.

The appellant states that the sole question he seeks to have reviewed is this: "When a married man declares a homestead on his separate property, procures a final decree of divorce from his wife, dies, leaving two adult and three minor heirs, and the inventory shows the homesteaded property among the assets of his estate, should the court in setting apart a homestead for the minor children grant the property to said minors in fee or merely for a limited number of years?"

The real estate involved is lot 5, block 8, of the Alta Vista tract in the city of Fresno. It was the separate property of the decedent. On the 21st day of February, 1927, the decedent, his wife and four minor children were residing on that property and on said date the decedent executed a declaration of homestead and caused it to be recorded. One of the minor children attained her majority on the 23d day of February, 1927, while a resident of this state. The other minor children, on the date the decree was made, were respectively nine years, seven years, and five years of age. On the 28th day of March, 1928, a final decree of divorce was entered dissolving the bonds of matrimony theretofore existing between Oscar J. Wright and his wife. The record does not disclose that in the divorce proceeding any order was made or was not made regarding the homestead. On September 3, 1928, Oscar J. Wright died, and thereafter an adult son was appointed administrator with the will annexed of the estate of the deceased. The record does not disclose what provisions, if any, were contained in the will regarding the disposal of the homestead.

[1, 2] In her petition the guardian set forth the foregoing facts and prayed for an order that the homestead be set aside in fee for the minor children. The trial court ordered judgment as prayed for. The respondent takes the position that the law pertinent to the subject of the quantum of the estate to be taken under such an order is contained in section 1465 of the Code of Civil Procedure. She argues that section 1468 is to be read in connection therewith, but that it contains nothing that is pertinent to the facts of this case. Her contentions are apparently correct as far as they go, but there are other provisions of the statute which must also be taken into consideration. "In accordance with the principle that a statute is construed in connection with and as a part of the body of legislation upon the general subject, it is a settled rule that all statutes which relate to the same general subject-matter—briefly called statutes in pari materia—must be read and construed together, as one act, each referring to and supplementing the other, though they were passed at different times. * * *" 23 Cal. Jur. 785. That general rule has been followed by the courts when considering homestead rights. Weinreich v. Hensley, 121 Cal. 647, 54 P. 254; Hannon v. Southern Pac. R. Co., 12 Cal. App. 350, 107 P. 335. The latter case holds that the law in force at the death of the spouse, whose property was impressed with the homestead character, controls the descent and devolution of the title. That the trial court had the power to set aside the homestead at least for some period of time for the use of the minors (Code Civ. Proc., § 1465), both parties agree. Whether such order may pass the fee or whether it should be limited is not conceded. It is not contended that any part of section 1468, Code of Civil Procedure, is directly applicable excepting the last sentence. However, that sentence, it has been held, was enacted to cover a case where the decedent had not selected a homestead and the trial court made the selection. In re Schmidt, 94 Cal. 334, 29 P. 714. The reasoning of the court in that case was based on the ground that at that time section 1474 of the Code of Civil Procedure stated the law on the same subject with reference to a homestead selected by the decedent.

[3] Since the rendition of that decision, section 1474, Code of Civil Procedure, and section 1265 of the Civil Code, have both been amended. An examination of section 1474, Code of Civil Procedure, discloses that it is concerned with the devolution of title of the homestead where there is a "survivor" and to homesteads selected by one spouse without the consent of the other. In the instant case a final decree of divorce had been entered and there was no "survivor." Zanone v. Sprague, 16 Cal. App. 333, 116 P. 989. Furthermore, in the instant case it is not claimed that the homestead was selected by the wife without the consent of the decedent. Turning to section 1265, Civil Code, it will be noted that the first part of the section is also concerned with the title of the "survivor." For the reasons just stated, that portion is not applicable. However, the statute continues. "* * * In other cases, upon the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent. * * *"

[4] It seems clear that on the death of Mr. Wright the homestead selected by him from his separate property passed to his "heirs or devisees, subject to the power of the superior court to assign the same for a limited period, * * *" not to exceed the period of the minority of the children. Homesteads are authorized to provide support for the family, but no one of the homestead statutes shows any intention on the part of the Legislature, except during minority, to create any rights in behalf of one child which are greater than the rights of any other child of the decedent. We think it is clear from what we have stated that the order as made was erroneous, and that the order should have designated the period of time for which the minors would have the use of the homestead.

The order is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

Aglae S. CAPUCCIO. Plaintiff and Appellant, v. Arthur J. CAIRE et al. (Defendants Other than Edmund A. Rossi), Defendants and Respondent; Edmund A. Rossi, Defendant and Appellant. (L. A. No. 9165.)

Supreme Court of California. May 3, 1929.

In Bank.

Appeals from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Ambrose Gherini, of San Francisco, Orrin K. McMurray, of Berkeley, and James E. Lyons, of San Francisco, for appellants.

J. F. Bluxome and Frank P. Deering, both of San Francisco, for respondents.

PER CURIAM. The decision heretofore rendered herein (77 Cal. Dec. 571) is hereby set aside by the court of its own motion, and the cause is hereby submitted for decision.

For opinion of May 3, 1929, see 277 P. 475.

207 Cal. 200

CAPUCCIO v. CAIRE et al. (L. A. 9165.)★

Supreme Court of California. May 3, 1929.

Rehearing Denied May 27, 1929.

1. Appeal and error ⚷878(4)—Where notice of motion for counsel fees was held sufficient, but motion was dismissed on other grounds, defendants' objecting to motion could not have sufficiency of notice reviewed on appeal (Code Civ. Proc. § 796).

Where motion for allowance of counsel fees in partition case was objected to on ground that notice of motion was insufficient under Code Civ. Proc. § 796, and that counsel fees were not allowable in case, and trial court held that motion was sufficiently noticed, but dismissed motion on second objection, defendants objecting to motion were not entitled to have Supreme Court determine that first objection to motion for counsel fees should have been sustained.

2. Partition ⚷114(6)—Notice of motion for counsel fees in partition proceeding held sufficient without express reference to Code providing for fees (Code Civ. Proc. § 796).

In action for partition, notice of motion for counsel fees to be paid by parties entitled to share in land divided *held* sufficient without reference to Code Civ. Proc. § 796, which was only provision of law under which plaintiff in partition would be entitled to move court for allowance of counsel fees.

3. Partition ⚷114(2)—Expenditures in partition action for common benefit should be divided among persons entitled to interest in property regardless whether controversies were litigated (Code Civ. Proc. §§ 752–801).

In action for partition under Code Civ. Proc. §§ 752–801, expenditures entailed in maintenance of action for common benefit should be divided among those who shall have been found to be entitled to their respective share and interest in property under section 796, regardless whether or not there had arisen and been litigated controversies over question whether parties to action were cotenants or over their respective interests in properties sought to be divided.

4. Partition ⚷114(4)—Plaintiff in partition could recover counsel fees, though issues were contested (Code Civ. Proc. §§ 752–801).

In action under Code Civ. Proc. §§ 752–801, to partition realty over which parties engaged in prolonged conflict, dismissal of plaintiff's motion for reasonable counsel fees on ground that counsel fees were not allowable under section 796, where issues were contested, was error.

5. Appeal and error ⚷1011(1)—Questions whether property could have been more equitably divided in partition held for trial court, whose decision will not be reversed on conflicting evidence in absence of abuse.

Where court appointed referees to make partition of real property involved in action, and appellants did not challenge ability of referees nor question their integrity and good faith, question whether referees might have made more just and equitable division of certain portions of properties and might have provided for more accessible means of ingress and egress to property were matters primarily for trial court to determine on hearing of report of referees, and, in absence of showing of abuse of discretion on part of court in determining such matters, decision of trial court on conflicting evidence will not be reversed.

In Bank.

Appeals from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Aglae S. Capuccio against Arthur J. Caire and others. From the judgment, plaintiff and defendant Edmund A. Rossi appeal. Reversed and remanded, with directions.

See, also, 189 Cal. 514, 209 P. 367.

Ambrose Gherini, of San Francisco, Orrin K. McMurray, of Berkeley, and James E. Lyons, of San Francisco, for appellants.

J. F. Bluxome, and Frank P. Deering, both of San Francisco, for respondents.

RICHARDS, J. In this matter there are two questions presented by the appellants upon their appeal from the judgment. The first of these involves the correctness of an order of the superior court in and for the county of Santa Barbara dismissing a motion made by the plaintiff in this action for an allowance of counsel fees. The second of these questions involves the correctness of an order of said court denying the appellant Rossi's motion to change and modify the report of the referees in this action. Each of the foregoing orders was made prior to the making and entry of the final judgment herein, and each is sought to be reviewed, and is, we think, reviewable upon the appeal from said final judgment.

The legal troubles and disputes of the parties to this action, in so far as these relate to their contentions upon these and certain former appeals, date their inception from the year 1912, when a certain corporation, known as the Santa Cruz Island Company, and of which the parties to this litigation, or the predecessors of some of them, were the stockholders, failed to pay the corporate license tax due under the provisions of the act of March 20, 1905, and the amendments thereto, and in consequence forfeited its corporate charter. In May, 1912, Edmund A. Rossi, one of the appellants therein, acquired from Amelia A. Rossi her shares and interest as a stockholder in and to the property and assets of said corporation, and thereupon commenced an action against the directors or trustees of said corporation, the purpose of which action was to enjoin the said directors and trustees from continuing to carry on the business of said defunct corporation and to compel them as the trustees thereof to wind up its affairs, pay its debts and distribute its

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★Rehearing denied.

assets among its stockholders according to their respective interests therein. When that action reached this court upon appeal one of the questions presented for determination related to the nature of the interest which the stockholders of such corporation had respectively in its real and personal properties and assets from and after the date of the forfeiture of its corporate charter, and this court, while holding that this question was incidental to the relief which was the main object of the action, nevertheless deemed it necessary to determine that, the corporation having ceased to exist and being thus no longer capable of holding the title of property, such property belonged to the persons who were its stockholders at the time it ceased to be a corporation, subject to the temporary possession of its directors who upon its dissolution had become its trustees for the purpose of winding up the affairs of the former corporation and making distribution of its assets to the real owners thereof, which owners, in so far as the real estate was concerned, were held to have become tenants in common thereof. There were certain other matters determined upon said appeal not necessary now to be referred to, but the orders appealed from were reversed and the cause remanded to the trial court for further proceedings. The decision of this court upon that appeal was handed down on December 16, 1916, and the remittitur therein was duly issued 30 days thereafter (174 Cal. 74, 161 P. 1161). Thereafter, and on August 8, 1917, another action was instituted by said Edmund A. Rossi, which had for its purpose that of obtaining an accounting and distribution among the former stockholders of said corporation according to their respective interests in its property arising from the forfeiture of its corporate charter.

The principal questions presented in that action and upon appeal from the judgment rendered therein related to an attempted revival of said corporation under certain later amendments to the earlier statute under the terms of which it had suffered the forfeiture of its charter. When that action reached this court upon appeal it was held, in conformity with the earlier decision above referred to, that said corporation, having ceased to exist under the state law as it stood when its said charter was forfeited, it could not be the subject of a revival, at least in the absence of a consent on the part of all its former stockholders whose respective rights in and to its properties had become vested when such corporation had ceased to exist. This court in the state of said appeal did not deem it necessary to determine the precise nature of the interests of the former stockholders of said defunct corporation in its properties, but apparently assumed that that question had been correctly decided upon the former appeal. The judgment of attempted revivor was reversed and the cause remanded to the trial court for further proceedings not inconsistent with the views expressed in the opinion. The decision of this court upon that appeal was handed down on July 28, 1921, and in due course became final (186 Cal. 544, 199 P. 1042).

In the meantime, and while this latter action was pending upon appeal in this court and in the month of May, 1918, the plaintiff herein instituted in said superior court the present action, which had for its purpose the partition of the lands of Santa Cruz Island among the parties to this action who, the plaintiff alleged, were tenants in common thereof. Santa Cruz Island, which is the largest of the so-called Channel Islands, is situate off the coast of the county of Santa Barbara, but is included within its boundaries and consists of about 58,800 acres of land; and prior to the dissolution of the aforesaid Santa Cruz Island Company had constituted the real estate holdings of said corporation and the lands and real properties thereof, to which, according to the terms of the first case of Rossi v. Caire, 174 Cal. 74, 161 P. 1161, the former stockholders of said defunct corporation had succeeded as tenants in common thereof. The trial court, upon the issue joined in this latter action, determined that the plaintiff therein was entitled to an interlocutory decree of partition of said real properties among the parties thereto and who constitute the tenants in common thereof in conformity with the earlier decision of this court in the first case of Rossi v. Caire. Upon appeal to this court the judgment of the trial court to that effect was affirmed in an opinion filed on September 14, 1922 (189 Cal. 507, 209 P. 374), and which in due course became final. Upon the going down of the remittitur upon that appeal the trial court proceeded to carry into effect its interlocutory decree through the appointment and activities of certain referees selected to make and to report a proper distribution of said real estate in conformity with the terms of said interlocutory decree in order to enable said court to enter its final decree of partition therein. Upon the return and report of said referees, and during the time when the said court was proceeding to hear such matters as had relation to the form and content of its said final decree of partition, the plaintiff herein gave and duly caused to be served a motion to the effect that on Monday, September 28, 1925, "the plaintiff will move the said court for reasonable counsel fees herein in favor of the plaintiff to be paid by the parties respectively entitled to share in the land divided in proportion to their respective interests. Said motion will be made on the ground that said plaintiff is entitled to such allowance and that it is just and equitable that the same should be made." At the time fixed for the hearing of said motion counsel for the moving parties therein in presenting the same stated to the court that the moving parties to said motion were making the same under the provisions of section 796 of the Code of Civil Procedure.

The parties to said action other than the plaintiff and Edmund A. Rossi, one of the defendants therein, appeared and presented certain objections to the hearing and determination of said motion. The first of these objections related to the form of the notice of said motion, and was based upon the ground that in said notice of motion it had not been expressly stated that said motion was to be a motion "for reasonable counsel fees expended by plaintiff for the common benefit," as required by the provisions of section 796 of the Code of Civil Procedure. The second objection which was urged to the hearing and determination of said motion was the objection that in said action, which purported to be an action for partition, the defendants thereto other than said Edmund A. Rossi had denied and contested the existence of a cotenancy between the parties to said action, and hence that in the presence of and existence of such denial and contest counsel fees of plaintiff in said action were not allowable under the provisions of said section of the Code of Civil Procedure. This objection also went further, to the extent of setting forth that in said action certain other contested issues had been presented and determined, and that as to all contested matters in said action both the plaintiff and defendants had been represented by counsel, and for this additional reason counsel fees were not recoverable to any extent whatever by the plaintiff in the action. Upon the presentation of the foregoing objections to the hearing and determination of said motion the moving parties thereto offered to produce witnesses in support of their motion, but the trial court, while holding that as to the first of said defendants' objections that it was technical and that the plaintiff's motion was sufficiently noticed under the provisions of section 796 of the Code of Civil Procedure and was so understood by counsel for the defendants, refused to permit the production of such or any evidence in support of said motion upon the ground urged in the defendants' aforesaid second objection, and thereupon made and entered its order dismissing said motion; from which order the first of the appeals herein to be considered was taken.

[1, 2] Counsel for the respondents insist that they are entitled to have this court and upon this appeal determine that their first ground of objection to the hearing of the plaintiff's motion for the allowance of counsel fees in this action should have been sustained by the trial court. We find no merit in this insistence for the two-fold reason that the trial court did not base its order for the dismissal of the plaintiff's said motion upon that ground, but, on the contrary, held that the plaintiff's said motion was being sufficiently made under the provisions of section 796 of the Code of Civil Procedure; and also for the reason that we are of the opinion that the trial court was entirely correct in so ruling. This, as we have seen, was an action for partition and the Code of Civil Procedure with special relation to actions of this character has expressly provided that "the costs of partition" of the plaintiff or either of the defendants, "including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein." The foregoing is the only provision of law under which a plaintiff in an action for partition would be entitled to move the court for an allowance of counsel fees, and it would therefore not be necessary to include an express reference to the aforesaid section of the Code in plaintiff's notice of motion.

We pass, therefore, to a consideration of the sufficiency of the second objection urged by the respondents upon the hearing of said motion, and which was to the effect that in a contested action for partition the plaintiff was not permitted to recover any counsel fees whatever under the aforesaid provisions of section 796 of the Code of Civil Procedure.

[3] We are satisfied that the foregoing objection to the hearing and determination of the plaintiff's motion for an allowance of counsel fees as made in the trial court under the provisions of section 796, Code of Civil Procedure, was and is not sustainable either under the provisions of said Code applicable to actions for the partition of real property, or under the authorities cited by counsel for the respondents in support thereof, or under the facts and circumstances in the instant case. This, as we have seen, was an action for the partition of certain real property, which action was instituted and has been thus far conducted under the provisions of chapter 4, pt. 2, title 10 of the Code of Civil Procedure. This chapter of said Code, commences at section 752 thereof and extending to section 801, inclusive, thereof, embraces a complete and elaborate scheme for the institution and maintenance of an action for partition. It provides in section 752 thereof that such an action may be brought by any one or more of several cotenants owning real property as joint tenants or tenants in common and having an estate of inheritance or for life or lives or for years therein. It imposes upon the plaintiff in such action the duty of setting forth in his complaint the full details as to the interests of all other persons in the property and the nature of such interests or ownerships so far as known to said plaintiff. It requires that the plaintiff shall immediately record in the office of the recorder of the county or of the several counties in which the property is situated a notice of the pendency of the action containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. It directs the issuance of a summons containing much more in detail than is required in the ordinary process issued in civil actions. It provides for the publication by the plaintiff of such summons and its service by that method upon all parties to the action whose share or interest is unknown and who themselves either reside out of the state or cannot be found therein. It further provides that when necessary the plaintiff may procure an abstract of title of the property to be partitioned for the inspection and use of all the parties to the action, and requires that the expense reasonably incurred in procuring such abstract shall be allowed to the party incurring it. All of the foregoing requirements imposed upon the plaintiff in the first instance arise prior to any appearances on the part of the defendants in the action. This title of said Code further proceeds to set forth a considerable number of important matters in the further course of the proceedings for the partition of the real property involved in said action, including the ascertainment of the rights of lienholders, the procedure for the appointment, qualification, services, and report of referees to be appointed by the court for the purpose either of making a proper distribution of said property in kind and in severalty to those who may be found entitled thereto or to report and recommend a sale of said property, either in whole or part, and the distribution similarly of the proceeds of such sale.

It will thus be seen that from the inception of an action for partition instituted by any one or more of several cotenants having the right as such and as plaintiffs to institute such an action there is a considerable succession of required procedural details which must be initiated and carried forward by the plaintiff or plaintiffs in the action and which at the final analysis inure to the common benefit of those parties to the action who shall be found to be respectively entitled to a share of the lands to be thus divided. It was doubtless for the purpose of making a just and equitable provision for the division of the expenses entailed either by the plaintiff or by any one or more of the defendants in pursuing the required courses for the partition of the property involved in said action whenever such expenditures could be shown to have been made for the common benefit that section 796 of the Code of Civil Procedure was formulated and embraced in said title thereof. Assuming that the action for partition was properly brought and that the trial court shall have so determined upon the issues as framed in said action and having so determined shall proceed to distribute said property or the proceeds thereof among the several persons so found to be the owners as cotenants of hitherto undivided interests therein, we are of the opinion that the more just and equitable rule to be applied to such cases would require a proper division of the expenditures entailed in the maintenance of such actions for the common benefit among those who shall have been found to be entitled to their respective shares and interests in said property by the ultimate judgment of the court regardless of whether or not there had arisen and been litigated controversies either over the question as to whether or not the parties to the action were cotenants or over the extent of their respective interests as such in the property thus sought to be divided. It is not to be understood that in so holding we are deciding that the cost of litigating purely controversial issues arising in such actions between parties thereto who have their own counsel and are incurring their own costs in the effort to sustain their adverse claims shall be chargeable or recoverable against the losing party or parties to such controversy. It is evident that such was not the intent of the framers of section 796, Code of Civil Procedure, since it is expressly provided therein that it is only when the costs, including counsel fees entailed in said action, shall be found to have been expended for the common benefit, that they shall be chargeable or recoverable by whichever of the parties, plaintiff or defendant, shall have so expended the same. The cases to which we have been referred by counsel for the respondents in support of said objection are not persuasive as furnishing to this court a sufficient reason for interpreting the provisions of the title of our Code of Civil Procedure relating to actions for partition otherwise than as we have thus construed it, since in the main such cases have arisen in jurisdictions the statutes whereof differ materially from our own; or in cases other than actions for partition.

[4] We have been cited by appellants and respondents to the case of Watson v. Sutro, 103 Cal. 169, 37 P. 201, wherein in an action for partition in which the parties thereto were represented by opposing counsel and also in which certain parties had engaged in various controversies some of which at least involved their respective claims of title to the property in question and in which the attorney for the plaintiff sought to have allowed and apportioned among said parties certain counsel fees alleged to have been expended for the common benefit, the trial court took testimony as to the reasonable value of the services so rendered by plaintiff's counsel for the common good and made an award and allotment therefor among the parties which it had found respectively entitled to

share in the lands divided in proportion to their respective interests therein. This court affirmed upon appeal such award and allowance, and in so doing placed an interpretation upon section 796 of the Code of Civil Procedure which we are constrained to follow in the instant case. We are moved so to do by a consideration of the facts and circumstances which we have set forth in an earlier stage of this opinion and which have reference to the prolonged controversy between the parties to this action respecting the real estate which it was the purpose of this proceeding to partition between them. In the case of Rossi v. Caire, 174 Cal. 74, 161 P. 1161, this court, as we have seen, decided that upon the dissolution of the Santa Cruz Island Company through the forfeiture of its charter the stockholders of said corporation who were the parties to that action and also to this action became tenants in common of the real estate involved therein. In the later case of Rossi v. Caire, 186 Cal. 544, 199 P. 1042, this court decided that an attempted revivor of said corporation was abortive and that the title and ownership of said real estate had reverted to those who had been the former stockholders of said defunct corporation. The present action was instituted after the decision of this court upon the first of said appeals had become final and after the issues presented by the second of said appeals had been brought to this court for determination, but before the rendition of its decision therein.

Upon the main decision of this court in the instant case in 189 Cal. 514, 209 P. 374, this court expressly approved the conclusion arrived at upon the first of the foregoing appeals to the effect that the parties thereto and to each and all of the subsequent appeals have become tenants in common of said real estate upon the legal death of the Santa Cruz Island Company. Such was the state of things when, following the final decision of that question by this court and following the procedural processes carried forward by the trial court in ordering and making a partition of said property in conformity with our said decision, the plaintiff herein made his motion for the allowancee of counsel fees herein under the provisions of section 796 of the Code of Civil Procedure. We are of the opinion that under the foregoing circumstances, and in accord with our interpretation of the meaning and intent of said section, the plaintiff was entitled to a hearing and determination of his said motion in the trial court, and that the action of said court in denying such motion upon the ground stated in the aforesaid second objection urged by the respondents against a hearing thereon was erroneous, and hence that in order to the correction thereof upon proper proceedings therefor in the trial court the judgment herein must be reversed.

[5] The second question presented by the appellants herein is entitled, in our opinion, to but brief consideration. It involves an order of the trial court denying a motion made by the defendant and appellant Edmund A. Rossi herein to change and modify the report of the referees herein in the several particulars enumerated in said motion. The record discloses that upon the going down of the remittitur upon the main appeal in this action the trial court proceeded to appoint and properly qualify three referees selected by said court to make partition of the real property in question among the parties entitled thereto and in conformity with the interlocutory decree theretofore made and entered in this action and that said referees thereupon proceeded with the performance of their duties in conformity with the order of their appointment and with said decree, and that, having completed their labors, they duly made and filed with said court their referees' report. The appellants herein do not challenge in any respect the ability of said referees, or of any one of their number, nor do they question the integrity and good faith of said referees in the slightest regard. Their whole contention upon this appeal is the contention that said referees might have made in certain respects a more just and equitable division of certain portions of said properties than they appear to have done, and might have provided for more acceptable means of ingress and egress to the property or of roadways extending across the same and making accessible the somewhat infrequent harbors thereon. These, however, were all matters which were primarily the function of the trial court to determine upon the hearing of the report of said referees, and they were each and all presented to the trial court for such determination at the time of such hearing. There is no showing on this appeal of any abuse of discretion on the part of said court in determining these matters adversely to the views of the appellants herein upon the hearing of said motion, and, this being so, it would seem to be clear that a review of the decision of said court upon the matters involved in said motion upon the conflicting evidence presented before it at the hearing thereon will not be undertaken by this court upon this appeal.

The judgment herein is reversed, and the cause remanded to the trial court, for further proceedings therein upon the motion of the plaintiff for an allowance of counsel fees, in accordance with the views expressed in this opinion. Upon the hearing and determination of said motion, the trial court is hereby directed to include the same and the result thereof in its findings and decree, to be forthwith entered herein, and to conform otherwise tô its former findings and decree, and to the views expressed in this opinion. It is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

207 Cal. 212

OUTRAM et al. v. TAFT REALTY CO. et al.★
(L. A. 10012.)

Supreme Court of California. May 6, 1929.

Rehearing Denied June 3, 1929.

Appeal and error 🔑1011(1)—Judgment based on findings on conflicting evidence could not be disturbed on appeal.

In action to recover payment upon a contract for purchase of real property, judgment for defendants based upon trial court's findings on conflicting evidence that there was no fraud, misrepresentation, and conspiracy on part of defendants inducing plaintiffs to enter into contract, could not be disturbed on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by Jessie M. Outram and another against the Taft Realty Company and others, to recover payment on a contract for a purchase of real property. From a judgment for defendants, plaintiffs appeal. Affirmed.

Henry M. Lee and W. I. Gilbert, both of Los Angeles, for appellants.

Farrand & Slosson, C. W. Fourl, and Horace P. Babson, all of Los Angeles, for respondents.

PRESTON, J. In this cause the judgment is affirmed. The basis of the action is alleged fraud, misrepresentation, and conspiracy on the part of defendants in inducing plaintiffs to enter into a contract to purchase certain real property situate in Wilmington, Los Angeles county. The court found for defendants and gave judgment accordingly. Plaintiffs have appealed. We find in the record evidence amply sufficient to uphold the action of the trial court, and as this question of its sufficiency constitutes the sole issue before us, we shall rest our conclusion upon the following brief statement of the case:

Defendants Nellie L. and Fred Mason are mother and son, respectively, both of whom are experienced in the real estate business. About September, 1923, at the instance of Nellie L. Mason, after inspection upon two occasions of said real property and neighboring real estate, and upon the representations and statements of defendants as to its present and prospective value, etc., and particularly through reliance upon representations made by defendant Fred Mason, who held an option upon it, plaintiffs, sisters, were induced to enter into a contract jointly with defendant Nellie L. Mason for the purchase of said property from defendant Taft Realty Company for the total sum of $39,650. Said contract called for a down payment of $15,000, $5,000 of which was advanced by each of said three purchasers and trust deeds were duly given for the balance. The purchase was made with the expectation of securing a large profit through resale before further payments became due under said trust deeds. All efforts to turn over the property at anything but a material loss proved unavailing, and in November, 1925, after failure of plaintiffs to meet their obligations under said trust deeds, said property was bought in at the foreclosure sale by the original owners for the balance due thereon.

Prior thereto, however, and in March, 1925, plaintiffs learned for the first time that the Taft Realty Company was not the original owner of the property, but that a week or so before the sale to them, said company, for the benefit of Fred Mason, and at a cost to him of $100, secured an option of purchase from the true owners and thereafter by means of a separate and secret escrow had said property first conveyed to it and later transferred to plaintiffs and said Nellie L. Mason; that by means of two escrows and this double conveyance, Fred Mason was enabled to raise the purchase price $5,000 upon the resale to plaintiffs and his mother, and at the close of the second escrow, he assigned to his mother said $5,000 profit, which amount she duly received. In other words, said company and Fred Mason were paid the customary commission of about 5 per cent. upon the sale, which amount they divided equally between them, and in addition a profit of $5,000 was made, which later went to Mrs. Mason, thus canceling her initial investment so that she practically lost nothing by the transaction. Upon learning these facts plaintiffs served a notice of cancellation and rescission of said deal, and, tendering a good and sufficient deed to the property to said company, they demanded the return of all moneys paid by them on account thereof. This was refused, and in November the property was sold under foreclosure as aforesaid.

Plaintiffs claim that it is obvious that Mrs. Mason and her son conspired together, and in addition to misrepresenting the value of the land and opportunities for its resale, Mrs. Mason temporarily paid in her $5,000 as a decoy to lure plaintiffs into joining with her in the contract, well knowing that her son had secured the property for a lesser sum and through his profit her $5,000 would be returned to her. Were this claim true, the authorities upon fraud cited by appellants would be applicable and would govern the situation.

Such, however, is not the case. The evidence is directly conflicting, and the court below, although it would have been warranted in believing the above to be the true sig-

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★Rehearing denied.

nificance of the facts, chose to take the opposite view of the matter. By its findings it adopted as true and correct the account of the deal given by defendants and their corroborating witnesses to the effect that property values were not misrepresented to plaintiffs; that the son did not take his mother into his confidence; that he had theretofore on two occasions made a profit out of selling real estate to her and did likewise on this occasion; that the transaction was in all respects regular and legitimate; that he owed his mother the sum of $7,500 and upon being notified that this $5,000 was held for him at the office of said company, he had it turned over to his mother as a payment on account of his said indebtedness to her. These findings have full support in the evidence, although, as above indicated, a finding for plaintiffs would likewise have been supported by the evidence. But our well-known rule as to conflicting evidence forbids interference with the judgment; hence the conclusion first above announced.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

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207 Cal. 154

BARRETT v. SOUTHERN PAC. CO.★
(S. F. 12122.)

Supreme Court of California. April 30, 1929.

Rehearing Denied May 27, 1929.

1. Appeal and error 🔑766—Motion to dismiss or affirm for omissions in brief held disregarded, where by stipulation cause was argued on merits and appellant had filed extensive supplement to brief (Code Civ. Proc. § 953c).

Appellee's motion to dismiss appeal or affirm judgment for appellant's failure to comply with Code Civ. Proc. § 953c, with reference to printing in brief portions of record, will be disregarded, where sufficient of record had been incorporated in appellant's opening brief to raise some, if not all, vital points on petition for hearing in Supreme Court, and by stipulation of parties cause was argued and submitted on merits; appellant in meantime having by leave of court filed extensive supplement to brief.

2. Railroads 🔑303(3)—Pier standing in highway and supporting railroad bridge held not public nuisance (Civ. Code, § 472, and § 465, subd. 5; Pen. Code, § 370).

Pier standing in center of paved highway and supporting railroad overhead bridge constructed under Civ. Code, § 465, subd. 5, and § 472, *held* not to constitute public nuisance within Pen. Code, § 370.

3. Railroads 🔑350(3)—Whether pier in highway supporting overhead bridge was maintained in manner to afford security for life and property within statute held fact question (Civ. Code, § 465, subd. 5).

In action against railroad for personal injuries to occupant of automobile striking pier supporting bridge over highway in fog, question of fact was presented as to whether pier standing in middle of paved highway was maintained in such manner as to afford security for life and property within Civ. Code, § 465, subd. 5.

4. Railroads 🔑303(1)—Compliance with railroad commission's order, relative to clearance where railroads cross over highways, cannot authorize negligent maintenance of pier in highway (Const. art. 12, § 23; Public Utilities Act, §§ 42, 43; Civ. Code, § 472).

In action against railroad for personal injuries to occupant of automobile striking pier supporting bridge over highway in fog, railroad's compliance with order of railroad commission, adopted pursuant to Const. art. 12, § 23, Public Utilities Act, §§ 42, 43 (St. Ex. Sess. 1911, pp. 39, 40), relative to clearance when railroads cross over highways, cannot authorize noncompliance with Civ. Code, § 472, or negligent maintenance of pier in highway.

5. Railroads 🔑259(1)—Lessee operating railroad held liable for damage from negligent maintenance of pier in highway.

Lessee railroad *held* liable for damage resulting from negligent maintenance of pier in highway, where, by terms of lease, lessee undertook to operate railroad applying earnings in part to maintenance of property.

6. Railroads 🔑259(1)—General rule is lessee railroad is liable as if operating road as owner (St. 1880, p. 21).

Where railroad lease was executed by virtue of legislative authority, under St. 1880, p. 21, general rule is that lessee company within terms of lease is liable as if it were operating road as owner.

7. Appeal and error 🔑1050(1)—Any error in admission of pleading tending to show defendant railroad's maintenance of pier was harmless, where other evidence showed maintenance by defendant.

In action against railroad for injuries when automobile struck pier in highway in which original answer denied unlawful or negligent maintenance of pier, but in subsequent pleading admission of maintenance was omitted, admission in evidence of original answer, if error, *held* harmless, where there was other sufficient evidence of maintenance of pier by defendant.

8. Evidence 🔑513(6)—In action for injuries when automobile struck railroad pier in highway, expert evidence as to feasibility of single span held admissible (Civ. Code, § 465).

In action against railroad for personal injuries to occupant of automobile striking pier supporting bridge over highway in fog, opinions of experts as to possibility, feasibility, and practicability of constructing bridge with single span over highway *held* admissible; such evidence being pertinent to question of whether there was compliance with Civ. Code, § 465.

9. Railroads 🔑347(2)—In action for injuries when automobile struck railroad pier in highway, exclusion of evidence as to construction of other bridges held not error.

In action against railroad for personal injuries to occupant of automobile striking pier

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★Rehearing denied.

supporting bridge over highway in fog, exclusion of evidence of construction of bridges over other highways with center abutments *held* not error.

10. Railroads 🔑350(13)—Driving automobile in fog on 20-foot highway with right wheels 12 feet from edge held not contributory negligence as matter of law.

In action against railroad for personal injuries to occupant of automobile striking pier supporting bridge over highway in fog, position of car at time of impact on 20-foot highway with right wheels 12 feet from right-hand edge *held* not contributory negligence as matter of law, in absence of evidence of vehicle approaching from opposite direction or of observed or observable obstruction ahead.

11. Railroads 🔑350(13)—Contributory negligence held for jury in action against railroad for injury when automobile struck pier in highway in fog.

In action against railroad for personal injuries to occupant of automobile striking pier supporting bridge over highway in fog, evidence showing that plaintiff was familiar with bridge, that wrecked condition of automobile showed excessive speed, that right wheels of car were 12 feet from right-hand edge of 20-foot highway, and that fogs were so dense as to require utmost caution, *held* sufficient to take to jury question of contributory negligence.

12. Appeal and error 🔑1064(1)—Railroads 🔑351(5)—Instructions submitting to jury question whether railroad pier in highway was legally authorized held erroneous and prejudicial.

In action against railroad for personal injuries to occupant of automobile striking pier supporting bridge over highway in fog, instructions submitting to jury question whether construction and maintenance of pier was legally authorized *held* erroneous and prejudicial, where it was impossible from record to determine upon which theory jury had found defendant guilty of negligence.

13. Railroads 🔑350(3)—Whether construction and maintenance of railroad pier in highway was legally authorized held law question for court (Civ. Code, § 465, subd. 5, and § 472; Pen. Code, § 370).

In action against railroad for personal injuries to occupant of automobile striking pier supporting bridge over highway in fog, whether original construction and subsequent maintenance of such pier was legally authorized under Civ. Code, § 465, subd. 5, and § 472; Pen. Code, § 370, *held* question of law for court.

14. Railroads 🔑350(3)—Whether railroad pier in highway was negligently maintained when struck by automobile in fog held properly jury question.

In action against railroad for personal injuries to occupant of automobile striking pier supporting bridge over highway in fog, whether pier was negligently maintained at time of accident was properly question for jury.

15. Railroads 🔑350(3)—Only question for jury in determining railroad's negligence in maintaining pier in highway was whether railroad provided safeguards or signals to warn travelers.

In action against railroad for personal injuries to occupant of automobile striking pier supporting bridge over highway in fog, only question to be left to jury in determining defendant's negligence was whether defendant provided safeguards or signals to warn users of highway of presence of pier.

16. Damages 🔑132(7)—$67,700 held excessive for permanent injury to knee and tongue of 43 year old man earning $2,500 per year.

$67,700 *held* excessive for injury to 43 year old man, with life expectancy of 26 years, earning $2,500 a year, resulting in permanent impairment of knee with some limitation of motion and permanent partial paralysis of tongue, interfering with proper mastication and swallowing of food and causing embarrassment when dining in public.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Charles W. Barrett against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal or affirm judgment. Judgment reversed.

Superseding opinion in 269 P. 551.

Ford, Johnson & Bourquin and Dozier & Kimball, all of San Francisco (Guy V. Shoup, of San Francisco, of counsel), for appellant.

James F. Brennan, of San Francisco, John J. McMahon, of Los Angeles, and William F. Herron, of San Francisco, for respondent.

SHENK, J. This is an appeal from the judgment on a verdict in favor of the plaintiff in an action for damages for personal injuries.

[1] The appeal was originally taken to this court. It was transferred to the District Court of Appeal for hearing and determination. The plaintiff moved in that court to dismiss the appeal or affirm the judgment on the ground that the defendant had failed to comply with the requirements of section 953c of the Code of Civil Procedure with reference to printing in the appellant's brief or in a supplement appended thereto the portions of the record desired to be called to the attention of the court. The motion was granted and the judgment affirmed. On petition for hearing in this court it appeared that sufficient of the record had been incorporated in the appellant's opening brief to raise some, if not all, of the vital points of law in the case, and the hearing was granted. When the cause was called for oral argument in this court, the matter before us, strictly speaking, was the motion of the plaintiff to dismiss or affirm the

judgment on the grounds stated in the plaintiff's notice of motion. By stipulation of the parties, however, the cause was argued and submitted on its merits. The defendant in the meantime had by leave of court filed an extensive supplement to its brief. Under the circumstances no further notice will be taken of the motion to dismiss or affirm.

Between four and five miles northwesterly from the city of Santa Barbara the defendant corporation operates a railroad for the carrying of passengers and freight above and across the state highway at a separated grade. The overhead bridge is in two spans, each extending from the outer stone abutments to a stone pier erected in the center of the highway. This pier is about 5½ feet in width, 20 feet long, and is V-shaped at the ends. The bridge is known as the Hollister avenue bridge No. 365E and was constructed by the defendant's lessor in 1899. It crosses the highway diagonally, and the highway approaches thereto are through a cut and on a curve. The highway, however, is straight for a distance of 240 feet easterly from the pier. The paved portion of the highway in this vicinity is regularly 20 feet in width, but from a point about 200 yards from the bridge the highway begins to widen. Immediately at the bridge it is 34 feet wide. Beneath it the spans are approximately 14 feet in width.

On August 30, 1924, at about 8:30 o'clock p. m., the plaintiff and Herbert D. Phelps left Santa Barbara northbound in a Davis sedan owned by the plaintiff. Phelps was driving the car, and the plaintiff was riding in the front seat at the right of the driver. As they left Santa Barbara and approached the bridge a dense fog, such as usually occurs in that section at night in the months of July and August, was encountered. The car was equipped with a movable spot light on the right side. The plaintiff testified that he manipulated the spot light and trained it on the outer right-hand edge of the highway so as to avoid leaving the pavement. Phelps testified that because of the fog on the windshield he peered out of the left front window to observe his course in driving. Both testified that when they reached the bridge they were traveling from 12 to 15 miles per hour and that the fog was so dense that it appeared like a fog wall and obscured their vision for any considerable distance ahead, although they could see the headlights of automobiles approaching from the opposite direction. Phelps testified that he could not see ahead more than a few inches beyond the radiator cap. It was in evidence beyond dispute that there were no danger signals on the approach to the pier and that the pier was gray in color and was not equipped with any red lights or other signal of danger. Phelps further testified that he was unable to see the pier because of the fog and because the pier was about the same color as the fog. The middle front end of the car struck the pier. The car was not overturned, but the front end thereof was impinged upon the V-shaped end of the pier. The impact threw the plaintiff forward into the shattering windshield, from which position he rebounded into the front portion of the car, thereby receiving serious injuries. So far as the record shows, the driver Phelps was not seriously injured.

In his amended complaint the plaintiff alleged that the overhead bridge and the pier were constructed and at all times mentioned in the complaint were maintained by the defendant corporation; that the pier constituted a public nuisance by reason of the fact that the defendant erected and maintained it unlawfully and without a permit from the board of supervisors of Santa Barbara county; that the pier obstructed the highway and impeded, endangered, and interfered with traffic along the highway, and that the defendant was negligent in that no light or warning signal of any kind was maintained by it on or near the pier. The plaintiff alleged general damages in the sum of $65,000 and special damages in the sum of $2,800.

The answer to the amended complaint denied that the overhead bridge and pier were constructed by the defendant corporation, and alleged that they were constructed in 1899 by the Southern Pacific Railroad Company under the authority of and in compliance with sections 465 and 472 of the Civil Code, and that, thereafter, on June 26, 1902, the structure, together with other railroads and railroad property was leased to the defendant on a fixed yearly rental, but that under said lease agreement the defendant "did not expressly agree to maintain but did expressly agree to operate said railroads." Other allegations of the complaint were denied. The answer also pleaded the affirmative defense of contributory negligence on the part of the plaintiff. The jury returned a verdict in favor of the plaintiff in the sum of $67,700.

In support of the appeal it is contended that the construction and maintenance of the pier were duly authorized by law, and that the defendant was not guilty of any negligence in connection therewith. Our attention is directed to subdivision 5 of section 465 and to section 472 of the Civil Code. Section 465 defines the powers of railroad corporations. In subdivision 5 it is provided that such corporations shall have power to "construct their roads across, along, or upon any * * * highway * * * in such manner as to afford security for life and property; but the corporation shall restore the * * * highway * * * to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise." Section 472 provides that: "Whenever the track of such railroad crosses * * * a highway, such railroad or highway may be carried under, over, or on a level with the track, as may be most expedient. * * *"

[2, 3] The foregoing code sections constitute authority for the construction and maintenance of the railroad across the highway in question. No authority in this state has been cited which would prevent the construction and maintenance under the authority of these code sections of a pier in the middle of the highway as a support for the overhead bridge, provided the terms of the statute be complied with, viz.: That the construction be accomplished "in such manner as to afford security for life and property," and that the highway be restored "to its former state of usefulness as near as may be." The existence of the pier in question did not therefore constitute a public nuisance within the meaning of the cases relied upon by the plaintiff. L. T. Co. v. S. & W. W. R. Co., 41 Cal. 562; Marini v. Graham, 67 Cal. 130, 7 P. 442; Voorhies v. Tidewater Southern Ry. Co., 41 Cal. App. 315, 182 P. 797. But while the construction and maintenance of the bridge and pier appear to have been authorized by statute, yet we think a question of fact was presented in this case whether the pier was maintained in such manner as to afford security for life and property. The prevalence of heavy fogs at night in this section in July and August was established by government records and local observations for many years. This climatic or atmospheric condition would seem to have required a color scheme or painting on the pier different from the grayish color of the fog. This was not done, at least before this accident. Then, too, the installation of red lights or other danger signals on or near the pier as a warning to travelers along the highway would seem to have been required in the exercise of ordinary care. In the absence of these precautions we think it was a question of fact for the jury to determine whether the maintenance of the pier in its condition on the night of the accident was negligence on the part of the defendant.

[4] It is insisted by the defendant that the order of the railroad commission (general order No. 26, effective January 1, 1913), adopted pursuant to the provisions of the Constitution and statutes relating to powers of that commission (Const. art. 12, § 23; Public Utilities Act, §§ 42, 43, Stats. Ex. Sess. 1911, pp. 39, 40), authorized the maintenance of the pier in its condition at the time of the accident. The order provided in part as follows: "Railroads * * * which cross above * * * public highways * * * shall have a minimum side clearance when two or more spans are used, each of twelve feet." This order was undoubtedly promulgated in recognition of the fact that railroads in this state were maintaining and might thereafter construct and maintain bridges of two or more spans above and over public highways, and the pier in question was maintained in full compliance with the side clearance requirement. But it is clear that compliance with the order relied upon did not and could not operate to authorize the noncompliance with section 472 of the Civil Code or to permit the negligent maintenance of the pier. The terms of the order of the railroad commission were not at all inconsistent, but were in harmony with the Constitution and laws relating to the regulation of public utilities.

[5, 6] It is also contended by the defendant that as lessee of the Southern Pacific Railroad Company it was and is not liable for any damage which might occur from the negligent maintenance of the pier, and that, if any corporation is liable therefor, it is the lessor. We think the state of the pleadings and the evidence sufficiently establish the responsibility of the defendant for the proper maintenance of the pier. The lease was in evidence. By its terms the defendant undertook to operate the leased railroads and to apply the earnings and income derived from such operation in part to the maintenance of the railroad property. By the provisions of the lease, if not in express terms at least by reasonable and necessary implication, the lessee engaged to maintain such pier with suitable protection to the public. The fact that the lessor might be liable under certain circumstances as held in Lee v. Southern Pacific R. R. Co., 116 Cal. 97, 47 P. 932, Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520, and similar cases, is beside the question when, as here, the lessee is properly found to be liable. The lease in evidence was executed by virtue of legislative authority (Stats. 1880, p. 21). In such case the general rule is that the lessee company, within the terms of the lease, is liable as if it were operating the road as owner. 1 Elliott on Railroads (3d Ed.) p. 711.

[7] The answer to the original complaint denied that the defendant unlawfully or negligently maintained said pier. Thereafter the answer to the amended complaint was filed, in which the denial pregnant with the admission of maintenance was omitted. The negative pregnant in the original answer was offered and received in evidence over the defendant's objection, and the ruling thereon is urged as error. Assuming, without holding, that the denial of the superseded answer was erroneously received in evidence, its inclusion in the record was harmless for the reason that there was other sufficient evidence of the maintenance of the pier by the defendant, including the evidence of the defendant's supervisor of bridges, called as a witness on behalf of the plaintiff, who testified that the defendant kept up and maintained in repair the railroad bed over the defendant's lines from Los Angeles to San Francisco, including the Hollister avenue bridge.

[8, 9] We are not persuaded that the trial court erred in admitting in evidence the opinions of experts as to the possibility, feasibility, and practicability of constructing the Hollister avenue bridge with a single span over the highway, or in refusing to admit evidence

of the construction of bridges over other highways with center abutments. The evidence received was pertinent to the question of whether there had been a compliance with the provisions of section 465 of the Civil Code, and the fact that other bridges in the state were similarly constructed had no legitimate bearing upon the status of this particular bridge.

[10, 11] The defendant presents a very forceful argument on the question of the alleged contributory negligence of the plaintiff as matter of law. Attention is drawn to evidence of the fact that the plaintiff had driven an automobile under this same bridge at least twice before and had ridden thereunder several times in busses; that the fogs were so dense as to require the utmost caution in proceeding along the highway; and that the wrecked condition of the automobile as it was impaled on the end of the pier is a demonstration beyond cavil of the excessive rate of speed at which the car was traveling under the circumstances. It appeared from the testimony of the plaintiff that he was, just prior to the accident, manipulating the spot light attached to the car, endeavoring thereby to assist in guiding the automobile so that it would not run off the paved shoulder of the highway at the right. At the time of the impact the right wheels of the car must have been at least 12 feet from the right-hand edge of the pavement. This position of the car on a 20-foot highway would place the left wheels of the car very near the edge of the pavement at the left. But we think that in the absence of a vehicle approaching from the opposite direction or of an observed or observable obstruction ahead, this position of the automobile on the highway may not be said to establish negligence on the part of the plaintiff as matter of law. The driver of the car was watching the highway in front and at the left. From the left he might have considered himself well on the proper side of the highway if the same had been of the ordinary width at that point. The entire situation presents a close question of fact on the issue of contributory negligence. If reasonable precautions had been taken to install on the pier or otherwise provide a warning of danger, it would be difficult to escape the conclusion that the negligence of the plaintiff proximately contributed to his injuries. But on the record it cannot be said that the question of the alleged contributory negligence of the plaintiff was not properly one for the jury.

[12] At the request of the plaintiff the court gave an instruction that, if the jury should "find by a preponderance of the evidence in this case that the maintenance of said pier as a support to said bridge was not authorized or permitted by any law of the state of California, as alleged in the complaint, I then instruct you that in maintaining said pier said defendant corporation was prima facie guilty of negligence." Objection is made to this instruction as reversible error on the ground that the court thereby left the question to the jury whether the law authorized the maintenance of a pier in the center of the highway. Also at the request of the plaintiff the court further instructed the jury that: "Anything which unlawfully obstructs the free passage or use, in the customary manner, of any highway, is a nuisance," and that "nothing which is done or maintained under express authority of a statute can be deemed a nuisance."

Counsel for the plaintiff presented the case to the court and jury on two theories: First, that there was and is no authority in law for the maintenance of a pier in the center of a public highway and that therefore the maintenance of the pier in question was a public nuisance under section 3479 of the Civil Code and section 370 of the Penal Code, in which case it was and is argued the defense of contributory negligence would not lie (citing Tognazzini v. Freeman, 18 Cal. App. 468, 123 P. 540), and the defendant would be liable as an insurer (citing Stockton Auto Co. v. Confer, 154 Cal. 402, 97 P. 881); and, secondly, that the maintenance of the pier, if lawfully authorized, but maintained in its condition at the time of the accident without lights or other warning signals, was negligence on the part of the defendant. The court instructed the jury at length on the second theory of the case, that is to say, that it was the duty of the defendant "to use ordinary care to notify or warn, by signals, lights, or otherwise, all persons traveling along or on said highway, of the existence of said obstruction in said highway; and if you find by a preponderance of the evidence in this case that plaintiff was injured, as alleged in plaintiff's complaint, by driving his automobile into and colliding with said obstruction; and if you further find by a preponderance of the evidence that at the time of colliding with said obstruction said plaintiff was using ordinary care and due care and caution, under all the circumstances at the time of said collision, for his own protection; and if you further find by a preponderance of the evidence that said defendant corporation did not use ordinary care to warn and notify said plaintiff of said obstruction in said highway; and if you further find by a preponderance of the evidence that the said failure, if any, to notify or warn said plaintiff of said obstruction in said highway was the sole and proximate cause of the injuries to said plaintiff, then I instruct you that it is your duty to find in favor of plaintiff in such amount as will compensate said plaintiff for the detriment, if any, caused by said injuries, if any."

[13, 14] But on the first theory of plaintiff's counsel the question of law therein presented was left entirely to the jury's notion of what the law was or ought to be on the subject, namely, whether the maintenance of the pier was or was not authorized or permitted by any law of the state of California, and that, if

the jury should find "by a preponderance of the evidence" that the maintenance of the pier was not lawfully authorized, said unlawful maintenance by the defendant was prima facie proof of negligence. The court also left to the jury the determination of whether or not the pier was an unlawful obstruction in the highway and therefore a public nuisance as defined by section 370 of the Penal Code. Whether or not the original construction and subsequent maintenance of such a pier in a public highway was legally authorized was a question of law for the court to determine. Under the instructions of the court, that question was submitted to the jury for determination, and that, too, "by a preponderance of the evidence." Whether or not this particular pier was negligently maintained at the time of the accident was properly a question for the jury. All of the jurors, or more than three of them, may have concluded that the maintenance of the pier in question was not authorized or permitted by any law of the state of California, and that the defendant was guilty of negligence for that reason. Likewise, some of them may have concluded that the pier when constructed was in full compliance with section 465 of the Civil Code, and the maintenance of such a pier, with due regard for the security of life and property, was legally authorized, but that the defendant was guilty of negligence in the maintenance of this pier in its condition at the time of the accident. It is impossible from the record to determine upon which of the two theories the jury found the defendant guilty of negligence. Some of them may have found against the defendant on the one and erroneous theory, and the remaining jurors may have reached the same conclusion on the other theory. It cannot be said that the same verdict would have been reached, if the jury had been correctly instructed. Under such circumstances the erroneous instruction was prejudicial. See Ginochio v. San Francisco, 194 Cal. 159, 228 P. 428, 24 Cal. Jur. p. 864, and cases cited.

[15] It may not reasonably be questioned that the original construction of the pier in 1899 was then legally authorized for the reason that, under conditions prevailing at the time of horse-drawn vehicles and dirt roads, the highway was restored to its former state of usefulness. In fact, it would seem to be generally accepted that a separation of the grade was a distinct advantage over a grade crossing which might then have been installed. Even in these days of swiftly driven motor vehicles and paved highways, it might be said that the separated grade with the pier in the center is more conducive to the security of life and property than a grade crossing at the point, provided the motor traveling public be properly warned of the presence of the pier. The only question, therefore, to be left to the jury would be whether the defendant had at the time of the accident provided safeguards or signals to warn users of the highway of the presence of the pier sufficient to relieve itself of liability as against a charge of negligence.

[16] Finally, the defendant contends that the damages are excessive. It appeared in evidence that the plaintiff, at the time of the accident, was 43 years of age, and that his expectancy was then 26 years. His earnings from his business were about $2,500 per year. The amount of such income multiplied by the number of years of his expectancy equals the sum of $65,000, which was the amount of general damages prayed for in the complaint and allowed by the jury in its verdict. The additional amount in the verdict was made up in response to proof of expense for nurses, doctors, hospital, incidental expenses, and damage to the automobile. There is no question as to the very serious and permanent disability suffered by the plaintiff. The defendant offered no evidence in an endeavor to minimize it. The extent of the injuries need not be recounted other than to say that the evidence shows permanent impairment to the plaintiff's knee which has resulted in some limitation of motion, and permanent partial paralysis of the tongue which interferes with the proper mastication and swallowing of food and also causes considerable embarrassment when the plaintiff dines in public. There is no sufficient evidence that the plaintiff is so disabled as to be incapacitated from engaging in some gainful occupation. A comparison of the evidence with the verdict convinces us that the jury was moved by considerations foreign to the evidence in arriving at the amount of $67,700 in the verdict. If the judgment could otherwise be affirmed we would feel compelled to reduce the amount thereof. To what extent it is unnecessary to say, for the reason that the cause must go back for further proceedings because of prejudicial misdirection of the jury.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.

207 Cal. 215

HENDERSON v. OROVILLE-WYANDOTTE IRR. DIST. (Sac. 4281.)

Supreme Court of California. May 6, 1929.

1. Action ⚷6—In action for declaratory relief with reference to water rights brought by landowner against irrigation district, court erred in refusing relief for lack of jurisdiction without leave to amend complaint (Code Civ. Proc. § 1060).

In action under Code Civ. Proc. § 1060, for declaratory relief against irrigation district by owner of land with water right appurtenant thereto, in which a bona fide controversy was shown as to nature, degree, and extent of plaintiff's rights, court erred in refusing relief for lack of jurisdiction without leave to amend complaint and without pointing where relief might be had.

2. Courts ⚷472(2)—Superior court held not without jurisdiction of action for declaratory relief relative to water rights on ground Railroad Commission's order was involved (Const. art. 6, § 5; Code Civ. Proc. § 76, subd. 3).

Superior court *held* not without jurisdiction under Const. art. 6, § 5, and Code Civ. Proc. § 76, subd. 3, of action for declaratory relief with reference to water rights brought by landowner against irrigation district, on ground that order of Railroad Commission granting permission to transfer property of water company to defendant was involved, and that such order is reviewable only in Supreme Court, since interpretation of such order, and not validity is involved.

3. Waters and water courses ⚷253—Transfer of property from water company to irrigation district does not destroy established water rights in land.

Water right dedicated to lands of plaintiff in 1892, and enjoyed continuously since that time, will not ordinarily be destroyed or consumed by any transfer of franchises or property from water company to irrigation district, where contracting parties had full notice of landowner's rights.

4. Waters and water courses ⚷249—Right to water service held, under circumstances, property right appurtenant to land, but subject to regulation.

Where plaintiff had purchased tract of land together with perpetual water right appurtenant thereto from water company engaged in sale and disposition of water along with sales and conveyances of land, plaintiff's right to water service was property right appurtenant to land, though subject to regulation, so that public trust was impressed on water company to furnish to those to whom water right had been dedicated.

In Bank.

Appeal from Superior Court, Butte County; Michael J. Roche, Judge.

Action for declaratory relief with reference to water rights by J. C. Henderson against the Oroville-Wyandotte Irrigation District. From a judgment denying relief for lack of jurisdiction, plaintiff appeals. Reversed, with directions.

Douglas Brookman, of San Francisco, and George F. Jones, of Oroville, for appellant.

Raymond A. Leonard, of Oroville, for respondent.

PRESTON, J. The judgment denying declaratory relief under section 1060 of the Code of Civil Procedure, for lack of jurisdiction, is reversed, with directions to the court below to overrule the demurrer.

Plaintiff, on behalf of himself and some 81 other landowners, sues to have his water rights in certain real property declared under a deed, contract, and order of the Railroad Commission of the state of California, which instruments affect his title and right of possession to said property. Defendant demurred generally and specially to the jurisdiction of the court over such subject-matter. The court did not merely refuse in the exercise of its discretion to entertain the matter, but, as above noted, refused relief on the ground of lack of jurisdiction, and this, too, without leave to amend the complaint. A judgment of dismissal followed, from which this appeal has been taken.

[1] Concededly a bona fide controversy has arisen between plaintiff and defendant as to the nature, degree, and extent of his rights under said instruments as against the claims of defendant. Why this does not constitute a typical case for declaratory relief by a court of general jurisdiction does not appear. Surely, such a court under these circumstances must at least point the index finger to the place where relief may be had even were it conceded that power to grant relief was wanting at its own hands. The reasons for our conclusion will be the more manifest from the following discussion:

In 1892 plaintiff purchased a tract of land, together with a perpetual water right appurtenant thereto, from Palermo Land & Water Company, a public utility engaged in the sale and distribution of water along with its sales and conveyances of land. Palermo L. & W. Co. v. Railroad Commission, 173 Cal. 380, 160 P. 228. It agreed to and did construct canals, ditches, and laterals suitable for conveying water to plaintiff's land, and for many years plaintiff enjoyed uninterrupted water service to his lands from said utility. Later, in 1919, defendant was organized as a public corporation—an irrigation district—largely for the purpose of including within its boundaries some of the lands to which had become attached or dedicated water rights of the type here under consideration. Accordingly, following its organization, defendant district negotiated with said utility to take over its properties and property rights and make its water supply, diversion, and transportation

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

works a part of the property of the said district.

The consent of the Railroad Commission of the state was necessary for such a transfer, and therefore, on June 30, 1922, an application was filed with that body by the corporations involved for the requisite permission. A hearing was duly noticed, at which plaintiff and some 81 other water users in like situation, all owning property without the boundaries of said district, appeared and set up their water rights and the dedication of water service to their lands, and protested against such sale, unless and until their rights to said water service were perpetually guaranteed and protected. Whereupon defendant district passed a resolution setting up this controversy with and protest of said outside water users, and, in consideration of the withdrawal of said protest, specifically declared therein that the president and secretary of the district should be empowered to enter into contracts with the protestants to the effect that water in certain amounts and at certain rates would be furnished them until January 1, 1928, and that subsequent to said date such service should continue uninterruptedly thereafter, and that such rates should never thereafter be increased, unless the users of water in the district were required to pay a higher rate, in which event the outside users would be required to conform to the rate paid by the inside users. Making the substance of this resolution a condition precedent to its order, the Railroad Commission gave its consent to the consummation of such transfer, its order in this behalf providing: "It is hereby ordered that the applications designated above be and the same are hereby granted, subject to the following conditions: * * * 2. That the present water users of the two water companies parties hereto, and those persons or firms desiring to become water users within ten (10) years from the date hereof, shall receive service from the Oroville-Wyandotte Irrigation District at the rates and under the conditions recited in Application 8000 and Application 8018 and in the resolutions of the directors of the Oroville-Wyandotte Irrigation District dated October 20, 1922, submitted and marked as Exhibit 4 in Application No. 8000 and Exhibit 5 in Application No. 8018."

This order of the commission became final. A deed was made by the utility to the district which contained, among other clauses, the following: "* * * It being understood that said property is so conveyed to said party of the second part subject to all existing obligations of the party of the first part to furnish water to the present water users and to such persons, firms or corporations as are entitled to the use of water from said party of the first part."

The complaint, after setting up the foregoing facts in detail, continues and shows that the contracts provided for in the order of the Railroad Commission were made, and the rates therein set forth, except as modified by the said Railroad Commission, continued until on or about January 28, 1928, at which time defendant took certain action admittedly indicating an intention on its part to increase the charges applicable to plaintiff and other outside users as well as to curtail the supply of water to them, all in such a way as to deny them the same consideration given to water users within the said district. The pleading further alleged that no warrant for this discrimination had been furnished by any rate-supervising body, and finally alleged that the situation was one calling for declaratory relief. Defendant interposed a demurrer to the jurisdiction upon both general and special grounds. The order sustaining said demurrer without leave to amend on the ground of lack of jurisdiction and the appeal from the judgment of dismissal furnishes the issue before us.

[2] Plaintiff, relying upon the provisions of said section of the Code demands reversal of the judgment. Respondent, however, insists in reply thereto that said order of the Railroad Commission granting permission to make said transfer to it is involved; that, as such an order is reviewable only in the Supreme Court, the superior court is without jurisdiction in the premises. This position is manifestly untenable.

In the first place, the order of the commission is only one of the written instruments involved affecting the title to said real property. Again, the validity of the order of the Railroad Commission is not in question nor under review. The interpretation of that order at most is the only question before the court. The superior court is a court of general jurisdiction. It derives its powers from article 6, § 5, of the Constitution, and section 76, subd. 3, of the Code of Civil Procedure. Yolo Water & Power Co. v. Superior Court, 43 Cal. App. 332, 185 P. 195. Where a written instrument affects the title to real property, otherwise subject to the jurisdiction of the superior court, we can conceive of no reason why such an instrument may not be construed and its meaning declared, even though the document is final in its nature and is the result of action by either the legislative, executive, or judicial branch of a state government or of the government of the United States.

[3] The further contention of respondent seems to be that, inasmuch as the Railroad Commission admittedly is without supervisory power over defendant irrigation district (Jochimsen v. City of Los Angeles, 54 Cal. App. 715, 202 P. 902; City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 P. 25, 10 A. L. R. 1425; Lindsay-Strathmore Irrigation District v. Superior Court, 182 Cal. 315, 187 P. 1056; Water Users' & Taxpayers' Ass'n v. Railroad Commission, 188 Cal. 437, 205 P. 682), and further asserting the pas-

sage of such resolution of the district was an act ultra vires its powers, the said district thereby acquired the water rights in question without restriction or condition, and plaintiff and others in like situation are thereby foreclosed from questioning the unregulated supremacy in the premises of said district. In other words, the contention is that the exemption, weakness, and infirmities of the district are now to be claimed elements of strength as against the claims of plaintiff and others. We, of course, are not required to finally dispose of this question, and do not do so, but we do not hesitate to say that a water right was in 1892 dedicated to the lands of plaintiff and others in like situation, and they have enjoyed such right continuously up to this time, and it is difficult to see how, by any transfer of franchises or property from the utility to the district, these rights can be said to have been destroyed or consumed—rights of which each of the contracting parties admittedly had full notice. Byington v. Sacramento Valley West Side Canal Co., 170 Cal. 124, 130, 148 P. 791. Nor at this time does anything appear that convinces us that the power to regulate this distribution to plaintiff and his associates has been lost.

[4] Appellant, for a reversal, relies largely upon the case of McIntyre v. Consolidated Water Co. (Cal. Sup.) 270 P. 444, an action similar to the one at bar. We agree that the holding in this case supports his contention. Respondent, however, contends that a distinction between that case and the situation at bar lies in the fact that here the right of plaintiff is only a right to have a delivery of water from the utility to him, whereas in the McIntyre Case a private property right existed in the water, in the wells, and in the distribution system in favor of plaintiff, which property right does not exist in plaintiff in this case. This difference exists in fact, but in our opinion it is not sufficient ground upon which to base a distinction, for the right of plaintiff to water service is a property right appurtenant to his land, although subject to regulation, or, in other words upon the utility corporation was impressed a public trust, to wit, the duty of furnishing water to plaintiff and others in like situation to whom a water right has been dedicated. See Price v. Riverside L. & I. Co., 56 Cal. 431, and McCrary v. Beaudry, 67 Cal. 120, 7 P. 264. In the case of Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 P. 395, it is said: "In the case of a public use, the beneficiaries do not possess rights to the water which are, in the ordinary sense, private property. A public use 'must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates.' McQuillen v. Hatton, 42 Ohio St. 202. 'The use and benefit must be in common, not to particular individuals or estates.' Lewis on Eminent Domain, sec. 161; Coster v. Tide Water Co., 18 N. J. Eq. 68; Pocantico Co. v. Bird, 130 N. Y. 259 [29 N. E. 246]; Gilmer v. Lime Point, 18 Cal. 251; McFadden v. County of Los Angeles, 74 Cal. 571 [16 P. 397]. The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not." Quoted with approval in Leavitt v. Lassen Irrigation Co., 157 Cal. 82, 89, 90, 106 P. 404, 29 L. R. A. (N. S.) 213. See Sutter Butte Canal Co. v. Railroad Commission, 202 Cal. 179, 259 P. 937.

This is a sufficient discussion warranting the conclusion already above announced.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

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207 Cal. 786

J. E. RUTHERFORD and Wyandotte Bangor Water Users Association (an Association), Plaintiffs and Appellants, v. OROVILLE-WYANDOTTE IRR. DIST. (a Public Corporation), Defendant and Respondent. (Sac. 4282.)

Supreme Court of California. May 6, 1929.

In Bank.

Appeal by plaintiffs from a judgment of the Superior Court of Butte County, Michael J. Roche, Judge, in an action for declaratory relief with reference to water rights. Reversed.

Douglas Brookman, of San Francisco, and George F. Jones, of Oroville, for appellants.

Raymond A. Leonard, of Oroville, for respondent.

PRESTON, J. This is a companion case to Henderson v. Oroville-Wyandotte Irrigation District, 277 P. 487, this day decided. That action was brought against this same defendant on behalf of some 81 landowners similarly situated to plaintiff here and the landowners on whose behalf this action is prosecuted. Although in each action the landowners and public utility involved are different, the cases are in all other respects practically identical. In fact, the two proceedings before the Railroad Commission, based upon application No. 8000 in the Henderson Case and application No. 8018 in this case, were consolidated and are both disposed of by one order. For a detailed statement of the facts, reference is made to said case of Henderson v. Oroville-Wyandotte Irrigation District, supra, and upon the same grounds and for all the reasons set forth therein the judgment in the instant case denying declaratory relief under section 1060 of the Code of Civil Procedure, for lack of jurisdiction, is reversed, with directions to the court below to overrule the demurrer.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

207 Cal. 221

GIBBONS v. CLAPP et al.

MORGAN et al. v. SAME.

(Sac. 4105.)

Supreme Court of California. May 8, 1929.

1. Judgment 🔑153(2)—Court, after expiration of one year, has no jurisdiction of motion to set aside default judgment not invalid on its face (Code Civ. Proc. § 473).

Where no application to set aside or vacate default judgment is made within one year under provisions of Code Civ. Proc. § 473, judgment not invalid on its face is beyond the reach of the court which rendered it, except as against attack in separate action, and any order purporting to vacate it is beyond court's jurisdiction and void.

2. Judgment 🔑141—Judgment void on its face may be at any time vacated on motion or on court's own motion.

Judgment or order void on its face may be vacated on motion made at any time, or court may of its own motion set it aside and disregard it, regardless of manner in which invalidity is brought to its attention.

3. Judgment 🔑141—Invalidity apparent from inspection of judgment roll renders judgment void on its face.

Judgment or order is void on its face when invalidity is apparent on inspection of the judgment roll.

4. Judgment 🔑141—Default judgment may be set aside at any time, where based on defective affidavit for publication of summons (Code Civ. Proc. § 412).

If affidavit for order directing publication of summons fails to comply with provision of Code Civ. Proc. § 412, default judgment, subsequently entered on such defective service, is void on its face, and may be set aside at any time.

5. Process 🔑96(2)—Affidavit for publication which shows existence of any one of several conditions specified by statute is sufficient (Code Civ. Proc. § 412).

Affidavit for publication of summons showing existence of any one of conditions mentioned in Code Civ. Proc. § 412, as basis for service by publication, fully satisfies statutory requirement.

6. Process 🔑96(3)—Affidavit for publication, reciting that action was brought to quiet title to real property in county, in which affiant believed defendant claimed interest, and that action was brought to exclude defendant's interest, held sufficient (Code Civ. Proc. § 412).

Affidavit for publication of summons, alleging that action was brought to quiet title to land situated in county, and that affiant was informed that defendant claimed interest therein, and that action was brought for purpose of excluding defendant from any interest in particular property, *held* sufficient under Code Civ. Proc. § 412.

7. Judgment 🔑174—Where order purporting to vacate default judgment quieting title was void, court properly adjudged title and right of possession in substituted plaintiffs (Code Civ. Proc. § 412).

Where affidavit for publication of summons was sufficient under Code Civ. Proc. § 412, and order purporting to vacate default judgment quieting title, more than two years after its entry, was void, trial court on having its attention called to its improper exercise of jurisdiction in vacating judgment, properly disregarded the void vacating order, and adjudged title and right of possession to be in substituted plaintiffs.

8. Appeal and error 🔑803—Dismissal of appeal from void order for failure to file transcript did not validate order.

Dismissal of appeal from void order for appellant's failure to file transcript imparted no validity to order.

9. Appeal and error 🔑173(6)—Defendant could not for first time on appeal from order refusing motion to vacate judgment complain that judgment was obtained by fraud.

Where it was not claimed on motion to vacate default judgment that extrinsic fraud had been practiced in securing entry of judgment, that claim could not be availed of for first time on appeal.

In Bank.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by Oscar Gibbons against Mrs. E. R. Clapp and others. Judgment was entered for plaintiff by default, and thereafter O. D. Morgan and another were substituted as plaintiffs. A motion of defendant named to vacate the default judgment was denied, and defendant named appeals. Affirmed.

J. T. Sharp, of Alturas, and H. W. Brunk, of Berkeley, for appellant.

J. J. Lerman, of San Francisco, for respondents.

PER CURIAM. This action was brought to quiet the title of the plaintiff, Gibbons, in and to certain real property. Service of summons was had by publication, and judgment as prayed for in the complaint was entered May 6, 1921. More than two years thereafter the defendant moved the court below to set aside and vacate its judgment and decree on the ground that the affidavit accompanying the request for an order directing publication of summons failed, the complaint being unverified, to comply with the provisions of section 412 of the Code of Civil Procedure, in that it did not aver sufficient probative facts to establish the existence of a cause of action against the defendant. On August 20, 1923, the trial court granted the motion, and set aside the judgment, 27 months after its entry. An appeal taken by the plaintiff from the order setting aside and vacating the judgment was dismissed by this court on January 6, 1925, for failure to file a transcript. When the cause came on again for hearing in the trial court, it was urged by the plaintiff that O. D. Morgan and the Farmers' & Merchants' National Bank had acquired all of his right, title, and interest in and to the property at a time subsequent to the entry of the judgment and decree quieting title, but prior to the vacation of such judgment upon appellant's motion. It then being made to appear that the real parties in interest had not been served with notice of appellant's motion to set aside the judgment, though the instruments transferring title to them had been of record at the time, the trial court, being of the opinion that its order granting said motion was ineffective and inoperative as to said parties, reopened the proceedings looking to the vacation of the judgment, and, upon application, permitted Morgan and the bank, as such real parties in interest, to file a supplemental complaint setting forth the facts showing their acquisition of the property involved. With the matter thus fully before it, the court below, upon reconsideration, concluded that the affidavit, as filed by the original plaintiff, for an order directing publication of summons, was amply sufficient to meet the Code requirements, and denied appellant's motion to vacate the default judgment entered against her. It thereupon decreed that the substituted plaintiffs were the owners in fee and entitled to possession of the property, and that appellant was without interest therein. This appeal followed.

[1-4] It is well settled that a court has no power to set aside or vacate, on motion, a judgment not void upon its face, unless the motion is made within a reasonable time; and it is as definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, which in no case exceeds one year. In the absence of application made within the time specified in section 473, supra, a judgment which is not invalid on its face is entirely beyond the reach of the court that rendered it, except in a separate action; and any order of the court purporting to vacate it is beyond the jurisdiction of the court, and, therefore, void. People v. Davis, 143 Cal. 673, 675, 77 P. 651; Dunsmuir v. Coffey, 148 Cal. 137, 140, 82 P. 682. However, a judgment or order void on its face may be vacated on motion made at any time, or the court may, of its own motion, set it aside or disregard it, regardless of how the invalidity is brought to its attention. People v. Davis, supra; Reher v. Reed, 166 Cal. 525, 528, 137 P. 263, Ann. Cas. 1915C, 737. A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment roll. People v. Davis, supra. It follows, therefore, that, if the affidavit upon which the order directing publication of summons was had in this action fails, as urged by the appellant, to comply with the provisions of section 412 of the Code of Civil Procedure, the default judgment thereafter entered on such defective service would be void on its face, and the trial court at any time could have properly set it aside. Should it be determined, however, that the affidavit fully satisfies the requirements of the Code section, the judgment would not be void on its face, and the attempt of the court below to vacate it upon motion made more than a year after entry would be beyond the jurisdiction of the court, and the order purporting to vacate the judgment would occupy no better position than a judgment that is void upon its face, and, like such a judgment, would be assailable wherever and whenever it might be produced. People v. Davis, supra; Dunsmuir v. Coffey, supra. It is preliminarily essential, therefore, that the sufficiency of the affidavit be determined.

[5] At the time of the filing of the affidavit in this cause, section 412 of the Code of Civil Procedure, so far as now material, authorized an order directing publication of summons when, in the absence of a verified complaint, it was made by affidavit to appear "that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, * * * that it is an action which relates to or the subject of which is real or personal property in this state, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or corporation from any interest therein. * * *" The section reads in the disjunctive, and an affidavit showing the existence of any one of the several conditions therein mentioned fully satisfies the statutory requirements. Brown v. Sandell, 79 Cal. App. 313, 317, 249 P. 209.

[6] The affidavit filed herein avers, among other things: "That said action is an action brought by the said plaintiff against the said defendants to quiet the title of plaintiff in and to certain real property described in the complaint on file herein, situated in Modoc County, State of California, and affiant states

that he is informed and believes that said defendant, Mrs. E. R. Clapp, claims some interest in said real estate, and affiant further states that said action is brought for the purpose of excluding said defendant, Mrs. E. R. Clapp, from any interest in said real property, and that said defendant, Mrs. E. R. Clapp, is a necessary and proper party to said action." That the action relates to adverse interests in certain real property situate in this state, and has as its object and purpose the exclusion of appellant from any interest in such real property, is readily apparent from the quoted portion of the affidavit. This, in our opinion, fully satisfies the statutory requirements. Brown v. Sandell, supra. Appellant cites People v. Mulcahy, 159 Cal. 34, 112 P. 853, in support of her contention touching the asserted insufficiency of the affidavit. The case of Brown v. Sandell, supra, wherein a hearing in this court was denied, has this to say in regard to the Mulcahy Case: "An examination of the opinion, however, clearly discloses that the Supreme Court did not have before it the amendment to section 412 of the Code of Civil Procedure, which included the provisions relating to causes involving adverse claims to property such as we have here. There is nothing in the Mulcahy decision wich covers the point to which it is cited, and it is, therefore, not authority upon that proposition. The terms of the statute are plain that either the verified complaint or the affidavit must show the existence of one of the conditions mentioned in section 412 of the Code of Civil Procedure, and as the affidavit here in question clearly disclosed that the action involved adverse claims to real property in this state, it was sufficient within the terms of that section."

[7] It must be concluded, therefore, that the affidavit filed in this case was sufficient, and the judgment thereafter entered valid on its face. The order of August 20, 1923, purporting to vacate the judgment more than two years after entry, was therefore void, and the trial court, upon having its attention called to its improper exercise of jurisdiction, had no alternative but to disregard such void vacating order, and, upon denial of appellant's motion to vacate, quite properly proceeded to adjudge title and right of possession to be in the substituted plaintiffs.

[8] The dismissal of the original plaintiff's appeal from the void order of August 20, 1923, for failure to file a transcript, imparted no validity to that order which otherwise it did not possess. Sullivan v. Gage, 145 Cal. 759, 770, 771, 79 P. 537.

[9] In response to a suggestion thrown out by appellant's closing brief that extrinsic fraud had been practiced in securing the entry of the default judgment in 1921, it may be said that fraud was not urged by her upon the motion to vacate, and may not therefore be availed of for the first time upon this appeal.

The order or "judgment" appealed from is affirmed.

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207 Cal. 144

UNITED STATES FIDELITY & GUARANTY CO. v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY et al. (S. F. 13189.)

Supreme Court of California. April 29, 1929.

1. Master and servant 🔑385(16)—Employee suffering permanent injury held entitled to medical and hospital treatment reasonably required to relieve him of effects of injury; "cure and relieve" (Workmen's Compensation Act, § 9(a).

Injured employee is entitled under Workmen's Compensation Act, § 9(a); St. 1917, p. 836, to medical and hospital treatment reasonably required to relieve him of effects of injury, even though permanently injured, notwithstanding that it necessitates holding that the words "cure and relieve" as used therein were intended to mean the same as "cure or relieve."

2. Master and servant 🔑416—Award for medical and hospital treatment reasonably required was not void for uncertainty.

Award by Department of Industrial Relations, Division of Industrial Accidents and Safety, requiring employer to furnish medical, surgical, and hospital treatment, including nursing, as may be reasonably required to cure and relieve employee from effects of injury, was not void because of uncertainty.

3. Master and servant 🔑416½—Department of Industrial Relations may take all necessary steps to enforce award made within statutory period (Workmen's Compensation Act, §§ 20 (d), 63(a).

Under Workmen's Compensation Act, § 63 (a); St. 1917, p. 873, the Department of Industrial Relations, Division of Industrial Accidents and Safety, has authority to make any necessary orders for purpose of making effective award made by it within 240 weeks after date of injury, in that an order therefor does not constitute rescission, alteration, or amendment of award of compensation in violation of section 20(d); St. 1917, p. 850.

In Bank.

Original application for certiorari by the United States Fidelity & Guaranty Company to review an order of the Department of Industrial Relations, Division of Industrial Accidents and Safety, in favor of William Hardy. Writ denied and award affirmed.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CURTIS, J. This proceeding was instituted for the purpose of having reviewed and annulled a certain order made by the Department of Industrial Relations, Division of Industrial Accidents and Safety. By section 364b of the Political Code, as amended in 1927 (St. 1927, p. 734, § 3), the Department of Industrial Relations has succeeded to all the powers vested in the Industrial Accident Commission by the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831), and acts amendatory thereof. On November 19, 1923, the respondent William Hardy was injured while in the employ of Gibbons & Reed, contractors. At the time Hardy received his injury the petitioner, the United States Fidelity and Guaranty Company, was the insurer of Gibbons & Reed against liability for compensation under the terms of the Workmen's Compensation, Insurance and Safety Act, enacted in 1917.

Petitioner without waiting for any action on the part of the Industrial Accident Commission paid for all medical, surgical, and hospital treatment, including nursing required to cure and relieve Hardy for a period of 240 weeks, or up to and including June 19, 1928, and in addition thereto paid to him the sum of $14.82 per week for 240 weeks, and thereafter $9.12 per week. On the 10th day of July, 1928, after a hearing before the Department of Industrial Relations, Division of Industrial Accidents and Safety, an award was made in favor of Hardy and against petitioner "of the sum of $14.82 a week, beginning November 27, 1923, and continuing for 240 weeks, and thereafter a life pension at the rate of $9.12 a week." In this award the petitioner was given credit against said award for all payments previously made by it on account of Hardy's disability. There is no objection or complaint made by petitioner to any of the terms of that portion of the award above set out as the department found, and it is admitted by the petitioner that Hardy's injury produced total permanent disability. The department, however, as a part of said award made the further order as follows: "It is ordered that defendant insurance carrier furnish to employee the medical, surgical and hospital treatment, including nursing, as may be reasonably required to cure and relieve him from the effects of said injury." It is conceded that this award for medical and hospital treatment was intended to cover not only the treatment furnished Hardy during the 240 weeks' period, immediately following his injury, and which the petitioner had paid for in full, but its intent and purpose was to provide for such treatment beyond said 240 weeks' period, and was designed to require petitioner to furnish Hardy medical, surgical, and hospital treatment, including nursing, so long as the same may be required to cure and relieve Hardy from the effects of his present injury and after said injury had been declared permanent. As stated by petitioner in its points and authorities filed herein: "The issue in this case is the power or jurisdiction of the said Department of Industrial Relations, Division of Industrial Accidents and Safety, to make the award of July 10, 1928, ordering that the petitioner herein furnish the employee (Hardy) the medical, surgical and hospital treatment, including nursing, as may be reasonably required to cure and relieve him from the effects of said injury." This identical question was before this court in two prior proceedings in which the petitioner herein was also the petitioner. The first of said proceedings was entitled United States Fidelity and Guaranty Company v. Industrial Accident Commission, S. F. 12102, and was referred to as the Blankenhorn Case. In that proceeding the petition was denied without any written opinion. The same question was again raised by the same petitioner in a second petition in the Blankenhorn Case, being numbered S. F. 12404. This petition was also denied as was also a motion for a rehearing, but no written opinion was filed on either occasion. Upon the filing of the present petition while the same question is raised as was presented in said prior proceedings, we deemed it best to grant an alternative writ, and, after argument and consideration of the case, to file a written opinion expressing the views of this court upon the question involved, which apparently may be one of frequent recurrence.

Before proceeding to the decision of the main question in the case, it might be well to state that the injury to Hardy having been sustained on November 19, 1923, the 240 weeks' period, beyond which payments for temporary disability could not be extended (section 9 of said act) expired on June 19, 1928, and the 245 weeks' period, after which no award of compensation can be rescinded, altered, or amended (section 20 [d] of said act) expired on August 3, 1928. The award of July 10, 1928, was, therefore, made after the department had determined that the injury to Hardy had produced total permanent disability, but within the 245 weeks' period in which an award for total disability might be made. There can be no question, in so far as the time limit is material to the validity of said order, that the department acted within time and had jurisdiction to make said order or award.

This brings us to petitioner's principal contention that the department is without the power or jurisdiction to make an award for medical, hospital, or surgical treatment, after it has determined that the injury to the employee has produced total permanent disability. Section 9(a) of the Workmen's Compensation Act provides that the employer shall furnish to the injured employee "such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, including artificial members, as may reasonably be required to cure and relieve from the effects of the injury." This duty of the employer to furnish to his injured employee medical treatment has undergone various changes since the enactment of the original Workmen's Compensation Act of 1913 (St. 1913, p. 279). In that act this obligation was limited to such medical treatment as might be reasonably required at the time of the injury "and within ninety days thereafter, to cure and relieve from the effects of the injury." Section 15(a). In the amendment of 1915 (St. 1915, p. 1082, § 4) the Industrial Accident Commission was given the power to extend this period of 90 days in which the employer was required to furnish medical treatment. In Union Iron Works v. Industrial Accident Com., 190 Cal. 33, 47, 210 P. 410, it was held that, without making any formal order of extension where the employer refused to furnish the required medical treatment, the commission under this amendment was empowered to make an award for such medical treatment to be furnished to the injured employee by a physician of his own selection over four years after the date of the injury, and that such award could be made at any time after the services were rendered and within 245 weeks after the date of injury. In 1917 the act was again amended to read as we have quoted it above. From its provisions it will be noted that the right of the employee to receive and the liability of the employer to furnish medical treatment is not expressly limited to 240 weeks, nor is this right or liability expressly limited to any period whatever. The only limitation which petitioner contends is to be found in the act as now in force is that implied in the words "as reasonably may be required to cure and relieve from the effects of the injury." Petitioner insists that these words just quoted plainly express a purpose and intent to limit medical treatment to those cases only in which the condition of the injured employee is not permanent and, therefore, which may be cured and relieved from the effects of the injury by medical treatment. Petitioner contends that a physical condition which has become permanent is a condition which is changeless, and consequently the condition could neither be cured nor relieved by medical treatment. In support of this contention petitioner relies upon orders of this court denying a petition for review, and for rehearing, in a proceeding referred to as the "Elmore case," and entitled Employers' Liability Assurance Corporation v. Elmore, 4 I. A. C. 359. In that proceeding the commission refused to order the employer to furnish medical treatment for an injured employee on the ground that the medical treatment provided for in section 15 of the Workmen's Compensation Act, as amended in 1915, "did not include treatment for a disabled condition such as had become definitely permanent and would not as a result of such treatment be cured or improved." Whatever force or effect might have been given to the orders of this court denying a petition for a review and a petition for a rehearing in the Elmore Case at one time has been completely overcome and nullified by the more recent consideration and determination given by this court to the various petitions before us in the Blankenhorn Case, which have already been referred to. It is evident from the action taken by this court upon the hearing of these different petitions in the Blankenhorn Case that we were not in accord with the conclusions reached by the commission in the Elmore Case, and that we favored a more liberal construction of the provisions of the Workmen's Compensation Act than that given to it by the commission at the time the Elmore Case was before it.

Petitioner has called to our attention certain statements appearing on page 40 of our decision in the case of Union Iron Works v. Industrial Accident Com., 190 Cal. 33 (210 P. 410, 413), to the following effect: "It therefore follows that the medical and surgical services contemplated and called for by the statute in question should be such as will tend to secure the return of the workman to productive employment. In other words, and perhaps more precisely stated, the treatment required by the statute is such as will reasonably and seasonably tend to relieve and cure the injured employee from the effects of the injury. * * *" From this language petitioner draws the conclusion that the sole object and purpose of medical and surgical treatment as provided for in the act is to restore the injured workman to productive employment, and that when this object and purpose cannot be accomplished—and it is self-evident that it cannot in case the injury has become permanent—the injured workman is no longer entitled to have any further medical or surgical treatment furnished to him by his employer. A reading of the opinion in the case of Union Iron Works v. Industrial Accident Com., supra, however, we think, makes it apparent that the court was not discussing medical treatment, provided by the statute, in its relation to an injury that had become permanent. In that case the injured employee became dissatisfied with the medical treatment furnished him by his employer for the reason that it was not curing his injury. He refused, therefore, to accept such treatment, and employed a physician and surgeon of his own choice, under whose treatment he was restored to health. The Industrial Accident Commission made an award in his favor for the services rendered by the privately employed physician and surgeon, and the court affirmed the award. In so doing it held that, as the commission had found that the medical treatment furnished by the employer was not such as would tend to secure the return of the employee to productive employment—that is, it did not tend to cure the injured employee—the latter was justified in his refusal to accept such treatment, and in securing treatment which would cure his injury. In discussing the nature of the treatment to which the injured employee in that case was entitled, and who had not sustained a permanent injury, the court used the language relied upon by petitioner. This language has no application to the facts in the present proceeding, where the injury of the employee is concededly permanent in its nature.

[1] Having disposed of the authorities relied upon by petitioner to sustain its contention that under the statute an employee whose injuries are permanent is not entitled to any medical, hospital, or surgical treatment, we will now turn to the statute itself in an endeavor to ascertain its meaning. As before noted, section 9 (a) of the act provides that the employer shall furnish to his injured employee such medical treatment, including nursing, as may reasonably be required to cure and relieve from the effects of the injury. To hold that an employee who has sustained permanent injuries is not entitled to medical treatment for the reason that his condition is beyond cure would be to eliminate entirely the word "relieve" from the above section of the act. It must be presumed that the Legislature had some purpose in mind in the use of the word "relieve" as it is found in the act, and it is the duty of the courts, so far as they are able, in construing said act, to give effect to this word, as well as to all other words and provisions of said act. By section 69 of said act it is provided that, whenever any part or section of said act is interpreted by the court, "it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." If we should follow the ordinary rules of construction applicable to the interpretation of statutes, in determining the meaning of section 9(a) of said act, providing that the employer furnish such medical treatment "as may reasonably be required to cure and relieve from the effects of the injury," we would hesitate to hold that "cure and relieve" meant simply to cure, and that an employee permanently injured was not entitled to medical treatment for the reason that his injury was beyond cure, if such treatment would tend to relieve said injury. We would find it difficult to conclude that the Legislature did not intend to provide medical treatment for the relief as well as for the cure of his injuries, and that in the case where the injury was permanent and could not, therefore, be cured, it was not intended that the injured employee should be furnished with such medical treatment as might be required to relieve him from the effects of his injury. When, however, we seek to construe this section of the act in the light of the injunction found in section 69 thereof, we think that there can be no question as to our duty to give it that liberal construction which its phraseology clearly warrants, and which will result "in extending the benefits of the act for the protection" of the injured employee Hardy. This may necessitate holding that the words "cure and relieve" were intended to mean the same as "cure or relieve." In our opinion this is the only reasonable conclusion that can be reached when we consider the act as a whole and its objects and purposes. A similar conclusion was reached by the Supreme Court of Minnesota in the case of Eberle v. Miller, 170 Minn. 207, 212 N. W. 190. The facts were substantially the same as those before us in the present proceeding. The statute of that state upon the subject was practically identical with the Compensation Act of our own state. On page 191 of the opinion (170 Minn. 209) the court said: "The controlling issue here under consideration is whether an employee who has sustained accidental injury in the course of his employment, resulting in total permanent disability, is entitled to further medical and hospital treatment when all has been done that can be done to cure or improve his condition resulting from such injury. * * * We think the words *cure* and *relieve* were intended to mean the same as *cure* or *relieve* and should be so construed." As before stated, we think this to be the reasonable construction to be given to our own statute. Under such a construction the injured employee, although permanently injured, would be entitled to such medical and hospital treatment as may be reasonably required to relieve him from the effects of his injury.

[2] It is further contended by the petitioner that the award of the department is void for uncertainty in that it cannot be ascertained therefrom what was the reasonable value of the medical services to be rendered, nor the amount to be awarded, nor the persons to whom the awards were made. Petitioner relies upon the case of Garratt-Callahan Co. v. Industrial Accident Com., 171 Cal. 334, 153 P. 239. By comparing the award involved in that action with that in the present action, it will readily be observed that they differ in many essential features. In fact, they are entirely different. The award in the present proceeding as to medical treatment is a clear and direct command to the petitioner "to furnish to employee the medical, surgical and hospital treatment, including nursing, as may be reasonably required to cure and relieve him from the effects of said injury." There is nothing uncertain as to the meaning of this order. The petitioner in explicit language is directed to furnish the injured employee certain treatment which is aptly described in the order of

award. There is no mistaking its terms. The petitioner will, we anticipate, find no difficulty in complying with the requirements of the award in so far as understanding just what said requirements consist of. Petitioner contends, however, that upon its refusal to furnish said treatment the department is powerless to make any further order in said matter, as more than 245 weeks have elapsed since the employee was injured. There is some doubt as to whether this question is properly before us at this time. Just what the department may do in case petitioner refuses to comply with said award must be determined in the future. In the Blankenhorn Case, upon the refusal of the insurance carrier to furnish the treatment provided for in the award, the commission, after the lapse of 245 weeks after the date of the injury to the employee, held a hearing and determined the amount that had been expended for the purpose of securing adequate treatment for the injured employee, and ordered said insurance carrier to pay the same. We denied a petition to annul said order. Notwithstanding the uncertainty as to whether the question of the effect of such an order, made more than 245 weeks after the date of the injury, is not involved in the present proceeding, the parties hereto have presented argument upon the same to all intents and purposes as if it were properly before us. This has been done no doubt for the reason that, if the department is without power to make any further order in this matter or to take any action in enforcing its award of July 10, 1928, then said award is a nullity and its direction to petitioner to furnish said treatment is but an idle gesture. We, therefore, think that it is but proper that we should give this question some consideration and answer it for the future guidance of the parties hereto.

[3] We have decided that the award in this case which provided for medical treatment for said injured employee beyond the 240 weeks' period is valid and is sanctioned by the terms of the Workmen's Compensation Act. Section 20 (d) of said act provides: "That no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury." "Compensation" as used in the Workmen's Compensation Act is a comprehensive term and includes not only liability payments provided for in section 9 (b) of said act, but also medical treatment provided for in section 9 (a), as well as death benefits provided for in section 9 (c). See sections 1 and 9. Would an order of the department (in case petitioner refuses to furnish medical treatment to the injured employee, and in case said treatment shall be furnished by a third person as was done in the Blankenhorn Case) directing that petitioner pay to said third person the amount expended for such treatment be either a rescission, an alteration, or amendment of the award of compensation, and, therefore, in violation of section 20 (d) of said act? We think not. Whatever future orders the department may be required to make in order to enforce said award will not in any way change or alter the terms thereof. The award itself will stand as made by the department. The orders, in case the department may hereafter find it necessary to promulgate any, will simply fix and determine the cost of the treatment furnished under said award to the injured employee from time to time, and for which the petitioner has refused to pay. On the other hand, if the award is complied with, no further action on the part of the department will be necessary, and no future orders will be required of it in order to enforce the award. We think this can be done without in any way violating the provisions of section 20 (d) of the act. That the department has the authority to take any and all necessary steps to make effective the award made by it, we think, was foreshowed by the enactment of section 63 (a) of said act, which reads as follows: "The commission is hereby vested with full power, authority and jurisdiction to do and perform any and all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of any power, authority or jurisdiction conferred upon it under this act."

It would be idle to give the department authority to make an award for the medical treatment required to relieve an injured employee suffering from a permanent injury, which treatment would in many cases be required long after the expiration of the 245 weeks' period, without vesting in the department the power to enforce such award. If there were any doubt that this authority was possessed by the department from the general terms of the act authorizing it to make such an award, we think this doubt is entirely dispelled by the enactment of said section 63 (a) above quoted. Our conclusion is, therefore, that the department had the power and jurisdiction to make the award of July 10, 1928; that the department has the further authority and power to enforce said award by appropriate orders, to be made hereafter, as it may find necessary in order to provide the injured employee the relief to which he is entitled by virtue of the terms of said award; and that the granting of such necessary orders will not in any way alter, amend, or rescind, or otherwise affect said original award.

The writ is denied, and the award is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.

98 Cal. App. 668

HURST v. BIGELOW et al. (Civ. 6664.)

District Court of Appeal, First District, Division 2, California. May 6, 1929.

Master and servant 🔑82(2)—Superintendent of grounds and caretaker at golf course suing for labor and services held not entitled to lien (Code Civ. Proc. §§ 1183, 1192).

In action for labor and services, defendant *held* not entitled to lien, where he acted as superintendent of grounds and caretaker of golf course and did practically no work of lienable character under Code Civ. Proc. § 1183, especially where claim of lien was not filed in time and owner of property had no knowledge of alleged work performed so as to charge him with lien under section 1192.

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Action by Frank Hurst against Guy J. K. Bigelow and others. From the judgment plaintiff appeals. Affirmed.

William S. Bayless, of San Francisco, for appellant.

G. W. Murphy, of Santa Rosa, Dudley D. Sales, of San Francisco, and Thomas P. Boyd, of San Rafael, for respondents.

KOFORD, P. J. Plaintiff sued for $3,500 for labor and services for fourteen months at $250 per month and prayed that the claim be foreclosed as a mechanics' lien. He was given judgment against his employer for the amount but was denied the lien and now appeals from the judgment.

Defendant Bigelow was the owner of 238 acres of land and orchard in Sonoma county. He leased it to a group of associates acting for the Moon Golf and Country Club for five years. The lease carried an option to purchase. These lessees assigned to defendant Lichtenberg who gave defendant Partridge an option. The latter gave an option to Mr. Woodburn, president of defendant Peninsular Development Corporation. This company employed plaintiff at a salary of $250 per month to manage, supervise, and keep in a state of repair the 50 acres of the leased premises which had been used and which it was intended to again use as a nine-hole golf course. Plaintiff commenced his period of employment January 11, 1925. He continued in the said employment until and after March 11, 1926. What work he did during this period is not clearly enough described in the evidence to form the basis of a detailed account. He styled himself a hotel man by occupation, and in one part of his testimony stated that his work was that of a hotel man employed to superintend the placing of the golf grounds in condition. He seemed to have acted as a superintendent of grounds and caretaker.

The court made written findings of fact to the effect that his claim of lien was not filed in time; that the owner of the property, Bigelow, did not have knowledge of the alleged work performed so as to charge him with a lien under Code of Civil Procedure § 1192; and, further, that plaintiff did almost no work during that time of a lienable character. The court found "that aside from the work of said plaintiff in mowing or causing to be mowed the grass on said links or golf course, and repairing said pipes that run to said golf course, and spending one and one-half days' time in patching the tees on said golf course, said Frank Hurst did not perform any work or labor or services on said golf course or any part thereof."

We have examined the evidence and find this finding to be supported by substantial evidence. The plaintiff appeared to be unable upon his examination to give details of time spent upon such parts of his work as might be considered of a lienable character so that the date and reasonable value thereof might be ascertained. The witnesses adverse to him testified that he did practically no work of that character, and particularly that he did no work after July, 1925, when a court receiver was appointed. His notice of lien was filed March 19, 1926, which was much more than the statutory time after the last item of work was performed which could possibly be considered to be work upon any such structure for which liens are allowed by Code of Civil Procedure, § 1183. The reasonable value of no item of work was proven.

The points on appeal depend upon an attack upon the findings of the court, which we find to be supported by the record.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

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98 Cal. App. 647

SECKELS v. DEPARTMENT OF INDUSTRIAL RELATIONS et al. ★ (Civ. 6532.)

District Court of Appeal, Second District, Division 1, California. May 3, 1929.

Rehearing Denied May 28, 1929. Hearing Denied by Supreme Court July 1, 1929.

Master and servant 🔑417(4½)—Petition to review Industrial Commission's order, held insufficient as not stating all material evidence and not showing matters included in rehearing application (Rules of Supreme Court and District Courts of Appeal, rule 26, § 4).

Petition for writ of review to review order of Industrial Accident Commission awarding compensation on ground that commission acted without and in excess of its jurisdiction, that there was no evidence that employee's injury was caused by misconduct of employer, and that commission on rehearing arbitrarily refused to hear testimony of witnesses on part of petition-

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★Rehearing denied. Hearing denied by Supreme Court.

er, *held* not to comply with rule 26, § 4, of Rules of Supreme Court and District Courts of Appeal, in that it does not clearly state all material evidence, and does not show what matters were included in application for rehearing.

Application by L. J. Seckels for writ of review to be directed to the Department of Industrial Relations to review an order of the Industrial Accident Commission awarding compensation to Boone Kirk for injuries in proceedings by Kirk before the Commission against petitioner and his insurance carrier. Petition denied.

J. L. Kearney, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco (W. F. Beem, of San Francisco, of counsel), for respondent Commission.

CONREY, P. J. Petitioner, Seckels, was the employer of respondent Kirk, who sustained an injury arising out of and in the course of his employment. Kirk instituted a proceeding before the Industrial Accident Commission against Seckels and his insurance carrier. In that proceeding an award was made against the insurance carrier, and an additional award based upon serious and willful misconduct of the employer was made against said employer. Thereafter the employer applied to the commission for a rehearing, which was granted. After the taking of some additional evidence, the original award was affirmed.

Petitioner now asks for a writ of review, and in his petition claims that the commission, in rendering said decision and making said award, acted without and in excess of its jurisdiction; that there is no evidence that Kirk's injury was proximately caused by the serious and willful misconduct of his employer; that the commission in making said award acted without and in excess of its jurisdiction, in that the commission refused to hear the testimony of witnesses of the defendant employer, and of the defendant himself, who would have testified to material facts pertinent to the issues; and that said arbitrary refusal by the commission to hear said testimony constituted a denial of petitioner's right to due process of law in the proceeding against him.

"The provisions of the Code of Civil Procedure of this state relating to writs of review shall, so far as applicable and not in conflict with this act, apply to proceedings * * * under * * * this section." Workmen's Compensation Act of 1917, p. 876, sec. 67(d). The petition for a writ of review must be verified. Code Civ. Proc. § 1069. The answer of an officer of the state to a complaint or petition need not be verified. Code Civ. Proc. § 1109, and section 446. An application for a writ of review, in a proceeding for review of an order of the Industrial Accident Commission, should conform to the requirements of rule 26, § 4, of the Rules of the Supreme Court and District Courts of Appeal. It is there provided that "such application, if based upon a want of evidence sufficient to warrant the conclusion of the Commission, must fairly state all of the material evidence relative to the point as to which such want of evidence is claimed to exist." The answer of the commission "shall be limited to a brief statement of the grounds of the order or award, and to the supplying of any evidence omitted or misstated in the application." In making an application to the commission for a rehearing in respect to any matter covered by its order, the application shall set forth specifically "every issue to be considered by the Commission." The applicant is deemed to have finally waived "all objections, irregularities and illegalities concerning the matter upon which such rehearing is sought other than those set forth in the application for such rehearing." Workmen's Compensation Act of 1917, p. 873, § 64(c).

The petitioner in this case claims that there is no evidence that Kirk's injury "was proximately caused by the serious and wilful misconduct" of his employer. The petition does not "fairly state all of the material evidence" relative to this issue. This is the more manifest when we read the brief filed with the petition, which refers to several items of evidence (not mentioned in the petition) relating to the conditions under which the employee's work was being done. Counsel says that Kirk was not ordered or instructed to go out to the place of danger where the accident occurred. But the answer filed by the commission shows that there was evidence to the effect that the employer's superintendent saw the employee get outside of the wall from which he fell and made no protest and gave no orders, nor had the superintendent made any protest or given any order on several previous occasions when the same thing was done in his presence; that on the contrary, on this particular occasion, when the employee went outside the wall to hammer a cement form into place, the superintendent said: "Let's get it in"; also that there was no life-line or belt furnished; that the superintendent was familiar with the orders of the commission, one of which (order 1143) requires the use of life-lines and safety belts "whenever it becomes necessary for workmen to crawl out on thrust-outs and such other places where no other protection is afforded them."

The petition herein, in its statement of facts, is not sufficient to support the claim of petitioner that, on the rehearing before the commission, the commission arbitrarily refused to hear the testimony of witnesses on the part of the defendant "who would have testified as to material facts pertinent under the pleadings in this case." As the petition does not show what matters were included in his application for a rehearing before the commission, or what facts he sought to prove by said rejected witnesses at the time of rehearing, we have in the petition no foundation for even a prima facie assumption that the offered testimony was pertinent to any issues upon which, at such rehearing, it was the duty of the commission to receive evidence.

The petition for a writ of review is denied.

We concur: HOUSER, J.; YORK, J.

MOYE v. NATIONAL SURETY CO. ★
(Civ. 6479, 6480.)

District Court of Appeal, Second District, Division 1, California. April 25, 1929.

Hearing Granted by Supreme Court June 24, 1929.

1. Appeal and error ⚩32—Right of appeal to District Court of Appeals from judgment of superior court reversing judgment of municipal court held not affected by fact action was transferred from superior court of another county (Const. art. 6, §§ 4b, 5, as amended in 1928).

Right of defendant under Const. art. 6, §§ 4b and 5, as amended in 1928, to appeal to District Court of Appeals from judgment of superior court reversing judgment of municipal court, with directions to enter new judgment after action had been transferred from superior court of another county, is the same as the right to appeal from any other judgment of the municipal court, and fact that defendant would have right of appeal from judgment of superior court transferring action would not give him right of appeal from judgment rendered.

2. Constitutional law ⚩249—Courts ⚩160—Constitutional provision relating to appeal from municipal court does not deny equal protection (Const. Cal. art. 6, §§ 4b, 5, as amended in 1928; Const. U. S. Amend. 14).

Const. Cal. art. 6, §§ 4b and 5, as amended in 1928, relating to appeal from municipal court, is not violative of Const. U. S. Amend. 14, guaranteeing equal protection of the laws.

3. Constitutional law ⚩23—Constitutional amendment relating to remedy only held to govern right to appeal, though action was commenced prior to adoption of amendment (Const. art. 6, §§ 4b, 5, as amended in 1928).

Since Const. art. 6, §§ 4b and 5, as amended in 1928, governing appeals from municipal courts, relate to remedy only, it governs right to appeal from judgment of superior court reversing judgment of municipal court, with directions to enter new judgment, though action in question was commenced prior to adoption of constitutional amendment.

Appeals from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action on surety bond by G. L. Moye against the National Surety Company. Judgment for defendant, and plaintiff appeals. On motion to dismiss appeal. Motion granted, and appeal dismissed.

Joseph H. Call and Wm. G. Allen, both of Los Angeles, for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondent.

HOUSER, J. On motion to dismiss appeal. There are two judgments of the superior court, and two appeals, in form; but, in substance, they are one judgment and one appeal, and will be so considered for the purposes of this decision.

The action upon which the proceeding before this court is predicated was upon a bond executed and delivered within the city of Los Angeles. Plaintiff originally filed a complaint in the county of Ventura. On motion presented by defendant to the superior court of that county, the place of trial was changed from Ventura county to the municipal court of the city of Los Angeles, in which court a trial resulted in judgment for plaintiff. On appeal to the superior court of the county of Los Angeles from the judgment, and from an order made after judgment, the judgment and order of the municipal court were reversed, and the case was remanded to the municipal court with directions to enter a new judgment in favor of the defendant and against plaintiff. From the judgment in the superior court plaintiff has appealed to this court, and the present proceeding is a motion to dismiss the appeal on the ground that this court is without jurisdiction to entertain or act upon the appeal attempted to be taken.

[1] It is contended by the defendant that, under the provisions of sections 4b and 5 of article 6 of the Constitution as amended in 1928, this court has no jurisdiction of the appeal. In resisting the motion to dismiss the appeal, plaintiff urges that, inasmuch as the cause of action was "transitory," the superior court of Ventura county had jurisdiction thereof. The argument seems to be that, as he would have had a right of appeal to this court from a judgment of the superior court of Ventura county, if a judgment had been rendered against him in that court, he has a right of appeal to this court from the judgment when rendered against him by any other court to which the cause was transferred. We fail to see that any such conclusion follows. The action having been transferred to the municipal court, the right of appeal from its judgment was in no respect different from the right to appeal from any other judgment of that court.

[2] Plaintiff also maintains that section 4b of article 6 of the Constitution is violative of the Fourteenth Amendment of the Constitution of the United States, which guarantees "to each person the equal protection of the laws." In principle, the case of Missouri v.

★Hearing granted. 280 P. 982.

Lewis, 101 U. S. 22, 25 L. Ed. 989, is decisive of the point against plaintiff's contention. See, also, Hayes v. Missouri, 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578; Zikos v. Oregon R. & N. Co. (C. C.) 179 F. 893.

[3] Finally, plaintiff urges that, because at the time the action was commenced (which was prior to the adoption of the constitutional amendment to which reference has been had) he had a right of appeal to this court, such right could not be taken from him by subsequent legislative or constitutional enactment. However, aside from other considerations, it is clear that, so far as the instant matter is concerned, as the constitutional amendment in question related to a change in remedy only, the point advanced by appellant is not well taken. People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148; Pacific Gas Radiator Co. v. Superior Court, 70 Cal. App. 200, 232 P. 995.

On authority of the provisions contained in sections 4b and 5 of article 6 of the Constitution, as well as the authorities to which reference has been had herein, it is ordered that the motion to dismiss the appeals be, and it is, granted, and the appeals are dismissed.

We concur: CONREY, P. J.; YORK, J.

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98 Cal. App. 585

CAPTAIN CHARLES V. GRIDLEY CAMP, NO. 104, UNITED SPANISH WAR VETERANS, v. BOARD OF SUP'RS OF BUTTE COUNTY et al. (Civ. 3823.)

District Court of Appeal, Third District, California. April 29, 1929.

1. Injunction 🔑114(2)—Organization of veterans not showing illegal expenditure or proving status as taxpayer could not enjoin supervisors from permitting use of veterans' memorial building by outside organizations (Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1; Code Civ. Proc. § 526a).

Organization of Spanish War veterans using veterans' memorial building erected under Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1, *held* not entitled to injunction against supervisors to prohibit use of building or rooms therein by other organizations than those composed of veterans, where there was no showing of any illegal expenditure of money or waste or injury to property under Code Civ. Proc. § 526a, or that plaintiff had status of citizen or taxpayer, or that incidental use of building by other organizations interfered with use thereof by veterans' organizations.

2. Municipal corporations 🔑716—Building constructed for municipal purposes may be incidentally leased for hire when not presently needed.

Municipality cannot embark on construction of buildings for renting or commercial purposes, but building constructed for municipal purposes may be leased incidentally, or rooms therein may be leased for hire for limited time when building is not in use and when such leasing will not interfere with purposes for which building has been erected.

3. Army and navy 🔑54—Supervisors may incidentally lease for hire memorial building or rooms therein for use by other than veterans' organizations, where veterans' use thereof is not interfered with (Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1).

Board of supervisors having authority over memorial building erected for use of veterans' associations under Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1, *held* to have authority to permit temporary use of building or rooms therein by organizations of persons other than veterans where charge is exacted to assist in upkeep of building, and building is not at the time necessary for use of veterans' organizations.

4. Army and navy 🔑54—Veterans' organization could use meeting room and incidentally use other portions of memorial building gratuitously under statute authorizing supervisors to purchase "supplies" (Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1).

Veterans' organization *held* entitled to use memorial building erected for patriotic purposes under Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1, without paying compensation in so far as use of meeting room and incidental use of other portions of building in line with purposes of organization are concerned, since subdivision b authorizes the supervisors to provide necessary supplies, and word "supplies" carries with it the idea of those things necessary for the enjoyment and occupation of the premises, and included heat and light (citing Words and Phrases, Third Series, "Supply").

5. Statutes 🔑227—Language of statute, permissive in form, will be treated as mandatory if it becomes necessary that power given for benefit of third persons should be exercised.

Where purpose of law is to clothe public officers with power to be exercised for benefit of the public or third parties and public interest or private right requires that the thing authorized should be done, language of statute, though permissive in form, will be construed as mandatory.

6. Army and navy 🔑54—Statute empowering supervisors to provide proper maintenance for memorial building, erected for veterans, is mandatory, where building has been constructed (Pol. Code, § 4041f, subd. b, as amended by St. 1927, p. 207, § 1).

Pol. Code, § 4041f, subd. b, as amended by St. 1927, p. 207, § 1, giving board of supervisors of memorial building, erected for use of veterans, power to make repairs and provide necessary custodians, attendants, and supplies for proper maintenance thereof, *held* mandatory and not merely permissive, where board had exercised its election and constructed building, since both public interests and private rights were involved.

7. Mandamus ⚷113—Court will not order supervisors to levy tax to maintain memorial building where necessity for tax levy does not appear (Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1).

Court in mandamus suit by veterans' organization could not require board of supervisors of memorial building, erected under Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1, to make tax levy for maintenance of building where it did not appear that there was any occasion for doing so; such order being dependent upon proof of facts making a tax levy necessary, though subdivision b, requiring supervisors to maintain building, is mandatory.

8. Army and navy ⚷54—Supervisors may adopt such reasonable rules for occupation of memorial building as will give all veterans' organizations equal facilities (Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1).

Board of supervisors by ratifying act of committee appointed to look after memorial building, erected for veterans' organizations under Pol. Code, § 4041f, subds. b, d, as amended by St. 1927, p. 207, § 1, may adopt such reasonable rules and regulations for its occupation as will provide equal facilities and opportunities to all organizations entitled to use the building.

Original application by the Captain Charles V. Gridley Camp, No. 104, United Spanish War Veterans, for writ of mandamus to be directed to the Board of Supervisors of Butte County and others. Writ granted, with limitations.

King & King, of Gridley, for petitioners.

Seth Millington, of Gridley, and Bond & Dierup, of Chico, for respondents.

PLUMMER, J. This cause is before us upon an original application for a writ of mandate by the above-named petitioners praying for an order of this court, directed to the respondents, commanding them to admit the petitioners to the use and occupation of a certain memorial building situate at Gridley, in the county of Butte.

The record before us shows that the county of Butte has erected four memorial buildings for the use of patriotic associations, one of said buildings being located in each of the following cities: Oroville, Chico, Paradise, and Gridley. The record further shows that prior to the erection of any of said buildings the board of supervisors of Butte county was petitioned to do so by the representatives of the various organizations of veterans of said county; that said organizations represented to the board of supervisors that if said memorial buildings were constructed at the expense of the county, that they would be so conducted and managed that there would be no charge against said county or the taxpayers thereof for the maintenance and care of the same; that each of said buildings would be self-sustaining and the county would not be looked to for any financial assistance on account thereof; that for some time after the erection of the memorial building at Gridley it was occupied and used only by South Butte Post No. 210, American Legion. The association or organization known as Captain Charles V. Gridley Camp No. 104, United Spanish War Veterans, was organized after the erection of the building just referred to. The memorial building at Gridley was completed in the year 1927 and dedicated on the 3d day of May of that year. The record shows that after the erection and dedication of said building the board of supervisors appointed a committee of ex-service men and a supervisor to manage and control the respective buildings, one member of the board of supervisors from the district in which one of the memorial buildings was situate being a member of that committee, for the purpose of controlling and looking after the building situate in the district represented on the board of supervisors. After its appointment the committee took charge of the respective buildings referred to, and during the year 1928 adopted the schedule of charges for the use and occupation of different rooms in the memorial buildings, based upon the expense of lighting, heating, and janitor service, so calculated and adjusted that each organization or society using any particular room in any particular building would pay a sufficient sum to cover the actual expense attendant upon such use. Thus, for the main auditorium for afternoon meetings the schedule called for a payment of $15; for evening meetings, up to midnight, $15; after midnight, an additional $5 per hour. This schedule was for the portion of the year beginning with April 1 and ending with September 30, and for the period of time between October 1 and March 31 the charge for the main auditorium was $25 both for afternoon and evening meetings. For clubrooms, afternoon meetings, $7.50; evening meetings, $10; banquet room and kitchen, $7.50; for meetings of veteran societies and their auxiliaries where the hall used by such associations was regularly used for evening meetings, $2.50; after midnight, an additional charge of $1.50. The building at Gridley, according to the record and stipulation of counsel, consisted of a main auditorium capable of accommodating 1,200 people; two rooms called clubrooms, for want of a better designation, capable of accommodating about 100 persons each, a banquet room, and kitchen. These rooms were used for the regular meetings of the different organizations, the main auditorium being used only for special purposes, such as public installations, public funerals, dances, and public entertainments; the banquet room and kitchen being used when banquets were being given.

Under the management of the committee

to which we have referred, different rooms in the building, including the main auditorium, have been rented to other societies than those composed of veterans, for entertainments and kindred purposes. For this use compensation has been made based upon a schedule of charges calculated to make the building self-sustaining.

After the organization of the petitioners herein, one of the rooms heretofore called a clubroom, but in fact a meeting room for organizations such as the petitioners, was used by them as a meeting place. The petitioners' organization consisting of about 30 members, continued to occupy and use one of the meeting rooms from the date of its organization until on or about the month of October, 1928. During that time it appears that the petitioners held a public function, entertainment, and dance in the main auditorium, using the same from about 1 o'clock one afternoon until 2 o'clock the following night, or, rather, the following morning, and in so doing consumed, in heating and lighting of main auditorium, electric current to the value of $47.50, and also otherwise used electric current aggregating in all the value of $160. The petitioners declining to pay said electric bill, or any portion thereof, were requested to give up their key to the building, and have so done. This action seeks a judgment restoring the petitioners to the use of said building, and declaring their right to use and occupy the same without payment of any charge therefor. The contention of respondents is that the act under which the building was constructed permits a reasonable charge for the use and occupation thereof. The petitioners also pray for an injunction from this court restraining and prohibiting the use of said building, or any room thereof, by any organization other than that composed of veterans, insisting that the expense of maintaining said building, including lighting, heating, and janitor service, should be defrayed by the county of Butte out of funds raised by taxation. The respondents, on the other hand, contend that when any room in said building is not in use or occupation by any of the veteran organizations, it is permissible to rent the same to defray the expenses of lighting, heating, and janitor service. In other words, to make the building self-sustaining; and that in so doing, the building is not being commercialized. In this particular our attention is called to the practice which prevails in many cities of the state where memorial buildings have been erected, to lease the main auditorium and other rooms therein at such time, and for such purposes as do not in any wise interfere with the full and comfortable enjoyment and occupancy of the different rooms of veterans' organizations; the contention being that when the main auditorium or any particular room would otherwise remain vacant, it is for the benefit of the veterans' organizations that some revenue be derived from the building rather than to permit the same to remain unused and a charge either upon the organizations composed of veterans or of the counties of which such veteran organizations are residents and taxpayers.

[1] We do not need to further follow the allegations of the petition or to the answer thereto, further than to state that the petition concludes with the prayer that the petitioners be let in to said building; that they be permitted to use the same without making any compensation therefor; and that the board of supervisors be prohibited from permitting said building to be used by any person or organization other than organizations composed of veterans, save and except as to what is called auxiliary associations. To the petition the respondents filed a demurrer as well as an answer, the demurrer being to the effect that the petition does not state facts sufficient to constitute a cause of action. In so far as injunctive relief is asked for in the petition, we find no statement of facts which would justify the issuance of any prohibitory order herein. There are no facts set forth in the petition complying with section 526a of the Code of Civil Procedure; there are no facts stated which show any illegal expenditure of money, which indicate any waste or injury to the estate or property of the county. In order that injunctive relief may be had, in addition to showing what we have here mentioned, section 526a, Code of Civil Procedure, limits the right of action to persons possessing the qualifications stated in the section, such as being citizens and taxpayers. The circumstances, so far as the record before us shows, are very similar to the case of Amusement Syndicate Co. v. City of Topeka, 68 Kan. 801, 74 P. 606, where the Supreme Court of Kansas said: "A private citizen cannot maintain an action to enjoin city officers from allowing use of the city auditorium for entertainments for private profit, even if it is wrongful; there being no damage peculiar to him." That was an action for injunction to restrain the leasing of an auditorium, and it was held that a private citizen not suffering any special damages peculiar to himself was not entitled to maintain the action, and that such action could only be maintained by relation of the Attorney General.

The buildings to which we have referred were erected in pursuance of the authority given by section 4041f of the Political Code, which reads: "Any County may provide and maintain (1) a home or homes for veteran soldiers, sailors and marines who have served the United States honorably in any of its wars; (2) buildings, memorial halls, or meeting places for the use of patriotic, fraternal and benevolent associations of such persons. For these purposes the Board of Supervisors of any county shall have jurisdiction and power." Then follow seven subdivisions of this section, as amended by the Legislature in 1927 (St. 1927, p. 207). Subdivision (b) relative to the power of the board of supervisors, reads: "To purchase, construct or lease, build or rebuild, furnish or refurnish, or repair any and all such buildings, and to provide all necessary custodians, employees, attendants and supplies for the proper maintenance of the same." And subdivision (d) empowers the board to levy a tax not exceeding three mills on the dollar, on all taxable property in the county, for the purposes of the act. There is nothing in any of the subdivisions of the section referred to which in terms excludes the power of the board of supervisors to permit the use of any such building or any room therein, for other purposes or other associations than that of veterans, when the same does not interfere with the comfortable, ordinary, and accustomed use of such buildings and the different rooms thereof by organizations composed only of veterans.

In behalf of the petitioners it is argued that the case of Allied Architects' Association of Los Angeles v. Payne, 192 Cal. 431, 221 P. 209, 30 A. L. R. 1029, holds and adjudges that the board of supervisors, or the committee or custodian placed in charge of such building, possesses no authority to permit the use thereof by any other than a veteran association. While there is language in the opinion in that case which is open to the construction that the author of the opinion entertained the idea that such buildings should properly be limited to the exclusive use of such organizations, and the case does hold that the board of supervisors may erect a building under the act which is devoted exclusively to the use of such organizations, yet the case does not go to the extent contended for by the petitioners. It is to be observed also that the case primarily was based upon a resolution of the board of supervisors of the county of Los Angeles, which specified that the building to be erected should be exclusively used as a meeting place for patriotic, fraternal and benevolent associations "whose membership shall be composed only of veterans," etc.

[2, 3] While we are of the opinion that under the section of the Political Code authorizing the construction of memorial buildings, boards of supervisors possess the authority and power to limit the use thereof and of every room therein, exclusively to veterans, it does not follow that the language should be so narrowly construed as to prevent the incidental use thereof or the incidental use of the rooms therein, such as the main auditorium, in such a manner as not to interfere with the main purposes for which the building has been erected, and at times when such rooms would otherwise be vacant. While the section of the Code authorizes the construction of such buildings, in the nature of things and in the ordinary course of events associations of veterans of wars that are past will cease to be. This is peculiarly applicable to cities no larger than the town of Gridley, and it would be carrying the idea further than we think the language of the act requires to hold that when the veteran associations referred to have ceased to be, the building must remain vacant or stand as an empty monument. The complaint in this case is directed particularly to the use permitted of the auditorium, but from the facts before us it is apparent that the auditorium having a seating capacity of 1,200 is designed for use only on special occasions, and under such circumstances we see no reason why the board of supervisors or the committee placed by it in control of the building, should not allow the incidental use of the auditorium for purposes not inconsistent with the objects for which the building was erected, or which do not obstruct or interfere with the use of the building by the different veteran organizations, either free of charge or for a stated compensation, and thus aid in defraying the expenses of maintaining the building. While the law appears to be well settled that a municipality cannot embark in the construction of buildings for renting or commercial purposes, there is very high authority that a building constructed for municipal purposes may be incidentally leased, or rooms therein leased for hire, when not in use, and when so doing does not interfere with the purposes for which the building has been erected. In 44 C. J. 1092, we find the law prevailing in a large number of jurisdictions stated as follows: "A municipality may either gratuitously or for compensation permit buildings erected for a municipal purpose to be used incidentally for lawful private purposes, which will not interfere with public use, such as the use of a city hall or other municipal building for lectures, entertainments, etc. While a municipality is without power to erect a building for the mere purpose of renting it out, yet after it has lawfully constructed or leased a building for municipal purposes, it has power to let, sublet, or rent for hire, the building, or a portion thereof, for a limited period of time, and for a lawful use, where the building, or portion thereof, is not presently needed for municipal purposes." This text is supported by a large number of authorities. Practically the same language is found in 19 Ruling Case Law, p. 771, § 77, where it is said, after stating that a municipality is without authority to engage in erecting buildings for the purposes of renting: "It seems, however, to be generally conceded that a municipality having erected a building in good faith, for municipal or public purposes, has the right, when such building is no longer used by the municipality, or when parts of it are not needed for public use, or when at intervals the whole building is not so used, and when it will not interfere with its public use, to permit it to be used either gratuitously or for a compensation, for private purposes. Such a temporary, casual and incidental use of unused public property, for the purpose of public economy, does not amount to an unconstitutional invasion of the rights of citizens," etc. In 16 Ann. Cas. page 1098, the same statement of the law occurs, supported by a large number of cases. In one of the cases (French v. Inhabitants of Quincy, 3 Allen [Mass.] 9) this language appears: "The court is of opinion that a town, having in its town-house rooms which it had authority to construct, as part of such building, and not having occasion to use them for the time-being, is not obliged to keep them unoccupied, but may derive a revenue from them by renting them, or may allow them to be used gratuitously."

The record shows no attempt whatever to commercialize the memorial building at Gridley, as that word is ordinarily understood. It shows, rather, an attempt to make the building self-sustaining, as appears to have been promised by the veteran organizations existing at the time the building was erected. It may be here stated that the record fails to show that the incidental use of the auditorium, as herein referred to, has at any time interfered with the accustomed, usual, and ordinary enjoyment of the building, by any organization of veterans. The fact that the board of supervisors has appointed a committee to look after the respective buildings does not appear to us to raise any valid legal objections. In the very nature of things there must be some one to look after such buildings. The committee appointed is but the agent of the board of supervisors, and as to each of the four buildings it appears that the board of supervisors of the district wherein the building is situate, is a member of the committee, and whatever is done by the committee is subject to the control, direction, and approval of the board of supervisors. Likewise, where there are several different organizations occupying the building, or different rooms therein, reasonable rules and regulations must be adopted in order that the occupation of the building by one organization will not interfere with the reasonable use of the building, or rooms assigned to it by other organizations. Nor do we see any legitimate objection if any one of the organizations using, say, a meeting room in the building, proposes to use the main auditorium for a public function which is in line with a public entertainment rather than within the limits of what is ordinarily termed a patriotic assemblage, to the exaction of compensation sufficient to cover the expenses attendant upon the use of the auditorium on such occasions. For illustration: If any one of the veteran organizations proposes to give a dance, it cannot be argued that the county would be under the obligation of hiring an orchestra; nor if any one of the organizations proposes to hold a boxing contest, to hire a referee. And if this is true, we do not see how it can be argued that the county would be under obligation to pay for light and heat on such occasions, irrespective of our views which are hereinafter expressed as to the right of petitioners to occupy the meeting room originally assigned to its use.

Upon the hearing of this cause it was conceded by counsel that the almost universal practice in the state is to permit the use of auditoriums by other than veteran organizations, and to exact a charge therefor to aid in the upkeep of the buildings.

[4] Have the petitioners, as claimed by them, a right to the use of the memorial building, or any portion thereof, without paying compensation therefor? The answer to this question depends upon the intent and purpose of the Legislature in adopting section 4041f of the Political Code. To what extent such occupation may go depends upon the reasonable necessities of the organization. If it be admitted that the petitioners have a right to the use and enjoyment of a meeting room in said memorial building, that concession can only go to the reasonable requirements of the organization. With a membership of only 30, we cannot avoid the conclusion that an assignment to it of a meeting room, of a sufficient capacity to accommodate at least 100 persons, is all that the section requires, together with such incidental use of the remainder of the building as functions in line with the patriotic purposes of the organization may require. With this in view we will examine the section. The second clause of the first paragraph empowers the board of supervisors to erect and build memorial halls or meeting places for the use of patriotic, fraternal, and benevolent associations of such persons. It was under this provision that the memorial building under consideration was erected. Subdivision (b) of the section carries out and further defines the power of the board of supervisors, to wit: "To purchase, construct or lease, build or rebuild, furnish or refurnish, or repair any and all such buildings, and to provide all necessary custodians, employees, attendants and supplies for the proper maintenance of the same." It is upon this subdivision that the petitioners base their contention that the Legislature intended the use of rooms in memorial buildings should be gratuitous. This subdivision provides for custodians, employees, attendants, and supplies. The word "supplies" has a different meaning from the word "materials." 7 Words and Phrases, Third Series, p. 309. If the clause had read, "and materials for the proper maintenance of the same," it is clear that the Legislature would have intended only the furnishing by the board of supervisors of such articles or substances as would enter into the construction of the building itself, in taking

the place of those portions of the building which needed attention, reconstruction, or repairing; that the word "supplies" carries with it the idea of those things necessary for the enjoyment and occupation of the premises; it does not include furnishings as used in the subdivision because that word is used separately. Thus, it may be reasonably inferred that the intent of the Legislature was that light and heat, for the reasonable use and occupation, should go with the building. "Custodians, employees, and attendants" is just as comprehensive as the words "janitor services." Again, a reading of the whole section leads to the conclusion that the Legislature had in mind a double purpose—to subserve the public interests of the country by providing for the erection of structures where the thought of patriotism might be given wider currency, and at the same time enable organizations of persons who had engaged in hazardous service for their country to meet and aid in keeping alive the principles upon which the republican form of government must rest. Had it not been intended that the reasonable use of meeting rooms and other incidental uses of other portions of such buildings was intended to be gratuitous, there would have been no reason for providing that such buildings should be erected for the uses of organizations of veterans or of those who had shown themselves willing to make the extreme sacrifice for the maintenance of the government. If it had been intended only to provide a meeting place, and rent the same to any such organization, there would have been no occasion for the use of the language which we have stated. There would really have been no occasion for the erection of such buildings under the provisions of the Code contained in section 4041f, supra. If that was the purpose and intent of the Legislature, it added nothing to the uses and purposes of the organizations because they could otherwise have hired their own halls.

[5-7] Again, it is argued by the respondents that all the provisions of the law are permissive, that is, that the board of supervisors may erect a building, and after the erection thereof, they may provide for its maintenance, etc., or may elect not to do so. While the section of the Code appears to be permissive in form, yet when the board of supervisors has exercised its election and constructed a building, the carrying out of the purposes expressed in the section necessitates a different construction and changes the permissive form to a mandatory reading in order that the purposes of the act may not be frustrated. This court, in the case of County of Los Angeles v. State, 64 Cal. App. 290, 222 P. 153, had occasion to examine quite extensively the use of the word "may" in a statute or Constitution as interpreted by the cases having to do therewith, and there quoted with approval the following language: "The word 'may' as used in the statute or constitution is often interpreted to mean 'shall' or 'must.' Such interpretation always depends largely, if not altogether, on the object sought to be accomplished by the law in which that word is used. It seems to be the uniform rule that, where the purpose of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large—that is, where the public interest or private right requires that the thing should be done—then the language, though permissive in form, is peremptory." In some of the cases there cited the permission given to public officers to levy a tax, in language permissive in form, was held to be mandatory. In the case at bar both public interest and private rights are involved, and the permissive form of the statute, in order to accomplish the purposes undertaken, must be held mandatory if the necessity therefor is shown to exist. This would include the levy of a tax as provided in one of the subdivisions of the section, to carry out the purposes for which the building has been erected. A judgment to that effect, however, must depend upon the necessities of the situation. If no facts or conditions are presented which necessitate a peremptory order directing the levy of a tax, then such order cannot properly be issued. If the maintenance of the building, if the accomplishment of the purposes for which it was erected are otherwise obtainable by legitimate means, the necessity for the levying of a tax does not appear. In other words, the board of supervisors cannot be required to levy a tax even though the section be held mandatory, when there is no occasion for the board of supervisors so doing. There is no showing in the record before us of any facts upon which such an order could properly be based. The facts rather lead to the conclusion that if the building is managed and controlled as we have indicated herein we think it may properly be, the general public may not be called upon, through taxation, to furnish the means of maintaining the building, and permitting to the petitioners gratuitous use of all portions thereof reasonably meeting their requirements. The petition asks for relief for an auxiliary association, but no facts are set forth in the petition showing that its membership is composed only of veterans, and therefore it does not come within the purview of the rights to which the petitioners are entitled.

[8] Our conclusion is that the petitioners are entitled to the gratuitous use of the meeting room to which they were originally assigned, and such incidental uses, gratuitously, to other portions of the building as may be in line with the patriotic purposes of the petitioners' organization, and that the board of supervisors, by ratifying the act of the committee appointed to look after the building, may adopt such reasonable rules and

regulations for the occupation of the memorial hall as will secure to all of the organizations entitled to use the same, equal facilities and opportunities.

Let a writ issue as prayed for by the petitioners, limited in extent, as herein stated, placing petitioners in occupancy and possession without payment of the charge insisted upon by the respondents.

We concur: FINCH, P. J.; THOMPSON, J.

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98 Cal. App. 706

SCHREYER v. FOSTER et al. (Civ. 5222.)

District Court of Appeal, Second District, Division 2, California. May 9, 1929.

1. Sales 🔑398—Court's findings held to support conclusion that buyer should recover sum paid.

Court's findings that terms of sale of automobile agency were never fully settled, that it was never determined just what portions of property should be included in inventory, nor when or how price should be paid, and that parties never reached agreement as to just when and how property should be transferred or paid for or conditions under which transfer should be made, supported conclusion of law that buyer should recover back sum paid in anticipation of reaching definite agreement.

2. Sales 🔑52(5)—Evidence held to sustain findings that terms of sale were never fully settled, nor property included and time and manner of paying price determined.

In action to recover sum paid by one negotiating for purchase of automobile agency, evidence *held* to sustain court's findings that terms and conditions of sale were never fully settled, nor portions of property included in inventory and time or manner of paying price determined.

3. Sales 🔑391(1)—One negotiating for purchase of automobile agency held entitled to recover sums paid on automobile company's refusal to accept him and associates as agents.

One negotiating for purchase of automobile agency, subject to approval of automobile company, *held* entitled to recover amounts paid on refusal of such company's assistant sales manager, under whose authority agreement contemplated that plaintiff and his associates should become company's agents, to accept them as sellers' successors because of insufficient capital.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Curtis T. Schreyer against C. R. Foster and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hewitt, Ford & Crump, of Los Angeles, for appellants.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondent.

IRA F. THOMPSON, J. [1, 2] The defendants appeal from a judgment rendered against them and in favor of plaintiff in the sum of $1,500. The testimony of the respondent's witnesses establish the following situation: The appellants owned and operated an agency for Chevrolet automobiles at Watts and Compton. During the month of December, 1923, the respondent and Clyde H. Kettering opened negotiations with the appellants concerning the purchase by respondent and Kettering of this business. In reply to respondent's inquiry during the first conversation concerning the price, the appellant C. R. Foster stated that they wanted $8,000 for the good will and business plus the inventory value of the stock of accessories and automobiles, to which the respondent replied that he did not have a great deal of cash on hand, but that he did have a piece of property for sale, and that if he could dispose of the property he would consider the purchase of the agency. During all of the subsequent negotiations the making of final arrangements was stated to be conditional upon a sale of this property by respondent. It also appears that no definite agreement was ever arrived at. At one time the appellants offered to turn over the business to the respondent upon a cash payment of $8,000 and agreed to make arrangements by which the remainder could be paid later, and finally they agreed to accept a cash payment of from $5,000 to $6,000. These negotiations continued from some time in December through January, February, and into March. During this time the appellants induced the respondent to pay three different sums of money as follows: January 11, 1924, $200; January 19, 1924, $1,000; and January 30, 1924, $300. The receipt for the first payment recited that it was a deposit "to be returned if deal is not accepted by the Chevrolet Motor Company of California." The receipt for the second payment contained a similar statement, but the third receipt was silent with respect thereto. On two or three occasions the respondent or Mr. Kettering asked the appellant C. R. Foster if the deal would be accepted by the Chevrolet Motor Company if only a part of the purchase price were paid in cash, to which the latter responded that he did not think it was necessary to let the company know everything that was done. Finally, on March 28, 1924, Mr. Kettering wrote a letter to a Mr. Ray Wilson, assistant sales manager of the Chevrolet Company, who had the authority to pass upon such matters, and asked if the latter would consider their taking over the agency with an investment of from $5,000 to $8,000, allowing Foster to carry the remainder. Mr.

Wilson replied to this question by saying that much more capital would be required and regretting the inability of respondent and Kettering "to go ahead with the proposition." Some time during the month of February, according to the testimony of appellant C. R. Foster, the respondent and Kettering told him that he could let the Compton agency go and they would take the Watts place, but they never discussed the "price of the Watts agency separate from the Compton agency." After Mr. Wilson's failure to approve the proposed deal, the respondent brought this action to recover the sums paid to appellants.

The appellants contend that the respondent was only entitled to recover in the event the Chevrolet Motor Company refused to approve a transfer to respondent, which refusal it was incumbent upon the respondent to prove. Further they assert that respondent failed to prove a refusal on the part of the Chevrolet Company; that the findings which indicate that the court so found are without support in the evidence; and, lastly, that inasmuch as the receipt for the sum of $300 did not contain the clause that this sum was to be returned in the event the "deal is not accepted by the Chevrolet Motor Company," the finding of the court to the effect that appellants promised to return the entire sum of $1,500 if the deal were not approved is also without support.

We think the whole argument of appellants is builded upon a false foundation. In one finding of the court it is said, "The full terms and conditions of the sale were never fully settled," and in another: "That it was never determined just what portions of the property should be included in said inventory and it was never determined when or in what manner the price for said business should be paid. * * * The parties hereto never at any time reached any agreement as to just when or how the property which they were negotiating should be transferred or paid for, or the conditions under which said transfer should be made." Obviously, these portions of the findings support the conclusion of law drawn by the court that the respondent should recover back the sum he had paid in anticipation of reaching a definite agreement, and equally apparent it is that the facts which we have recited sustain the quoted findings.

[3] Furthermore, the approval of the Chevrolet Motor Company was essential to the completion of a contract of transfer, even if we disregard the writing. The agreement contemplated that respondent and his associates should become the agents of the company under, according to the testimony, the authority of the assistant sales manager, Mr. Wilson. When this gentleman failed to accept respondent and Kettering as the successors of appellants, upon the proposal to pay down only from $5,000 to $8,000, respondent brought himself both within the letter of the written promise and the spirit and intent of all the negotiations.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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98 Cal. App. 671

ROBSON et al. v. HAHN et al. (Civ. 5185.)★

District Court of Appeal, Second District, Division 2, California. May 6, 1929.

Rehearing Denied June 4, 1929. Hearing Denied by Supreme Court July 3, 1929.

1. Brokers ⚷67(1)—Brokers securing second listing of realty for smaller net price, without informing principals of purchasers' agreement to pay commission, committed fraud depriving them of right to compensation.

Brokers employed in confidential, advisory capacity by persons relying on them for advice and assistance committed a fraud, depriving them of right to compensation for services, by securing second listing of realty for smaller net price, without informing principals of purchasers' agreement to pay commission.

2. Brokers ⚷75—Complaint alleging that brokers charged both vendors and purchasers commission sufficiently alleged fraud to warrant oral evidence thereof.

Complaint alleging that defendant brokers charged and received commissions from purchasers as well as plaintiffs, who employed them to sell realty, sufficiently alleged fraudulent conduct to warrant admission of oral evidence thereof, though other fraudulent acts not alleged were resorted to for purpose of securing written contract to allow defendants amount received in excess of net selling price to plaintiffs as commission.

3. Brokers ⚷67(1)—Listing of property to sell for net price and retain excess held to constitute agreement to pay commission.

Listing of property with brokers to sell at net price to owners and retain any sum received in excess thereof as commission *held* to constitute an agreement to pay commission.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by John H. Robson and another against Cliff Hahn and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Denis & Griffith, of Los Angeles, for appellants.

Clarence L. Kincaid, of Los Angeles, for respondents.

IRA F. THOMPSON, J. This action was commenced for the purpose of recovering from the defendants the sum of $1,000 paid to them as their compensation for their services, as real estate brokers, in effecting a sale of property belonging to the plaintiffs upon the allegation that without the knowledge of the plaintiffs or the buyers the defendants

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★Rehearing denied. Hearing denied by Supreme Court.

collected commissions from both. Judgment was rendered in favor of the plaintiffs, and defendants appeal therefrom.

On August 8, 1922, the respondents employed the appellants to sell for them a piece of real property, which for the sake of convenience we may hereafter refer to as lot 8, for the sum of $21,000, agreeing to pay appellants 5 per cent. of the selling price as their commission. On August 12, 1922, at about 8 o'clock in the evening the appellants Hahn and Sheehan called at the home of Frank and Mary Caldwell for the purpose of inducing the Caldwells to buy the property. The appellants took Mrs. Caldwell to the property during the evening, and although she did not inspect the inside of the place she informed them she liked it and would take it, but that she would not sign up in the absence of her husband, Frank Caldwell. About noon of the day following the appellants called on the respondents and informed them that lot 8 could not be sold for $21,000 and induced respondents to sign another and different listing in which respondents agreed to sell for $19,000 net to them and allow the appellants as their commission any sum received in excess of the net selling price. A couple of hours later in this same day appellants again called on Mr. and Mrs. Caldwell, and informed them as they had Mrs. Caldwell on the evening previous that they had the property for sale at a net selling price to the sellers of $20,000 and the Caldwells would be required to pay to appellants for representing them as purchasers an additional $1,000 as commission. The Caldwells accepted the offer thus made and agreed to buy the property for the total sum of $21,000. The sale was handled in an escrow, and neither the sellers, the respondents, nor Mr. and Mrs. Caldwell, the purchasers, knew of the payment of a commission by the other until after the escrow was completed, and the escrow statement forwarded, although, as already indicated, the respondents knew that appellants were to receive as commission all sums in excess of the net selling value of $19,000. Mrs. Caldwell owned a piece of property on Crocker street which she required the appellants to sell for the sum of $23,000, and for which sale she only paid to them as commission $333.35. This property had to be sold in order that the Caldwells might have the funds with which to purchase lot 8. The escrow instructions signed by respondent John Robson did not disclose the purchase price of $21,000.

[1, 2] It is apparent from the facts which we have recited that proof was made of the representations found to have been stated to the respondents and to the Caldwells by oral testimony. Objection was lodged to all such testimony by the appellants on the ground that it was incompetent and outside the issues for the reason that the complaint did not charge that appellants had fraudulently or by mistake, trick, or device, secured the respondents to sign the second listing. The same objection was raised by demurrer. The objections to the oral testimony, like the demurrer to the complaint, were overruled. It may be fairly said that the entire appeal rests upon a settlement of this one problem.

There would seem at first blush to be much merit in this contention of the appellants, but a close analysis of the situation compels us to a different conclusion. The appellants were employed in a supposed confidential, advisory capacity for the respondents, who relied upon them for their advice and assistance. The betrayal of that confidence constitutes a fraud. Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am. St. Rep. 189; Hageman v. Colombet, 52 Cal. App. 350, 198 P. 842. Or, as is said in Rauer's Law, etc., Co. v. Bradbury, 3 Cal. App. 256, 84 P. 1007: "Whenever he [the agent] has an interest in making the sale which is antagonistic to that of his principal, he is unable to discharge his full duty to the latter and by continuing to act as his agent, without disclosing to him the fact of such interest, he commits a fraud upon him which will deprive him of all right to compensation for his services" (citing a list of authorities). The case from which we have just quoted was in many respects similar to the instant cause. The agent there required the purchasers to pay a commission, which fact he concealed from the seller. When, therefore, the complaint in the present case alleged that the appellants had charged and received commissions from the purchasers as well as the sellers who employed them, it did in fact allege that they were guilty of a fraudulent act, and the door was thrown open to determine whether they had in fact been endeavoring to serve two masters. One of the earliest authoritative pronouncements, and one which illustrates the fraudulent nature of the act alleged, is found in the gospel of Matthew (chap. 6, v. 24), as follows: "No man can serve two masters; for either he will hate the one and love the other; or else he will hold to the one and despise the other. Ye cannot serve God and mammon." The act alleged is said to be "against sound public policy and good morals." Glenn v. Rice, 174 Cal. 269, 162 P. 1020. This case also says: "His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing." The irresistible conclusion, therefore, is that the allegation of double dealing is an allegation of fraudulent conduct sufficient to warrant the court in rending the veil of legality with which the transaction was cloaked by the admission of oral testimony, for the purpose of discovering the true conduct of the parties. Or as is said in Hageman v. Colombet, supra: "In case of fraud no mere form of words of which the parties have made use can shut out inquiry as to the real facts." And this is true regardless of the fact that other fraudulent acts, not alleged, may have been made use of for the purpose of securing a written contract presenting the surface of lawfulness.

[3] It is suggested that the second listing of the property by the respondents does not constitute an agreement to pay commission, but we find the authorities to have settled the question to the contrary. Sill v. Ceschi, 167 Cal. 698, 140 P. 949; 9 C. J. 581.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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98 Cal. App. 797

Frank CALDWELL and Mary E. Caldwell, Plaintiffs and Respondents, v. Cliff HAHN, H. M. Sheehan, and Jack McDowell, Defendants and Appellants. (Civ. 5184.)★

District Court of Appeal, Second District, Division 2, California. May 6, 1929.

Rehearing Denied June 4, 1929. Hearing Denied by Supreme Court July 3, 1929.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Denis & Griffith, of Los Angeles, for appellants.

Clarence L. Kincaid, of Los Angeles, for respondents.

IRA F. THOMPSON, J. This is an appeal by the defendants from a judgment awarding plaintiffs the recovery of $1,000 paid by them as commissions to the appellants for representing respondents as purchasers of that property designated as lot 8 in the opinion filed this day in the case of Robson v. Hahn (Cal. App.) 277 P. 507. The facts and the law are set forth in that opinion and we deem further discussion unnecessary.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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98 Cal. App. 619

SCHUSTER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.★ (Civ. 6083.)

District Court of Appeal, Second District, Division 2, California. May 2, 1929.

Rehearing Denied May 31, 1929. Hearing Denied by Supreme Court July 1, 1929.

1. Courts 🔑514—Courts should not interfere because of dissatisfaction of litigants with decree of court of another state.

Dissatisfaction on part of litigants with orders of court of one jurisdiction should not prompt courts of sister state to attempt to interfere.

2. Courts 🔑514—Jurisdiction to control administration of trusts is limited to court which appoints trustee.

Trustee appointed by foreign court is amenable only to that court, and the fact that his residence is in another jurisdiction will not confer authority on courts of that jurisdiction to control administration of the trust or require accountability for trust property.

3. Courts 🔑514—Continuing jurisdiction of court administering estate to settle trust accounts is not altered, where trustees are appointed by will.

Fact that trustee is appointed by will and not by court does not deprive court administering estate of continuing jurisdiction to settle accounts under the trusts, to supervise management thereof, and oversee distribution of income and principal to beneficiaries.

4. Abatement and revival 🔑13—Where testator died in Arizona, will appointing trustee was probated there, and suit by beneficiaries was pending there to require accounting and removal of trustee, court could not assume jurisdiction of similar suit in California.

Where testator resided in state of Arizona, and his will appointing trustee was admitted to probate in that state, and trust estate was ordered to be distributed to trustees there, and beneficiaries had filed petition in Arizona court for accounting and to have one of trustees removed, California court, pending appeal in the suit commenced in Arizona, could not properly assume jurisdiction of similar suit brought by beneficiaries to compel accounting and for removal of trustee.

5. Prohibition 🔑26—Prohibition to restrain contempt proceeding in pending action could be granted on facts shown only by affirmative defense in that action, where facts were admitted.

In proceedings for prohibition to restrain trial court in contempt proceedings on ground of excess of jurisdiction, writ could issue based on facts set up by way of affirmative defense in the proceedings below, where such facts were admitted to be true and were substantiated by record, though they were not shown by the complaint.

6. Prohibition 🔑10(2)—Prohibition lies to prevent court from sentencing petitioner for contempt in failing to answer questions, where excess of jurisdiction was shown.

Where admitted facts disclosed that trial court was acting in excess of its jurisdiction, proper case was presented for writ of prohibition to prevent trial court from sentencing defendant for contempt for failure to answer questions, since there is no remedy by appeal from judgment of contempt, and such a remedy, if it existed, would not be adequate to protect petitioner against loss resulting from transferring records from one state to another.

Application by Adolf Schuster for writ of prohibition to be directed to the Superior

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★Rehearing denied. Hearing denied by Supreme Court.

Court for Los Angeles County and Walter S. Gates and Victor R. McLucas, Judges thereof. Writ granted.

Loewenthal, Lissner, Roth & Gunter, of Los Angeles, for petitioner.

Newlin & Ashburn and C. W. Johnson, all of Los Angeles, for respondents.

IRA F. THOMPSON, J. This original proceeding is brought to prevent the respondent court from proceeding further in an action entitled Arthur Schuster et al., plaintiffs, v. Adolf Schuster et al., defendants, and particularly to prevent the respondent court from sentencing the petitioner for contempt of court, because of his failure to answer questions at the time fixed for the giving of his deposition. The principal contention of the petitioner is that the respondent court has no jurisdiction over the subject-matter of the action, or, assuming that it has jurisdiction, it ought not to seek as a matter of comity to exercise the jurisdiction. The following constitute the salient facts: Benjamin Schuster, a resident of Apache county, Ariz., died December 10, 1911. His will was admitted to probate by the superior court of that county and state on January 29, 1912, and letters testamentary were issued to the executors named in the will, to wit, Adolf Schuster (the petitioner herein), Max Schuster (now deceased), and Josephine Schuster (the widow of deceased and one of the plaintiffs in the action now pending in the respondent court). By the terms of the will, a large portion of the estate was given to Adolf Schuster, Josephine Schuster, and Max Schuster as trustees, for the purposes of paying certain fixed portions of the income to Josephine Schuster, the widow, and to her for the maintenance of the children of the deceased, and, upon the arrival of the children at certain ages, to pay to them certain portions of the principal, and finally, upon the death of the widow and the attainment of a designated age by each of the children, to distribute to them the remainder of the principal. The children are Arthur Schuster, Marguerite Schuster Ellison, Lloyd Schuster, and Edward Schuster. All of these children except Edward Schuster are plaintiffs in the pending action; the plaintiff Lloyd Schuster being an incompetent, and appearing by Rolland Ellison, his guardian ad litem. Edward Schuster is made a defendant. On February 18, 1913, the trust estate was by an order of the superior court of Apache county, Ariz., distributed to the trustees named. Max Schuster died October 6, 1925, and Adolf Schuster was appointed executor of his last will and testament. On December 31, 1926, Marguerite Schuster Ellison and Arthur Schuster filed their petition in the Arizona court setting forth the death of Max Schuster, one of the trustees, and alleging that the trustees had not accounted, and that the petitioners' interests were adverse to those of the trust estate, and that Adolf Schuster had assumed sole control thereof, and asked the court to appoint a new trustee in the place of Max Schuster, deceased, for the purpose of securing a proper accounting. The petitioner here filed an answer thereto denying that his interest was adverse to that of his trust and admitting his failure to render a formal account, although he said the books had always been open to the petitioners and beneficiaries, and averring his willingness to account. It does not appear whether this petition has ever been heard or determined. It does appear, however, that a petition by Adolf Schuster to have ascertained the amount which should be distributed to Marguerite Schuster Ellison, prior to the decease of Josephine Schuster, filed by him on April 18, 1927, is still pending and undetermined in the Arizona court; the proceeding having been continued at the request of Marguerite Schuster Ellison. It also appears that, pursuant to the allegation of willingness to account already noticed, the trustees, by Adolf Schuster, did on April 14, 1927, file an account setting forth the assets and liabilities of the trust estate together with the income and disbursements thereof. The plaintiffs in the action pending in the respondent court, Marguerite Schuster Ellison, Lloyd Schuster, and Josephine Schuster, interposed and filed written objections to the report and account. A hearing was had from May 2 to May 9, 1927, upon these pleadings, in which all of the appearing parties were represented by counsel, and on September 3, 1927, the court made its order and decree settling the account. Some minor items were not allowed, but on the whole the report was confirmed. On October 26, 1927, Marguerite Schuster Ellison gave notice of appeal from the order and decree to the Supreme Court of the state of Arizona, and it is alleged that the appeal is still pending and undetermined.

Within two months after the appeal was taken, and on December 16, 1927, Marguerite Schuster Ellison and the others who filed their objections before the Arizona court and participated in the hearing commenced the action already mentioned in respondent court, in which they allege, in very similar vein to the proceeding in Arizona, that Adolf Schuster, the petitioner here, has exercised full control and management of the trust estate; that his interests are adverse to those of the trust estate by reason of his direction to the A. & B. Schuster Company, a corporation, which it is alleged he dominates, to take possession of certain of the trust property for its own use and benefit; that plaintiffs are entitled to an accounting in order to discover these transactions; that plaintiffs are unaware of the exact amounts which should have been paid to the children of the deceased, Benjamin Schuster, upon arriving at certain ages, to wit, 22 years and 27 years, and that petitioner has not paid them their full share in accordance with the provisions of the trust; that they are unable to determine the exact amount which should have been paid to the children until an accounting has been had, although it appears that the Arizona court has ratified and confirmed the payment of the amounts due to all the children on arriving at the age of 22 and the age of 27, except Marguerite Schuster Ellison, and has discharged the trustees as to these interests; and that Edward Schuster has acknowledged receipt of his full share payable to him at the age of 27. They ask that Adolf Schuster, the petitioner here, and the A. & B. Schuster Company, a corporation, which corporation they say is his alter ego, be required to account, and that petitioner be removed as trustee and some one else be appointed in his stead. There are other facts relating to the procedure by which it was sought to compel the petitioner to give his deposition and to punish him for contempt in refusing to answer the question, but it is unnecessary to state them.

[1] It is patent that the Arizona court has heretofore assumed and exercised, and is still exercising, jurisdiction of the trust, and a strange and anomalous situation would surely result if the California courts should remove a trustee who is appearing as such in Arizona, especially if the latter court should be of the opinion that he should not be removed. Furthermore, all of the parties to the action pending in the respondent court, with the exception of the defendant corporation, have appeared in, and submitted their contentions in, the foreign forum. Dissatisfaction on the part of litigants with the orders and decrees of that court should not prompt the courts of a sister jurisdiction to attempt an interference. There are other cogent reasons which might be enumerated, all of which point in the same direction and indicate to our minds a situation entirely different from that considered in Smith v. Davis, 90 Cal. 25, 27 P. 26, 25 Am. St. Rep. 92, and similar authorities. In the case cited, which is relied upon by respondents, a trust was created, by agreement executed in California, relating to lands situate in Washington territory. The trustee named in the deed of trust was incapable of acting, and declined to act. It was held that the courts of this state had jurisdiction to appoint a trustee to execute the trust on the general and well-recognized doctrine that equity acts in personam, and not in rem. We are confronted with a problem radically different.

[2] Indeed, our Legislature, sensing something of the situation which might arise by action of different courts in different counties of our own state, has said, in section 1699 of the Code of Civil Procedure, that, "where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trusts," and has outlined the procedure therefor. It would also be utterly inconsistent with any proper concept of judicial authority to charge a court with the responsibility of settling the accounts of the trusts to say that it did not have the power to remove a recalcitrant or neglectful trustee. In Dowdall v. Superior Court, 183 Cal. 348, 191 P. 685, in drawing the distinction between the jurisdiction possessed by the court which distributed the estate to the trustee and that possessed by any other superior court of the state, our Supreme Court designated the former as "the primary jurisdiction," and stated that any other superior court to which might be presented a bill in equity relating to the accounts of the trustee should, upon being informed of the jurisdiction of the probate court, postpone the proceeding before it and allow the accounts to be settled in the court of primary jurisdiction. If this be true of the courts of our own jurisdiction, it will readily be appreciated that some considerable degree of importance in this case must be granted to the comity existing between sister states. We would be compelled to assume that the law of Arizona is the same as our own with respect to the retention of jurisdiction over the estate for the purpose of executing the trust, even though that court had not proceeded to and were not exercising its jurisdiction. Under such circumstances we find the language employed in Schwartz v. Gerhardt, 44 Or. 425, 75 P. 698, to be particularly apt. It reads: "It is undoubtedly a well-established principle of law that a trustee appointed by a foreign court is amenable only to that court, and the fact that his residence is in another jurisdiction will not confer authority there to control the administration of his trust, or to require accountability for the trust property. The rationale of this doctrine is that, the trust relations having been created by judicial decree of another country, the trustee is accountable only to the court creating the trust. He becomes the instrumentality of the court for the administration of the property entrusted to his care and custody, which is to be considered and treated as in custodia legis; and, if other jurisdictions were permitted to interfere with and to direct the execution of the trust, it would lead to great conflict of authority and inextricable confusion, which would hinder rather than aid in the rightful administration thereof. 2 Beach, Trust and Trustees, § 758; Campbell v. Sheldon, 13 Pick. [Mass.] 8; Jenkins v. Lester, 131 Mass. 355; Curtis v. Smith, 6 Blatchf. 537, Fed. Cas. No. 3505; Woodruff

v. Young, 43 Mich. 548, 6 N. W. 85; Vaughan v. Northup, 15 Pet. 1, 10 L. Ed. 639; Peale v. Phipps, 14 How. 368, 14 L. Ed. 459."

[3, 4] The obvious reply to this quotation, without saying that it is a correct one, would seem to be that here the trustees were not appointed by the court, but by the testator. And such we understand to be the effect of respondents' argument that the status of a testamentary trustee is essentially different from that of an executor. In other words, the respondents recognize the rule announced in Philbrook v. Randall, 195 Cal. 95, 231 P. 739, that "the court having jurisdiction over the administration of the estate and the executrix is the probate court" of a foreign jurisdiction which appointed the executrix, and "such court is therefore the proper forum in which to seek an accounting and settlement of the estate," regardless of the fact that the executrix may have been guilty of a devastavit by her neglect to account, but they attempt to avoid the force of the opinion in the instant case by pointing to the difference in the manner of the appointment. We must concede that a testamentary trustee is vested with some rights and charged with responsibilities prior to the time of distribution (Estate of O'Connor, 2 Cal. App. 475, 84 P. 317), but this does not militate against the continuing jurisdiction of the court administering the estate to settle the accounts under the trusts, to supervise the management thereof, and to oversee the distribution of the income and the principal when the time arrives, to the beneficiaries. In order that the situation may be made less free from doubt, let us suppose that the Arizona court, acting under a law comparable to section 1702 of our Code of Civil Procedure, which reads in part as follows: "The court in which the administration is pending shall have power at any time before final distribution to appoint some fit and proper person to fill any vacancy in the office of trustee under the will, whether resulting from such *declination, removal, or otherwise;* provided, it shall be required by law or necessary to carry out the trust created by the will, that such vacancy shall be filled; and every person so appointed shall, before acting as trustee, give a bond such as is required by section one thousand three hundred eighty-eight of this code, of a person to whom letters of administration are directed to issue" (italics ours), had appointed, for any of the causes therein mentioned, the trustee to take the trust estate, would we not be in exactly the situation described in the quotation from Schwartz v. Gerhardt, supra? What substantial difference does it make that the trustees have received recognition at the hands of the court by the distribution of the estate to them and the confirmation of their reports and accounts, but drew their appointment from the will rather than from the court probating the will?

Entirely aside, however, from the statutory enactments under which jurisdiction of the estate is retained, to which we have directed attention, we find some light in the case of Marsh v. Marsh Ex'rs, 73 N. J. Eq. 99, 67 A. 706. In that case a part of the lands were in New Jersey, and one of the heirs brought action there for a partition of the local realty and for an accounting of the rents received therefrom. The court says: "Prima facie the courts of the testator's domicile and of the probate have primary jurisdiction of the accounts of the trustees and their allowance, and the fact that the trustees' receipts are to some extent from the rents of lands in other states does not, I think, affect the right of the court of domicile and probate to pass on all the items of the trustees' accounts, both as to charge and discharge, according to the laws of this forum. This results from the fact that the trustees derive title through the probate of the will and the receipt of letters testamentary from the New York court, and that court has therefore jurisdiction for the settlement of the trustees' accounts, wherever they may reside. 1 Perry, Trusts, § 71; Chase v. Chase, 2 Allen (Mass.) 101. In Davis v. Davis, 57 N. J. Eq. 252, 41 A. 353 (1898), Vice-Chancellor Grey said that active trusts are usually to be enforced in the state of the domicile of the decedent. Complainant, having gone to those courts, has submitted himself to their jurisdiction for the purpose of settling the amount due to the cestui que trusts up to May 1, 1904, and Minnie Marsh [the plaintiff in New Jersey], the defendant, being a party to the proceedings for an accounting there, the court may certainly include all income and expenditures up to the time of its filing. And in these proceedings all questions arising on the accounting can be settled more satisfactorily than on an accounting here, because the law of the domicile is probably the law to be applied on the settlement of the disputed items." And again the court says: "The jurisdiction in New Jersey, so far as relates to the accounting for rents prior to May 1, 1904, or the filing of the cross-bill, is ancillary, I think, to the primary jurisdiction of the court of domicile and probate, and ordinarily should be exercised only for the purpose of preserving the rights of the parties pending settlement in the place of primary jurisdiction." We also read (5 R. C. L. § 110), "when a testamentary trust is created, and the trustee appointed and the parties interested are resident in the same state, there is no doubt that the laws of that state govern all questions in regard thereto." Confirming the text is the case of First Nat. Bank of Paterson v. Nat. Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139. The force of the observation that, if the courts of other states were to interfere in instances like the one now before us, great conflict of authority and inextricable confusion would hinder the administration of justice, becomes apparent from the authorities. We are not here dealing with the different courts of our own state, whose jurisdiction is, subject to the Constitution, a matter of legislative control, but the judicial branch of government of a sister state, to whose acts and jurisdiction we owe the highest degree of courtesy and recognition. We are not disposed to say that there may not be instances where the exercise of jurisdiction by our own courts might not be invoked, but we are forced to conclude that the situation here presented does not warrant the court in taking jurisdiction, and that, when it assumes to act, it is acting improperly and in excess of its rightful authority. Weintraub v. Superior Court (Cal. App.) 267 P. 733, quotes with approval from Broom v. Douglass, 175 Ala. 268, 57 So. 860, 44 L. R. A. (N. S.) 164, Ann. Cas. 1914C, 1155, as follows: " 'By "excess of jurisdiction," as distinguished from the entire absence of jurisdiction, we understand and mean that the act, though within the general power of the judge, is not authorized, and therefore void, with respect to the particular case because the conditions which alone authorize the exercise of his general power in that particular case are wanting; and hence the judicial power is not in fact lawfully invoked.' " We cannot imagine language more apt to express the situation presented in the instant cause.

[5, 6] The respondents assert, however, that, inasmuch as the complaint in the action pending fails to disclose the proceedings in the Arizona courts other than to say that the plaintiffs have been endeavoring to secure an accounting "through proceedings in the superior court of the state of Arizona, in and for the county of Apache," and that it does not allege the fact that the personal defendants reside in that state, or that the testator was a resident there and his will probated there, but that said matters are set up by way of affirmative defense, the writ of prohibition will not lie. In the petition for the writ, however, the petitioner repeats and repleads all of the allegations of the affirmative defense, and the respondents have admitted their truth. It is true that in respondents' brief they suggest that they be permitted to amend to meet these allegations, but this suggestion, though it were made in the form of a motion, would be without appeal to our sense of justice, for the reason that it appears from the abstract of record filed in the cause pending in the Supreme Court of Arizona, and the abstract of the probate docket, together with copies of the instruments filed in the probate proceedings in Arizona, accompanying the report of the referee appointed by this court to take testimony upon one branch of the case, that the material allegations of the affirmative defense are true. What difference can it make, when the truth of the matter appears, whether it be by allegations of the petitions supplemented by admissions or in the complaint? Here the facts are to be considered as though fully settled, and, since a consideration of them discloses the excess of jurisdiction, the writ ought to issue. And this is true because there is no remedy by appeal from the judgment of contempt. Furthermore, it appears that, though there were a remedy by appeal, it would not be adequate to protect the petitioner against the loss bound to accrue to him by being forced to bring his records from Arizona to California.

The peremptory writ will issue.

We concur: WORKS, P. J.; CRAIG, J.

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98 Cal. App. 615

WILLIAMS v. NIETO et ux. (Civ. 3767.)

District Court of Appeal, Third District, California. May 1, 1929.

1. Mortgages 🔑459(1)—In action to foreclose mortgage, where complaint was verified, answer not pleading homestead was insufficient to put homestead in issue (Code Civ. Proc. § 437).

In action to foreclose a mortgage in which complaint was verified, answer was insufficient to put homestead in issue as against mortgage, where homestead was not pleaded in answer, under Code Civ. Proc. § 437, relating to pleading.

2. Homestead 🔑57(1)—In action to foreclose mortgage, burden was on defendants to show there was declaration of homestead which had been recorded and that claimant resided on property at time.

In action to foreclose mortgage, burden rested on defendants to show not only that there was a declaration of homestead and that it had been recorded, but also that claimant was resident on property at time declaration of homestead was made and recorded.

3. Homestead 🔑57(3)—In action to foreclose mortgage, evidence held insufficient to show there was valid declaration of homestead before execution of mortgage.

In action to foreclose a mortgage, evidence *held* insufficient to show there was a valid declaration of homestead on property prior to execution of mortgage.

4. Homestead 🔑118(1)—Where court found mortgage was executed and acknowledged by husband and wife, question whether there was valid homestead became immaterial (Civ. Code, § 1241).

In action to foreclose mortgage, where court found on sufficient evidence that mortgage was executed and acknowledged by both husband and wife, question of whether or not there was a valid homestead on property became immaterial, under Civ. Code, § 1241, providing that homestead is subject to execution or sale in satisfaction of judgments obtained on debt secured by mortgages executed and acknowledged by husband and wife.

5. Pleading ⚷129(2) — Where verified complaint contained copy of mortgage and verified answer did not deny execution, genuineness and due execution of mortgage were admitted (Code Civ. Proc. §§ 447, 462).

In action to foreclose mortgage, where complaint was verified and contained copy of note and mortgage, and answer was verified, but did not deny execution of either note or mortgage, genuineness and due execution of note and mortgage were admitted, under Code Civ. Proc. §§ 447, 462.

6. Mortgages ⚷59—Mortgage was valid as against mortgagors, even if certificate of acknowledgment was defective and mortgage was not entitled to be recorded (Civ. Code, § 1217).

Under Civ. Code, § 1217, mortgage was valid as against mortgagors, even if certificate of acknowledgment was defective so that mortgage was not entitled to be recorded, since purpose of acknowledgment to mortgage on real estate is to obviate proof of its execution when it is offered in evidence and to entitle it to be recorded, but mortgage itself is valid between parties and against all persons, except subsequent purchasers or mortgagees for value in good faith, whose conveyance is first duly recorded.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action to foreclose a mortgage by W. H. Williams against R. J. Nieto and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Robert J. Adcock, of Los Angeles, for appellants.

Emmons & Aldrich, of Bakersfield, for respondent.

PRESTON, Justice pro tem. The plaintiff brought this action to foreclose a mortgage on certain real property situated in Kern county. A judgment and decree of foreclosure in the usual form was entered against both defendants. From this judgment, the defendants prosecute this appeal.

Said mortgage was given to secure the payment of a promissory note for the sum of $750, dated November 26, 1921. Appellants contend there was a valid declaration of homestead on said property and that the decree of foreclosure should have been made subject to said homestead.

The record reveals two complete answers to this contention:

[1] First. The homestead is not pleaded in the answer as a special defense against the mortgage; in fact, it is not mentioned in the answer at all. The answer contains, first, a general denial of the allegations of the complaint; second, the statute of limitations; and, third, want of consideration for the note and mortgage.

Section 437 of the Code of Civil Procedure, as it stood on December 20, 1926, when the answer in this case was filed, provided: "The answer of the defendant shall contain: 1. A general or specific denial of the material allegations of the complaint controverted by the defendant. 2. A statement of any new matter constituting a defense or counterclaim.

"If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant.

* * *

"If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint."

The complaint in the case at bar is verified.

In Doll v. Good, 38 Cal. 290, the court said: "The rules of pleading, under our system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal truth.

* * *"

The answer in the case of Reeve v. Colusa Gas & Electric Co., 152 Cal. 110, 92 P. 89, failed to aver that the persons whose negligence caused the injury were *fellow servants of plaintiff*, and the court held that the defense could not be invoked unless pleaded. See, also, Layng v. Mt. Shasta Mineral Spring Co., 135 Cal. 143, 67 P. 48; Mott v. Minor, 11 Cal. App. 774, 106 P. 244; 21 Cal. Jur. 136, 137, and cases there cited.

In Wilson v. White, 84 Cal. 239, 24 P. 114, the court said: "A defense which is not pleaded cannot be considered, although shown by the evidence. The rule as to curing defects by litigating a matter without objection applies only where the pleading is defective, and *not where there is a total absence of averment.*" See, also, Brians v. Superior Court, 32 Cal. App. 206, 162 P. 420; Kimball v. Richardson-Kimball Co., 111 Cal. 386–397, 43 P. 1111.

It seems clear that defendants are limited on appeal to the two issues raised by the answer, to wit: Lack of consideration for the mortgage and statute of limitations.

The trial court found against defendants and appellants on both of these issues and the evidence is amply sufficient to support said findings.

[2, 3] Second. If we assume for the sake of argument that the answer is sufficient to put the homestead in issue as against the mortgage, still the evidence is wholly insufficient to show that there was a valid declaration of homestead on the property prior to the execution of the mortgage in question. The only time that a homestead was men-

tioned in the trial court was during the examination of defendant R. J. Nieto by his own counsel, and then the following occurred:

"Q. Is there a homestead on the property? A. Yes, sir.

"Mr. Aldrich (counsel for plaintiff): We object to that as incompetent, irrelevant and immaterial, as against a mortgage executed by both husband and wife.

"Mr. Adcock (counsel for defendants): We contend that the mortgage never has been executed.

"The Court: I have ruled on that question. Sustain the objection."

No complaint is here made of the trial court's ruling. The homestead was not offered in evidence. Nothing was offered to show the date of the making or recording of the alleged homestead—whether it was before or after the execution of the mortgage. The burden rested entirely upon appellants to show not only that there was a declaration of homestead and that same had been recorded, but also to show that the claimant was a resident upon the property at the time the declaration of homestead was made and recorded. Machado v. Machado, 36 Cal. App. 646, 172 P. 1124; Michels v. Burkhard, 47 Cal. App. 162, 190 P. 370; Apprate v. Faure, 121 Cal. 466, 53 P. 917; 13 Cal. Jur. 558. These requirements appellants failed to meet.

From the state of the record in this case it is clear that appellants are in no position to urge upon this court that there was a valid declaration of homestead on the mortgaged property.

[4] Furthermore, the court found, upon sufficient evidence, that the mortgage was executed and acknowledged by both husband and wife; therefore, the question of whether or not there was a valid homestead on the property becomes wholly immaterial. Section 1241, Civ. Code.

[5] Appellants also contend that no evidence was introduced to show that Suzy Nieto, wife of defendant R. J. Nieto, signed or executed either the note or mortgage. This contention is based upon the fact that Suzy Nieto's signature to both the note and mortgage is by mark and there is only one witness to her mark. Section 17, Code Civ. Proc. The complaint is verified and contains a copy of the note and mortgage. The answer is also verified, *but does not deny the execution of either the note or mortgage.* Therefore *the genuineness and due execution of both the note and mortgage are admitted.* Sections 447 and 462, Code Civ. Proc; 21 Cal. Jur. 155, and cases there cited.

The testimony, however, shows, and the court found, that both defendants did, on November 26, 1921, for a valuable consideration, make, execute, and deliver to plaintiff the note and mortgage in question, and that no part of the money called for in said note and mortgage has ever been paid to plaintiff.

[6] The next and final contention of appellants is that said mortgage was not entitled to be recorded, because it was not properly acknowledged by Suzy Nieto. The certificate of acknowledgment is defective, but the acknowledgment is no part of the mortgage. The purpose of an acknowledgment to a mortgage on real estate is merely to obviate proof of its execution when it is offered in evidence and to entitle it to be recorded, but the mortgage itself is valid between the parties and against all persons, except subsequent purchasers or mortgagees for value in good faith, whose conveyance is first duly recorded. 1 Cal. Jur. 236.

It follows that appellants are in no position to object to the sufficiency of the acknowledgment, for the mortgage is valid as against them, whether recorded or not. Section 1217, Civ. Code; Downing v. Le Du, 82 Cal. 471, 23 P. 202.

We find no merit whatever in the appeal. The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

98 Cal. App. 638

SALSBERRY v. JULIAN. (Civ. 6215.) ★

District Court of Appeal, Second District, Division 1, California. May 3, 1929.

Rehearing Denied May 28, 1929.

1. Appeal and error 🔑957(1)—Trial court's exercise of discretion in setting aside default will not be disturbed, except for manifest abuse (Code Civ. Proc. § 473).

Action of trial court, in exercise of discretion under Code Civ. Proc. § 473, in setting aside default judgment, will not be disturbed on appeal, unless abuse of such discretion clearly appears, and any doubt should be resolved in favor of application, to end that trial of cause on merits may be had.

2. Judgment 🔑143(15)—Setting aside default held not abuse of discretion, in view of defendant's illness and failure to notify attorney of date of service (Code Civ. Proc. § 473).

Trial court *held* not to have abused discretion in setting aside default, under Code Civ. Proc. § 473, where defendant was ill for week after service of summons and complaint, and, although he gave attorney copy of complaint and summons on his recovery from such illness, he neglected to notify attorney as to date of service.

3. Judgment 🔑158—Where verified answer accompanied motion to vacate default judgment, affidavit of merits was not jurisdictional (Code Civ. Proc. § 473).

Where verified answer equivalent to affidavit of merits accompanies motion to vacate default judgment, affidavit of merits made by defendant in person is not jurisdictional element for granting relief, under Code Civ. Proc. § 473.

4. Judgment 🔑159—On motion to set aside default, affidavit that defendant stated all facts concerning "cases" to attorney was substantial equivalent of statement that he had stated all facts of present case.

On motion to vacate default, defendant's affidavit that he stated all facts concerning "said cases" to attorney, and acquainted such attorney with defense, was substantial equivalent of affidavit that he had stated all facts of present case to counsel.

5. Appeal and error 🔑224—On motion to set aside default, plaintiff, having filed counter affidavits and not having objected to filing of affidavit, held not in position to complain of filing on appeal.

On appeal from order setting aside default judgment, plaintiff *held* in no position to urge objection as to filing of affidavit of merits, where counter affidavits in reply thereto were filed by plaintiff, and no motion was made to strike affidavit from files.

6. Judgment 🔑162(1)—On motion to set aside default, truth of affidavit of merits cannot be controverted.

On hearing of motion or application to set aside default, truth of affidavit of merits, or of matters of fact set forth in affidavit as defense, or as basis of applicant's rights in original proceedings, cannot be controverted, and therefore counter affidavits going to merits are irrelevant and improper.

7. Appeal and error 🔑935(2)—Order setting aside default held presumed act of court, and not referred to court commissioner without examining record or exercising discretion.

Order setting aside default judgment *held* not erroneous, on ground that court did not examine record nor exercise its own discretion, but erroneously referred matter to court commissioner, where record on face did not show that motion was so referred, but only that records, proofs, and briefs filed by counsel were, on submission of motion, referred to court commissioner, since it is to be presumed that court itself passed on record, and that order was made by court itself.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by John Salsberry against C. C. Julian. From an order vacating a default judgment, plaintiff appeals. Affirmed.

Culbert L. Olson, of Los Angeles, for appellant.

David H. Cannon, of Los Angeles, for respondent.

McLUCAS, Justice pro tem. This is an appeal from an order vacating a default judgment, granted against the defendant. The complaint was for money due, and was filed on September 29, 1926. A copy thereof, together with summons, was served on defendant in Los Angeles county on September 30th. Default was entered and judgment given and entered on October 14th. On October 18th defendant served and filed notice of motion to vacate and set aside the judgment, on the ground that the judgment was entered against the defendant through his mistake, inadvertence, surprise, and excusable neglect. The motion was based upon the affidavit of defendant's attorney and upon all records and files in said action, and upon the verified answer of the defendant offered for filing and served with said notice. The verified answer contained a denial of the material allegations of the complaint. The plaintiff filed several affidavits in opposition to said motion, which was set for hearing on October 25th. On October 25th, after the submission of the motion, defendant made and served upon the plaintiff an additional affidavit of merits, which was filed on October 26th.

[1] There was a decided conflict in the showing made by the respective parties as to whether defendant was ill between October 1st and October 8th, and also as to whether negotiations for settlement were pending at the time the default was entered. On this showing the court resolved the doubt in favor of the defendant. An application to be relieved from a default judgment, made under section 473 of the Code of Civil Proce-

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★Rehearing denied.

dure, is addressed to the sound discretion of the trial court, and it is a well-settled rule of this court that the action of the trial court in the exercise of such discretion will not be set aside upon appeal, unless an abuse of discretion shall clearly appear, and that any doubt that may exist in that regard should be resolved in favor of the application, to the end that a trial of the cause upon the merits may be had. Waybright v. Anderson, 200 Cal. 374, 253 P. 148; Gorman v. California Transit Co., 199 Cal. 246, 248 P. 923; Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204.

[2] No such abuse of discretion clearly appears in the instant case. Serious illness, in connection with other circumstances, has been held a ground for relief in Fink & Schindler Co. v. Gavros, 72 Cal. App. 688, 237 P. 1083, Patterson v. Keeney, 165 Cal. 465, 132 P. 1043, Ann. Cas. 1914D, 232, Burns v. Scooffy, 98 Cal. 271, 33 P. 86, and Merchants' Ad-Sign Co. v. Los Angeles Bill Posting Co., 128 Cal. 619, 61 P. 277. The defendant was served with summons and complaint on September 30th. Defendant's affidavit recites that, at the time of service of the summons on defendant, affiant was busily engaged in important business transactions which required his constant and careful attention; that affiant placed the summons and complaint among his papers, intending to deliver them to his attorney, but because of the pressure of business affiant failed to indorse on the copy of the complaint and summons the date of the service thereof; that on October 1st affiant became so ill as to prevent his attending to his usual business until October 8th; that upon the return of affiant to his office after his illness he immediately delivered to his attorney the summons and complaint. The affidavit of defendant's attorney states that he was handed a copy of the complaint and summons by the defendant on October 8th; that defendant had just returned to his office after an absence therefrom occasioned by illness; "that said affiant was at the time he received the copy of the summons and complaint given the impression that said summons had just been served upon the defendant;" and that affiant did not learn that the summons was served on the defendant on September 30th until the date of the filing of the motion to set aside the default judgment on October 15th. In Brasher v. White, 53 Cal. App. 545, 200 P. 657, it was held an abuse of discretion to deny a prompt application for relief, where the attorney was laboring under a mistake as to the date of service of summons. In the case at bar the attorney was laboring under a similar mistake, and a prompt application for relief was likewise made. Pending negotiations for settlement, in connection with other circumstances, has also been held a ground for relief from a default judgment. Merchants' Ad-Sign Co. v. Los Angeles Bill Posting Co., supra.

[3] Appellant further urges that defendant failed to make a prima facie showing of merits in support of his motion to set aside the judgment. It may be conceded that the affidavit of defendant's attorney, to the effect that affiant had discussed with the defendant the matter of his defense, and that affiant was of the opinion, and had so advised defendant, that he had a good and meritorious defense, is deficient, in that said affidavit did not state that defendant had stated the facts of the case to his attorney; but it is also to be remembered that the verified answer of the defendant, denying the material allegations of the complaint, was on file with the motion, and could be considered by the court in determining whether the application was meritorious. Where a verified answer equivalent to an affidavit of merits accompanies the motion to vacate judgment, an affidavit of merits made by the defendant in person is not a jurisdictional element for granting relief under section 473, Code of Civil Procedure. Waybright v. Anderson, supra; Melde v. Reynolds, 129 Cal. 308, 61 P. 932; Williams v. McQueen (Cal. App.) 265 P. 339; Eberhart v. Salazar, 71 Cal. App. 336, 235 P. 86; Sampanes v. Chazes, 54 Cal. App. 612, 202 P. 462; Fulweiler v. Hog's Back Con. Min. Co., 83 Cal. 126, 23 P. 65; Montijo v. Sherer & Co., 5 Cal. App. 736, 739, 91 P. 261. In Savage v. Smith, 170 Cal. 472, 150 P. 353, the court said: "The further objection that there was no affidavit of merits is met by the consideration that a verified answer setting forth a defense to the cause of action alleged in the complaint was actually on file at the time the notice was served. That such verified answer meets all the requirements of an affidavit of merits is, of course, well settled. Bailey v. Taaffe, 29 Cal. 423; Fulweiler v. Min. Co., 83 Cal. 126, [23 P. 65]; Melde v. Reynolds, 129 Cal. 308 [61 P. 932]. This answer, whether properly filed or not, was in fact one of the 'records and files in said action,' referred to in the notice, and was certainly available as an affidavit showing a meritorious defense. See Reher v. Reed, 166 Cal. 525 [137 P. 263, Ann. Cas. 1915C, 737]."

[4] In addition to the affidavit of merits made by the defendant's attorney, which was also served upon the plaintiff on the day the application was submitted, but after submission thereof, an affidavit of merits by the defendant personally was presented. This rebuttal affidavit was filed on October 26th, the day after submission of the application. No objection to the filing was then made; but counter affidavits in reply thereto were thereafter filed by the plaintiff. Appellant objects to the sufficiency of the affidavit of merits filed by the defendant in person on the ground that said affidavit states that defendant "fully, fairly and completely stated to his attorney all the facts concerning said cases and acquainted his said attorney with his defense

to said motions," instead of stating that defendant fully and fairly stated the facts of this case to his counsel. We observe no merit in this contention. An affidavit stating that defendant has stated all the facts concerning this case and a companion case is the substantial equivalent of an affidavit stating that defendant has stated all the facts of this case to his counsel. The affidavit includes all the requisites laid down in the cases cited by appellant.

[5] Appellant states that defendant's counsel, on submission of the motion, was not granted leave to file any additional or amended affidavit of merits, but following the submission of the motion defendant served on plaintiff's attorney, and on the following day, without leave of court, filed the affidavit of defendant. Appellant concedes that defendant had secured leave, when the motion was submitted, to file additional affidavits in rebuttal to plaintiff's affidavits after the submission of the motion. Appellant relies upon the case of Forrest v. Knox et al., 21 Cal. App. 363, 131 P. 894, and urges that the notice of motion to vacate the judgment was not based on this affidavit of defendant and that this affidavit was not referred to in the notice. In the case of Forrest v. Knox, supra, after submission of the motion, defendant, without notice to plaintiff and without his knowledge, obtained permission from the court to file another affidavit in support of his motion. In the present case a copy of defendant's affidavit was served upon the plaintiff in the day the motion was submitted, October 25th. Counter affidavits in reply thereto were filed by the plaintiff on October 26th. The motion was not decided until December 8th. Meanwhile plaintiff made no objection to the filing of defendant's affidavit and no motion was made to strike said affidavit from the files. It follows that plaintiff is in no position to urge this objection on appeal.

[6] Much of the showing made in plaintiff's affidavits goes to the merits of the case. On the hearing of a motion or application for relief the truth of the affidavit of merits, or of the matters of fact set forth in the affidavit as a defense, or as a basis of the applicant's rights in the original proceedings, cannot be controverted. Counter affidavits going to the merits of the case are therefore irrelevant and improper. 14 Cal. Jur. p. 1071.

[7] Appellant contends that the court itself did not examine the record and, on passing on the motion, did not exercise its own discretion based on its own knowledge of the record of the showings presented in support of and in opposition to the motion, but erroneously referred the same to a court commissioner upon whose conclusions, assistance or recommendations the motion was granted. The trial court certified "that said motion was submitted to the court without oral argument for lack of time of the court to hear oral argument, and for the same reason and to assist the court the records, proofs, and briefs filed by counsel were upon the submission of said motion referred to a court commissioner, with whose assistance the court considered said record before passing on said motion." We see no merit in plaintiff's contention. While we have been unable to find any authority for referring a motion to set aside a default judgment to a court commissioner for decision, yet the record on its face does not show that the motion was so referred, but only that the records, proofs and briefs filed by counsel were, upon the submission of said motion, referred to a court commissioner. On its face the certificate shows that the court considered the record, with the assistance of the commissioner, before passing on the record. It is to be presumed that the court itself passed on the record, and the order setting aside the judgment is made by the court itself.

The order setting aside the judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

John SALSBERRY, Plaintiff and Appellant, v. C. C. JULIAN, Defendant and Respondent.★ (Civ. 6216.)

District Court of Appeal, Second District, Division 1, California. May 3, 1929.

Rehearing Denied May 28, 1929.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Culbert L. Olson, of Los Angeles, for appellant.

David H. Cannon, of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Appeal from an order setting aside a default judgment, rendered and entered in favor of the plaintiff and against the defendant. The same questions are raised on this appeal as are raised in Salsberry v. Julian (Cal. App.) 277 P. 516, and for the reasons stated therein the order setting aside the judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

★For opinion denying rehearing, see 278 P. 257.

98 Cal. App. 650

SHORTELL et al. v. EVANS-FERGUSON CORPORATION et al. (Civ. 5246.)★

District Court of Appeal, Second District, Division 2, California. May 3, 1929.

Rehearing Denied May 31, 1929. Hearing Denied by Supreme Court July 1, 1929.

1. Accord and satisfaction 🔑5—Accord must be based on valid new consideration.

In view of Civ. Code, §§ 1427, 1521, an accord must be based upon a valid new consideration.

2. Contracts 🔑72—Release from or cancellation of illegal or void contract is never valid consideration.

Release from or cancellation of an illegal or void contract can never be valid consideration, since the party released has neither been accorded a right which he did not already possess nor excused from performance of any act which he could have been compelled to perform.

3. Vendor and purchaser 🔑39—Conditional agreement to purchase lots by reference to unrecorded map is void (St. 1907, p. 290, § 8).

Conditional agreement for purchase of lots by reference to an unrecorded map is void under St. 1907, p. 290, § 8.

4. Appeal and error 🔑173(6)—Invalidity of agreement could be raised for first time on appeal, where such invalidity appeared upon face of complaint.

Where invalidity of conditional agreement to purchase lots appeared on face of complaint which set out agreement in hæc verba as an exhibit and by reference made it part of complaint, it was not necessary to allege that agreement was void, and its invalidity could be raised for first time on appeal.

5. Contracts 🔑10(5)—Agreement for purchase of lots, reserving right in owner to return deposit at any time before contract of sale was signed and approved by owner, held lacking in mutuality.

Agreement for purchase of lots, containing reservation of right in owner to return deposit at any time before contract of sale was signed and approved by owner, thus binding owner to nothing, *held* lacking in mutuality.

6. Contracts 🔑10(1)—Mutuality is absent, where one party reserves right of cancellation.

Where one party to a contract reserves the right of cancellation, mutuality is absent.

7. Accord and satisfaction 🔑7(1)—Compromise and settlement 🔑5(2)—Acceptance by purchasers of deposit, less interest on deferred payments, on mutual cancellation of void agreement, held not "accord and satisfaction" (St. 1907, p. 290, § 8; Civ. Code, §§ 1427, 1521).

Agreement for purchase of lots by reference to unrecorded map, and reserving right in owner to return deposit at any time before contract of sale was signed and approved by owner, being void under St. 1907, p. 290, § 8, and lacking in mutuality, *held* that acceptance by prospective purchasers of deposit, less interest on deferred payments, on mutual cancellation of agreement, did not constitute an "accord and satisfaction" under Civ. Code, §§ 1427, 1521, since there was no obligation on part of purchasers which could be extinguished and no consideration for agreement to accept something less than purchasers were entitled to.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Accord and Satisfaction.]

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by James H. Shortell and another, doing business under the firm name and style of Shortell & Organ, against the Evans-Ferguson Corporation and another. Judgment for defendants, and plaintiffs appeal. Reversed.

F. Von Schrader, of Los Angeles (Barker & Keithly, of Los Angeles, of counsel), for appellants.

Swanwick & Donnelly and Goudge, Robinson & Hughes, all of Los Angeles, for respondents.

BURNELL, Justice pro tem. November 15, 1923, appellants signed the document set forth below and handed it, together with the $2,500 mentioned therein as a deposit, to respondent Evans-Ferguson Corporation (as agent for respondent California Trust Company), which thereupon executed an acceptance of the offer contained therein. The document in question reads as follows:

"Wilshire-Fairfax Tract.

"Evans-Ferguson Corporation
"Sole Agents
"508-9-10 California Bank Building
"Phones: 824-507
"Metropolitan 2372
"Los Angeles, California

W. H. Elwell
Tract Manager
Office at
Wilshire Blvd.
& Fairfax Ave.
Phones: 56489.

"Los Angeles, California, 11-15, 1923.

"To California Trust Company.

"I hand you herewith my check for $2500.00 and request that you reserve for me that piece or parcel of land which it is proposed shall be known as lot 22 & 23 block 44, Tract No. 7555, and which tract is to be designated by you as Wilshire-Fairfax Tract.

"It is my understanding that the map of said tract has not yet been recorded, but that the same will be submitted for approval to the city of Los Angeles, and will be recorded as soon as approved by Evans-Ferguson Corporation and necessary officials and that you cannot sell or offer said land for sale in accordance with said maps until it is so recorded.

"It is my wish to purchase from you the lot aforesaid, provided the map or plat thereof is recorded. In the event that the map is re-

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★Rehearing denied. Hearing denied by Supreme Court.

corded, I hereby offer to purchase the same from you upon the following terms, to wit:

"Purchase price $25,000.00, payable as follows:

"$2500.00 now deposited with this reservation, to be applied on account of the cash payment, and the balance, $5833.33, on or before recording of map, $8333.34 on or before August 15, 1924, $8333.33 on or before May 15, 1925; all deferred payments to bear interest from date of this receipt at the rate of seven per cent per annum, payable quarterly, at 300 California Bank Building, Los Angeles, and all payments to be made to the California Trust Company.

"It is agreed that the purchase, if made, shall be subject to the following conditions, namely:

"(1) Subject to reservations, restrictions, conditions and/or easements, etc., over and upon said property.

"(2) The owner reserves the right to grade and improve said property in accordance with its plan of improvements of the tract of which said property is a part, and either to remove soil from said lot or to place additional soil thereon.

"(3) The owner at its option to furnish either (a) a contract of sale on terms, or (b) a good and sufficient deed conveying the property to the buyer, together with a guarantee of title showing the record title to be free and clear from incumbrance except and conditions, restrictions, right-of-way and reservations as hereinbefore provided. In case a sale be made on terms, the buyer to execute (a) a trust deed and note in the usual form adopted by the owner, or (b) at the owner's option, a contract of sale in the usual form adopted by the owner, upon the complete satisfaction of which the owner shall furnish a deed and guarantee as above specified.

"I agree that there are no promises, verbal understandings or agreements except as in this application set forth, and that any contract or deed hereinafter executed by me for the above property will supersede and merge this receipt.

"The owner reserves the right to return the above money to the undersigned at any time before a contract of sale is signed by the undersigned and approved by the owners.

"Robert H. Organ,
"James H. Shortell,
"Address 7026 Melrose Ave.

"(Both married) Undivided half interest.

"The undersigned hereby accepts the deposit above mentioned, subject to all the conditions contained in the foregoing application.

"Evans-Ferguson Corporation,
"By W. H. Elwell.

"Shortell & Organ & J. D. West. GHZ"

In March, 1924, appellants were at their request released from their "obligations" under this agreement and the deposit returned to them, less, however, the sum of $516.25, which was retained, over their protest as accrued interest on deferred payments. The present action is for recovery of that amount. Respondents pleaded and the trial court found that appellants had agreed to pay the $516.25 for the privilege of being relieved from their obligation to purchase, and had accepted the return of the balance of the deposit ($1,983.72) and the release as an accord and satisfaction.

The grounds upon which the appellants base their contention that the judgment against them was erroneous and should be reversed are thus stated in their opening brief: "There was no accord and satisfaction, for the reason that there was no *honest* dispute upon which, under the law, an accord and satisfaction can be predicated, because under the contract of deposit defendants, if they agreed to the rescission, or mutually rescinded, were not entitled to deduct any sums of money whatsoever, as interest or otherwise, for the reason that (a) the contract under which the deposit was made was void for want of mutuality in that the owner could cancel same at any time; (b) the voucher check which was cashed by the plaintiffs did not show an acceptance by them of a lesser amount in full satisfaction of the larger amount due under the contract, but showed clearly on its face that the lesser amount was being sent 'less interest'; and (c) that the contract was void, because by Statutes of 1907, page 290, the selling of lots by reference to an unrecorded map is prohibited, and the vendee may recover the money paid on such a contract."

[1, 2] An accord is thus defined: "An accord is an *agreement* to accept, in" extinguishment "of an *obligation*, something different from or less than that to which the person agreeing to accept is entitled." Civ. Code, § 1521. We have italicized the words "agreement" and "obligation" to emphasize the fact, first, that an accord, being an agreement, must be based on a valid consideration and, second, that that which is to be extinguished must be "a legal duty, by which a person is bound to do or not to do a certain thing." Civ. Code, § 1427.

That an accord must be based upon a valid new consideration has been held repeatedly. Deland v. Hiett, 27 Cal. 611 [87 Am. Dec. 102]; Dobinson v. McDonald, 92 Cal. 33, 27 P. 1098; Peachy v. Witter, 131 Cal. 316, 63 P. 468; Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25. 134 P. 989; Sierra, etc., Power Co. v. Universal Electric & Gas Co., 197 Cal. 376, 387, 241 P. 76; Cloyne v. Levy, 26 Cal. App. 637, 148 P. 224. The consideration which respondents claimed and the trial court found to be the basis of the accord was the release of the "obligation" on the part of appellants to purchase the lots, and the cancellation of the agreement hereinabove set forth. If, therefore, that agreement was void, the appellants were not obligated thereunder, they were under no legal duty performance of which the respondents could have enforced, its cancellation extinguished no obligation, and the transaction was devoid of two of the essential elements of an accord—consideration and the extinguishment of an obligation.

Release from or cancellation of an illegal or void contract can never be a valid consideration, since the party "released" has neither been accorded a right which he did not already possess nor excused from the performance of any act which he could have been compelled to perform. The principle is thus stated in Page on Contracts: "While the parties to a contract may make such terms and select such consideration as they choose, the consideration selected must be the forbearance or acquisition of some legal right. If they select something which is not a legal right, the acquisition or forbearance of it constitutes no consideration, though the parties may believe otherwise. * * * If the forbearance is of what the promisee has no legal right to do * * * no consideration exists." Section 301. "The promise must be such as to offer a legal right or the forbearance of a legal right to which the promissor would not otherwise have been entitled." Id., § 302. "Modification or abandonment of an illegal contract by mutual agreement cannot be a lawful consideration for a new contract based on such original contract, even if there is some additional consideration." Id., § 512.

[3] This brings us to the question of the validity of the agreement of November 15, 1923. That it must be construed as an offer on the part of appellants to buy and on that of respondents to sell lots by reference to an unrecorded map seems too plain to require any extended discussion. We have here a document requesting the reservation for the signers of two lots described only by reference to an unrecorded map, and which they state they desire to purchase at a specified price and on terms which are fully set forth, including a down payment or deposit of $2,500. It provides the time and amount of deferred payments and for interest thereon from the date of the instrument, payable quarterly; it has all the earmarks of an offer to buy, which, upon its acceptance by the Evans-Ferguson Corporation, became an agreement of sale, conditional, it is true, upon the actual recording of the map, but nevertheless such an agreement as comes clearly within the purview of section 8 of the statute relating to sales or offers of sale of lots by reference to unrecorded maps. The statement as to the understanding on the part of appellants that the map had not been recorded, and that respondents could not "sell or offer for sale said land in accordance with said map until it is so recorded," may have been incorporated in the agreement in a vain attempt to take it out of the statute, but, if so, the ostrich of invalidity has not succeeded in concealing itself by hiding its head in the sands of verbosity.

The act above referred to requires the preparation and recording of maps of tracts laid out into lots for purpose of sale. Section 8 is as follows: "No person shall sell or offer for sale any lot or parcel of land, by reference to any map or plat, unless such map or plat has been made, certified, indorsed, acknowledged and filed in all respects as provided in this act, or was filed or recorded prior to the taking effect of this act and in accordance with the laws in force at the time it was so filed or recorded, and no person shall sell or offer for sale any lot or parcel of land by reference to any map or plat other than such recorded map or plat or true and correct copy thereof." The next section provides: "Every person who violates any of the provisions of this act is guilty of a misdemeanor. * * *" Stats. 1907, p. 290; Act 4574, Deering's Gen. Laws. It has been held repeatedly that an agreement violative of this statute is void. King v. Johnson, 30 Cal. App. 63, 157 P. 531; Smith v. Bach, 183 Cal. 259, 191 P. 14; Young v. Laguna Land & Water Co., 53 Cal. App. 178, 199 P. 810; Smith v. Bach, 54 Cal. App. 236, 201 P. 611; Hartzell v. Doolittle (Cal. Sup.) 269 P. 527; Krause v. Marine Trust & Sav. Bank (Cal. App.) 270 P. 246; White v. Jacobs (Cal. Sup.) 267 P. 1087. As said in Young v. Laguna Land & Water Co., supra, such a contract "was void from the beginning and is unenforcible." This being the case, it is manifest that a "release" from the "obligation" to perform was a mere nullity and conferred no right which appellants did not already possess. There was not only an entire lack of obligation on the part of appellants, but under the decisions of our courts they were legally entitled to the return of the entire amount paid in on the illegal contract, and this notwithstanding their knowledge of the nonrecordation of the map.

In Smith v. Bach, 183 Cal. 259, 191 P. 14, the action was by a vendee under a contract violative of the statute in question, seeking recovery from the vendor of a portion of the purchase price which had already been paid to the latter. The court said: "Concluding, as we do, that the contract in question is void, it only remains to determine the rights of plaintiffs to recover in this action. There are authorities which, while not denying the general rule that an illegal contract cannot be enforced whether malum in se or malum prohibitum, hold that all the consequences which attend a contract contrary to public morals do not attend one which is purely malum prohibitum, and that in the latter case courts will take notice of the circumstances and will give relief if justice and equity require a restoration of money received by either party thereunder. (13 Corpus Juris, p. 411, sec. 341.) In such a case the complaining party is protected, the prohibition being for his benefit, and not being in pari delicto he is entitled to relief. (Id., p. 501, sec. 443.) By the weight of authority where money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money. In such a case it is the duty of the court in furtherance of justice to aid one not in pari delicto, though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require." On appeal from the judgment rendered on the second trial of the same case (54 Cal. App. 236, 201 P. 611), it was held: "The contract pursuant to which the money was paid by plaintiffs was for the purchase of certain lots referred to as delineated upon an unrecorded map, and hence, as declared by statute (see Stats. 1907, p. 290), it was null and void. Nevertheless, appellant insists that, as plaintiffs must be deemed to have had knowledge that the map was unrecorded prior to making the payments, they are estopped from maintaining an action to recover the sum so paid. In other words, appellant's claim is that parties by their acts may destroy and render nugatory the plain language of this prohibitory provision. The contention is wholly without merit. As said by the Supreme Court in discussing the question on the former appeal by plaintiffs (Smith v. Bach, 183 Cal. 259, 191 P. 14); 'Where money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money.'"

The rule announced by both the Supreme Court and the District Court of Appeal was reaffirmed by the former in the very recent case of White v. Jacobs, supra. In that case the trial court had given judgment on the pleadings in an action wherein it was sought to recover a deposit made on a contract for the sale of lots by reference to unrecorded maps. Affirming this judgment, the court held: "This being so, and the sole defense of the said defendants to the third count or cause of action being the defense that the plaintiff knew at the time of entering into the agreement therein set forth that the map therein referred to was an unrecorded map, it follows that, if the defendants' averments in that regard constituted no defense, the trial court acted correctly in granting the motion of the plaintiff for a judgment against said defendants on the pleadings. In the case of Smith v. Bach, 183 Cal. 259, 191 P. 14, it was held by this court that the sale or offer for sale of lots of land by reference to an unrecorded map or plat was expressly prohibited by the terms of the aforesaid statute and that contracts for such sales based thereon were illegal and void. In a later decision of the same case by the District Court of Appeal (Smith v. Bach, 54 Cal. App. 236, 201 P. 611) it was held that the fact that the plaintiff, who was seeking to recover the money paid on account of such illegal and void transaction, knew that the map referred to therein was unrecorded, constituted no defense to her right of recovery. We have no doubt as to the correctness of the foregoing decision by the appellate tribunal and expressly approve the same, and, in so doing, hold not only that the trial court in the instant case acted correctly in granting the plaintiff's motion for a judgment on the pleadings and in entering such judgment, but that this appeal is frivolous and without merit and was taken for purposes of delay."

In Krause v. Marine Trust & Savings Bank, supra, we find this language: "The purchase price of the lot, which was paid pursuant to this void executory contract, was therefore *without consideration*, and hence was a proper claim for repayment *in this action for rescission*." The statement just quoted would seem to conclusively answer repondents' contention that appellant may not be heard to claim rescission of a void and hence legally nonexistent contract.

[4] Respondents urge that "the parties having tried the case in the court below upon the theory that there had been a valid and existing contract between the parties, the appellants cannot on appeal be heard to advance the theory that no such contract existed." We have examined the authorities upon which they rely for support of this contention, but find none of them in point in view of the state of the record in the case. The complaint alleged payment of the $2,500 deposit on the contract in question, which contract is set out in hæc verba as an exhibit and by reference made a part of the pleading. It further alleges a mutual rescission, a return of a portion of the deposit, and the refusal to return the balance. It was not necessary to allege that the contract was void. Its invalidity appeared upon its face, since it specifically stated that the map referred to therein had not been recorded. In Young v. Laguna Land & Water Co., supra, a similar contention was thus dealt with: "It is argued by appellants on this appeal that the invalidity of the contract by reason of the failure to record the map was not raised in the court below but that it was raised for the first time by respondent on this appeal. For this reason, it is argued, this court cannot consider the point. The question was raised by the plaintiffs in the amendment to their complaint, wherein they expressly alleged that the contract for the sale of this lot was made in reference to the map which was exhibited to the plaintiff Florence R. Young and which had been prepared for recordation at the date of said agreement but which was never recorded by

said defendant at all. Thus, *on the face of plaintiffs' complaint*, the contract was void and unenforcible." (Italics ours.)

[5] Appellants urge as another and distinct ground for their contention that the contract was void and hence that there was a failure of consideration, the point that it was lacking in mutuality. This point, we think, is well taken. A brief analysis of the document in question demonstrates that it bound respondents to nothing. Under the last clause there is a reservation of the right in the owner of the property "to return the above money" at any time before a contract of sale is signed and approved by the owner, and the "acceptance" signed by the Evans-Ferguson Corporation is subject to this condition. As said in Stanton v. Singleton, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334: "Of course, there is, on the face of the instrument, no mutuality of contract, for appellant [in that case] does not promise in it to do anything." It is the general rule that: "Where a contract imposes no definite obligation on one party to perform, it lacks mutuality of obligation, or of consideration, which means the same thing. If it is not binding on one party it does not bind the other." 6 Cal. Jur. 211; North Confidence Mining Co. v. Morrice, 56 Cal. App. 145, 204 P. 851; McCowen v. Pew, 18 Cal. App. 302, 123 P. 191; Brown v. San Francisco Savings Union, 134 Cal. 448, 66 P. 592; Levy v. Lyon, 153 Cal. 213, 94 P. 881. As said in Rourke v. McLaughlin, 38 Cal. 196, if a contract must be construed to give one of the parties the election to perform, it is devoid of mutuality, "for it would be leaving the existence of the contract to the will of one of the parties, which would be to say that there was no contract at all."

[6] The general rule is stated in 13 Corpus Juris at page 337, supported by reference to a number of decisions, that, where one party reserves the right of cancellation, mutuality is absent. See, also, Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 P. 177. A party to an agreement which thus purports to bind him alone has the right to withdraw from it and to demand and recover whatever he has paid thereunder. Thus, in Hamlin v. Barnhart, 26 Cal. App. 632, 147 P. 1188, the court said: "The right of respondent to withdraw from the agreement seems clear. There was no mutuality of consideration provided for. On the one hand, it was proposed to bind respondent in absolute terms to perform on her part, while appellant's performance was made conditional. * * * In the event of his default, respondent had no remedy as against his caprice. * * * 'If a promise does not offer any enforcible legal right or forbearance it is not a consideration. This principle is sometimes expressed in the rule that promises, in order to be a valid consideration each for the other, must be mutual. * * * Where the parties assume to make a contract in which a promise is the consideration for a promise, and analysis shows that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise.' (1 Page on Contracts, secs. 302, 303, 304.) * * * Treated as a mere offer to exchange, the proposal was revocable by respondent at any time before acceptance by appellant." Nor is such lack of mutuality in an agreement for the sale of land remedied by a subsequent offer of performance by the party not bound. Zaring v. Lavatta, 36 Idaho, 459, 211 P. 557.

The case of Weber v. Hulbert, 225 Ill. App. 321, well illustrates these principles of law, and in some respects presents a situation strikingly akin to that of the parties in this case so far as the question of mutuality or lack thereof is involved. The plaintiff in that case had signed a so-called "proposal" to purchase a lot from the defendant for a price and on terms specified therein. She paid a deposit and received a receipt from the owner's agent which concluded with the statement: "This receipt being issued subject to prior sale and to *acceptance* by Thomas H. Hulbert [owner]. The said sum to be returned in case of prior sale or non-acceptance." It was held that the agreement lacked mutuality, and that the plaintiff was entitled to recover back the deposit. We quote from the opinion: "If the so-called proposal, as finally signed by the parties at the times shown, be considered as an attempt to incorporate into a contract all the terms of the purchase of the lot therein mentioned, it is void as a unilateral contract. When, on the morning of August 20, plaintiff gave Ham her check for $1,250, payable to defendant's order, she received a receipt signed by Ham, in which it was stated that the amount was received 'on account of her proposal for purchase' of the lot in question for the price of $12,500, and that the receipt was issued 'subject to prior sale and to acceptance' by defendant, and that said sum was to be returned to her in case of prior sale or such non-acceptance. When these things were done it is clear that defendant was under no obligation to make a conveyance of the lot to plaintiff. When later in the same day Ham again called on plaintiff and presented the duplicate proposals to plaintiff for her signature, and she signed them, and Ham had delivered them to defendant, it is equally clear that defendant was under no obligation to make such conveyance. And, in our opinion, after defendant had signed said duplicate proposals and after one copy thereof had been received by plaintiff by mail, defendant was not bound thereby to make a conveyance of the lot to plaintiff even though she should have thereafter elected to make, and did make, further payments up to $6,250. In the third clause of the proposal is the statement: 'The said above described property, *if conveyed*, is to be conveyed by a good and sufficient warranty deed,' etc. Then follows the recital of various restrictions and conditions. Then under plaintiff's signature to the proposal proper there follow certain statements in the form of a receipt, under which appears defendant's signature. He therein acknowledges the receipt from plaintiff of $1,250, 'as deposit on the above proposal,' but he does not accept the proposal as made. All the agreement on his part is, that, if all the subsequent payments agreed in said proposal to be made by plaintiff have been made promptly when due, said sum of $1,250, together with subsequent payments, is to be returned 'if for any fault, failure or neglect chargeable to me the said above recited property shall not be conveyed in accordance with the terms of the said proposal.' He does not promise to convey the lot to plaintiff even though the subsequent payments mentioned should be promptly made by her. The mere fact that he has the right, as stated, to return all moneys paid by her presupposes the fact that he has a right to refuse to convey the lot, if he should so desire. The contract, if it is a contract, is unilateral, lacking in mutuality and void."

[7] We are of the opinion that, because the original agreement was void in law, and in addition thereto was entirely lacking in mutuality, there was no "obligation" on the part of appellants which could be extinguished, and no consideration for an agreement to accept something less than appellants were entitled to, and that as a matter of law no accord and satisfaction was had. In expressing these views we are not unmindful of the rule laid down in Berger v. Lane, 190 Cal. 443, 213 P. 45, "that the compromise of a disputed or doubtful claim is in itself a good consideration [for an accord] and that no investigation into the character or value of the claim submitted will be gone into for the purpose of setting aside a compromise honestly made." We cannot agree, however, that there was a bona fide disputed or doubtful claim in this case. The absolute invalidity and illegality of an agreement to sell, or offering to sell, lots by reference to an unrecorded map had been so repeatedly pronounced by the decisions of our courts as to leave no room for doubt in the mind of any one. The language of the contract itself shows that the parties recognized this fact. In Berger v. Lane it is further said: "But, on the other hand, it is equally true that, to constitute a good consideration for a settlement by way of compromise, there must have been an actual bona fide difference or dispute between the parties as to their legal rights." In Lapp-Gifford Co. v. Muscoy Water Co., supra, quoted with approval in Berger v. Lane, it is said: "While it is not necessary that the dispute or controversy should be well founded, it is necessary that it should be founded in good faith. Without an honest dispute an agreement to take a lesser amount in payment for the liquidated claim is without consideration and void. An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will satisfy the requirements of the rule."

In all of the cases which we have examined dealing with this subject it is to be noted that the legality and validity of the original agreement was unquestioned, the dispute settled by the accord being one as to the rights, duties, and obligations of the parties thereunder. A dispute or contention as to the rights of parties under a valid legal contract, even though the contention of one of them be untenable or the result of a misconstruction of their agreement, may, under the rule laid down in such cases as Berger v. Lane, be the proper subject of an accord. Where the original contract is void because contrary to express statutory law, an entirely different rule applies. In Sierra Power Co. v. Universal Electric & Gas Co., supra, at page 387 of 197 Cal. (241 P. 81) we find this pertinent statement: "Since an accord is an agreement it is subject to the same rules applicable to other agreements (1 Cal. Jur. 127). 'The discharge of claims by way of accord and satisfaction is dependent upon contract express or implied; and it follows that the essentials necessary to valid contracts generally must be present in a contract of accord and satisfaction. Therefore there must be (1) a proper subject matter; (2) competent parties; (3) a consent or meeting of the minds of the parties; and (4) a consideration.' (1 R. C. L. 178, sec. 3.) The agreement of accord and satisfaction which the defendant here contends for could under the evidence arise only by implication. The statute expressly forbade the plaintiff to charge or receive compensation for electrical energy at any rate other than that specified in the contract duly filed. It therefore could not lawfully accept the amounts tendered by the defendant. In view of this situation counsel for the plaintiff very pertinently inquires, 'How can the law imply that plaintiff has done that which the statute expressly forbids?' We think the answer must be that a contract of accord thus arising cannot properly be brought into being with one of the essentials of a contract lacking, to-wit, *a lawful subject matter.*" (Italics ours.)

We are of opinion that the judgment should be reversed, and it is so ordered.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

HAIGHT v. MARIN MUNICIPAL WATER DIST. (Civ. No. 6563.)★

District Court of Appeal, First District, Division 2, California. May 8, 1929.

Hearing Granted by Supreme Court July 3, 1929.

1. Damages ⚷23—Damages recoverable for breach of contract are such as may be reasonably supposed to have been within contemplation of parties when making contract (Civ. Code, § 3300).

Under Civ. Code, § 3300, damages for breach of a contract are only such as may reasonably be supposed to have been within contemplation of parties, at time of making contract, as probable result of breach.

2. Vendor and purchaser ⚷18(1)—Payment of consideration for option to purchase property rendered offer irrevocable.

Offeree's payment of $500 as consideration for option to purchase property rendered offer irrevocable.

3. Vendor and purchaser ⚷18(3)—Where offeree accepted offer before option expired, contract for sale of property automatically came into existence.

Where offeree, on last day of option period, accepted contract for sale of property, contract automatically came into existence.

4. Vendor and purchaser ⚷351(1)—Vendor water district, breaching contract, could not be charged with purchaser's resale profit, where officers had no knowledge of resale contract when giving option (Civ. Code, §§ 3300, 3306).

Under Civ. Code, §§ 3300, 3306, relating to damages, municipal water district, giving purchaser option to purchase land, and later breaching contract after purchaser had contracted to resell, could not be charged with purchaser's resale profit, where officers of district had no knowledge of resale contract at time they gave purchaser option.

5. Vendor and purchaser ⚷351(1)—Vendor's knowledge of purchaser's resale contract, acquired after vendor gave purchaser option, was insufficient to charge vendor with purchaser's resale profit on vendor's breach of contract.

Knowledge acquired by officers of vendor water district, after they had given purchaser an option to purchase land, was insufficient to charge water district with purchaser's resale profit, where water district breached contract.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Charles O. Wellock against the Marin Municipal Water District. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Jessie Haight, as administratrix of the estate of Charles O. Wellock, deceased, was substituted as plaintiff after plaintiff's death. Judgment modified, and, as modified, affirmed.

George H. Harlan, of San Rafael, for appellant.

William Kehoe, of San Francisco, for respondent.

GOODELL, Justice pro tem. This appeal was taken from a judgment for $10,500 in favor of the plaintiff, Charles O. Wellock, and from an order denying the defendant's motion for a new trial. The plaintiff died after the appeal was perfected, and his administratrix was substituted herein as respondent.

The action was for the recovery of consequential damages, namely, a prospective profit of $10,000 which plaintiff failed to make because the district did not enter into a contract of sale with plaintiff after he had exercised an option to purchase from the district a tract of land for $50,000 at a time when he had third parties under contract to buy the same land from him for $60,000; also to recover $500 paid by plaintiff when the option was obtained.

The facts are that the district owned 459 acres of land at Deer Park, near Fairfax, in Marin county, for which it had no further need, and which it desired to sell. Its board of directors had, by resolution, authorized the payment of a commission of 5 per cent. of the selling price of any of its lands. By a later resolution, dealing only with this tract, the board set $50,000 as the lowest figure at which it would sell, and authorized its general manager to give an option at that price for not longer than 60 days, the consideration for such option to be $500 for each 15-day period, and the option money to be applicable to the purchase price in case of consummation.

On April 3, 1925, Mr. Wellock obtained a writing, signed in the name of the district by its general manager, granting him a 15-day option to purchase the tract for $50,000, for which option he paid $500. The option was silent as to terms of payment. On the next day, the 4th, a letter, signed in the name of the district by its general manager, was sent to the optionee, "confirming" the option of the day before, and setting out the terms as follows: 25 per cent. of the purchase price to be paid "upon delivery of an agreement of sale," and the balance in three equal installments, one, two, and three years after date, with the privilege of paying off before maturity, and the deferred payments bearing 6 per cent. interest. This letter of the 4th amplified the provisions of the option, containing, on the one hand, terms more favorable and workable for the optionee, and, on the other, reservations favorable to the district, not made in the option. Both letters had been drafted by the attorney for the district, and about three days later he drew up a proposed agreement of sale (with the date and names of purchasers left blank),

★Hearing granted. 284 P. 926.

designed for use in case the option was exercised, which draft was submitted to the optionee. This draft contained mutual promises and covenants usually found in such writings, and expressed in legal and formal style the terms and provisions found in the letter of April 4, but, just as the letter of April 4 had enlarged upon the option of the 3d, the draft of agreement enlarged somewhat upon both letters.

On or about the 14th the district's board learned that the optionee had negotiated a contract to resell the land in question to Messrs. Rice and Greisen for $60,000, and a special meeting of the board was called for the 15th to consider the revocation of the option. The meeting was attended by 10 of the 15 members, and the attorney for the district reported that the resale contract had been made, and that the optionee would thereby enjoy a profit of $10,000, while at the same time claiming a commission of $2,500 from the district under the 5 per cent. resolution. A resolution to cancel and revoke the option was then introduced, but failed of adoption on a 5 to 5 vote (8 votes being requisite for affirmative action). The optionee on the same day expressly waived any commission that might accrue to him, and stood only upon his rights under the option, in which he claimed to be dealing in his own right, as a principal.

The resale contract between the optionee and Rice and Greisen was made on the 6th, and called for consummation by the 17th of April, and a cashier's check for $22,500 was escrowed by Rice and Greisen with a title company in San Rafael, deliverable only upon the assignment to them of a contract of sale signed by the district. The proposed form of contract had been submitted to them by the optionee and had had their approval. The district never concerned itself with, or became a party to, this Wellock-Rice-Greisen escrow.

With matters in this condition the optionee, on the last day of the life of his option, April 18, gave written notice to the district of his acceptance of the offer contained in the letters of April 3 and 4. The board met on April 21, when its attention was for the first time called to the acceptance of the 18th, and, after discussion, adopted a resolution, by an 8 to 5 vote, expressly confirming the option and directing the executive committee to take up the matter of the agreement of sale between the district and the purchaser and report back at the next meeting three weeks later. Mr. Wellock was present with his counsel, and protested that a delay greater than one week would be fatal to his resale, and would cause him, consequently, the loss of the $10,000 profit. Rice and Greisen were present with their counsel and joined in the protest. The board nevertheless adjourned for three weeks. On April 23 Rice and Greisen withdrew from escrow the $22,500 check. This action was commenced a few days thereafter.

The appellant presents a number of points in urging a reversal, chiefly: (1) That Wellock was the agent of the district, and could not, therefore, realize any secret profits from the sale of his principal's property; (2) that the manager of the district had no authority to execute the option, such authority being committed by law to the president and secretary, and, therefore, that there was no valid offer or option for Wellock to accept; (3) that Wellock did not accept the option; (4) that there was no meeting of the minds of the parties as to any contract whatsoever; (5) that there was no tender either made, or waived, nor any showing that plaintiff was ready and able to perform; (6) that there was no breach; and (7) that there was no showing that plaintiff suffered any damage. Other points might be added, but they are subsidiary to those mentioned. The conclusion at which we have arrived renders it unnecessary to discuss at any length any of these, other than the question of damages.

The judgment awards $10,500 on the theory that the plaintiff is entitled to recover the $500 paid when the option was given and the $10,000 profit which he would have made if the resale contract had been carried through to a successful conclusion. On the resale the plaintiff's $10,000 profit would have come out of the pockets of the plaintiff's vendees who had contracted, voluntarily, of course, to pay him $60,000 for land costing him but $50,000. The judgment, however, takes it out of the treasury of the district as consequential damages, and this measure, we are satisfied, is not justifiable in the circumstances of this case.

Normally the measure of damages for breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300. The breach which gives rise to this action was the defendant's failure or refusal to enter into a formal contract of sale at the price of $50,000. Had such contract been entered into and then breached by failure to convey, the amount ordinarily recoverable would have been "the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach," etc. Civ. Code, § 3306.

In the case at bar there was no proof upon which to base a finding of the market value of the land, which finding in turn would form the basis, under section 3306 of the Civil Code, for an award of the ordinary measure of damages. Indeed, the theory of the plaintiff, as shown by his complaint, was that the resale contract, and it alone, advanced the market value to $60,000 for the time being, and that when the resale was lost the value of the land was no more than the original contract price of $50,000. The allegation in that respect is as follows: "That the market value of said property on said 21st day of April, 1925, and at the time of said breach by defendant was, because of said ability and willingness of said proposed purchasers to buy the same for sixty thousand ($60,000) dollars, the sum of sixty thousand ($60,000) dollars; * * * that when said offer of said proposed purchasers was withdrawn, as aforesaid, the market value of said property ceased to be more than fifty thousand ($50,000) dollars." This is only another way of saying that the plaintiff relies upon the resale price, rather than the market value, to establish his measure of damages, which means, in short, that consequential damages are claimed.

[1] The rule with respect to consequential damages is well settled in this state. In Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 56, 87 P. 1093, 1095 (7 L. R. A. [N. S.] 913), it is said: "It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach *are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract*, as the probable result of a breach. Other damages are too remote." (Italics ours.) "* * * Such, as we understand it, is the rule declared by section 3300 of the Civil Code, as that section has always been construed by this court, and it is the rule enunciated in the leading case of Hadley v. Baxendale, 9 Exch. 341, which has been universally accepted and followed. See Mitchell v. Clarke, 71 Cal. 165, 11 P. 882, 60 Am. Rep. 529."

In the Mitchell Case the rule referred to is quoted as follows: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to defendant, and thus known to both parties, the damages resulting from a breach of such contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at most could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract." See, also, Wallace v. Ah Sam, 71 Cal. 197, 200, 12 P. 46, 60 Am. Rep. 534. And in Fraser v. Bentel, 161 Cal. 390, 396, 119 P. 509, 512 (Ann. Cas. 1913B, 1062), the following is quoted from 1 Sutherland on Damages, § 47: "In awarding damages for the nonperformance of an existing contract the gains or profits of collateral enterprises in which the party claiming them has been induced to engage by relying upon the performance of such a contract, *and of which no notice has been given the other party*, cannot be included." (Italics ours.) Other cases to the same effect are Schumann v. Karrer, 184 Cal. 50, 192 P. 849; Friend & Terry Lumber Co. v. Miller, 67 Cal. 464, 8 P. 40; Schnierow v. Boutagy, 33 Cal. App. 336, 164 P. 1132.

[2, 3] The contract upon which the respondent relies was concluded on April 18, 1925, being made up of an offer of the district, dated April 3, and an acceptance thereof by Wellock, dated April 18. When the offer was made, the offeree paid the offerer $500 as a consideration for the fifteen-day option, which, of course, rendered the offer irrevocable, and bound the district as effectively as if a bilateral contract had been then signed, for there was nothing it could do thereafter to retract or revoke. The acceptance which would convert this irrevocable offer into a contract, binding on both sides, was wholly in the power of the offeree. The district's hands were tied for 15 days without the offeree being bound in that interval, but such is the nature of an offer for which a consideration is paid. When, therefore, on the last day of the option period, the offeree accepted, the contract automatically came into existence.

There is nothing in the option of the 3d, or the modifying letter of the 4th, to show—or even to hint or suggest—that a resale was contemplated by Wellock to Rice and Greisen, or anybody else, and there was no oral testimony to that effect. From all that appears in the record, the officers of the district had no knowledge that Wellock had any resale in mind until, as alleged, the 7th, and as found by the court, the 14th, of April. By no possibility could the district have learned of the resale before the 6th, for the resale contract was not made until that day, as alleged by plaintiff. Whether the knowledge of the resale came to the district on the 7th, as alleged, or on the 14th, as found, can make no difference, for it certainly knew nothing about it on the 3d, when it bound itself irrevocably to sell.

Professor Williston in his work on Contracts, vol. 3, §§ 1356, 1357, in discussing the Hadley v. Baxendale rule and the basis for it, quotes the following from the decision in Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 543, 23 S. Ct. 754, 755, 47 L. Ed. 1171, where Justice Holmes says: "It is true that as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established *what the parties probably would have said if they had spoken about* *the matter.* But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed *he would have assented to if they had been presented to his mind.*" (Italics ours.)

[4] We are satisfied that, before the defendant district can be charged with the plaintiff's resale profit, knowledge of such resale contract must be brought home to its officers before they bind the defendant. The district became bound, as indicated in the discussion above, not when the contract was technically concluded, on April 18, but when the irrevocable offer was made on April 3. The resale contract was not made until three days later, which would indicate that *it* was made because the irrevocable *offer* had been first definitely secured, and not that the *offer* was made with *it* in contemplation. When the facts in the instant case, particularly the time element, and the chronological order of events, are considered in the light of Justice Holmes' lucid exposition of the rule, can it be thought that the district would have bound itself (as it did on April 3) if its officers had known anything about a $60,000 resale contract?

In the case of Wallace v. Ah Sam, supra, the contract relied upon in the claim for consequential damages was made *after* the contract sued upon, just as the resale contract here was made *after* the District became bound. Commissioner Searls there says: "The rule adopted in the court below, if applied to contracts of this character, would tend largely to place it in the power of parties entitled to recover damages to regulate the amount of recovery to suit themselves." He adds: "We have no reason to believe that plaintiffs acted in bad faith in executing the leases specified in the record, and we only refer to the possibility of such conduct for the purpose of showing that the rule under which such a course may be pursued is inherently vicious." To the same general effect are the remarks of Justice Angellotti in the Hunt Bros. Case, supra, where, after discussing the rule of Hadley v. Baxendale, he says: "As has often been suggested by writers upon this subject, the remote effects of slight causes are so beyond all possible conception of the parties to a contract, both in character and extent, that any other rule would practically preclude the making of contracts altogether, for no sane person could be expected to assume such uncertain and limitless liability." Williston, at section 1357, says: "* * * No doubt notice subsequent to the formation of the contract though prior to the breach is insufficient. A suggestion was indeed made by Baron Bramwell that perhaps notice after the contract was made, and before breach, would be enough. This, however, has been rejected by later cases. * * * The true reason why notice to the defendant of the plaintiff's special circumstances is important is because just as a court of equity under circumstances of hardship arising after the formation of a contract may deny specific performance, so a court of law may deny damages for unusual consequences where the defendant was not aware when he entered into the contract how serious damage would flow from its breach."

[5] The respondent argues that when the directors of the district, at their meeting on April 21, "confirmed" the letters of April 3 and 4, they had knowledge of the resale contract, and that such knowledge is sufficient to satisfy the rule we have discussed. But we are satisfied that this is answered by the authorities cited herein. The contractual obligation of the district was settled and crystallized by its offer of April 3, for which it received a consideration, and a contract either was or was not concluded by its acceptance. The plaintiff's suit was brought upon the theory that it *was.* Anything that was done thereafter would not matter, as we see it. If the letters of April 3 and 4 had been disaffirmed, such action would not have unmade the contract; and, if once made, the "confirmation" of the 21st would not change or alter the contractual situation.

Respondent is not entitled under the evidence and pleadings to recover consequential damages, and the judgment is therefore modified by striking therefrom the sum of $10,000, and, as so modified, the judgment is affirmed; appellant to recover costs of this appeal.

We concur: **KOFORD, P. J.; NOURSE, J.**

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C. H. McWILLIAMS, Eda I. McWilliams, Arthur G. Gage, Marie Gage, A. J. Jarmuth, H. P. Oates, Irene L. Oates, Ewell D. Moore, Harriet Moore, J. B. Farraher, and Eva A. Farraher, Plaintiffs and Respondents, v. C. A. HUDSON and Joseph O. Morris, Defendants and Appellants. (Civ. 3717.)★

District Court of Appeal, Third District, California. May 9, 1929.

Rehearing Denied May 24, 1929. Hearing Denied by Supreme Court June 5, 1929.

Appeal by defendants from an order of the Superior Court of Los Angeles County, George H. Cabaniss, Judge, relieving plaintiffs from their failure to file bill of exceptions in time. Appeal dismissed.

On Rehearing.
For former opinion, see 276 P. 598.

Woodruff, Musick, Pinney & Hartke, of Los Angeles, and Ticknor, Carter & Webster, of Pasadena, for appellants.

James Farraher and Ewell D. Moore, both of Los Angeles, for respondents.

PER CURIAM. Appellants in their petition for rehearing call our attention to the case of Jones v. Buck, 70 Cal. App. 368, 233 P. 82, which followed and adopted the rule announced in the case of Wolcott v. Hudner, 67 Cal. App. 704, 228 P. 46, holding that an appeal lies from an order relieving a party from default under section 473, Code of Civil Procedure, for failure to present for settlement a bill of exceptions to be used on appeal within the time provided by the Codes; also to the fact that in 1915 the Code was amended to provide for bills of exception on appeals which are not used on motions for new trial; and also to the fact that the ruling in Kaltschmidt v. Weber, 136 Cal. 675, 69 P. 497, relative to the relieving of a party from default on failure to present for settlement a statement on motion for new trial, is not applicable to circumstances such as were presented in the cases of Jones v. Buck and Wolcott v. Hudner, supra, which dealt only with the settlement of bills of exception to be used on appeal. While the language of section 963 of the Code of Civil Procedure would indicate that an appeal of the character involved in this action would lie, yet the question has been definitely settled contrary to the appellants' contention by the case of Lake v. Harris, 198 Cal. 85, 243 P. 417, and the two cases decided by the District Court of Appeal above referred to can no longer be considered as authority upon the right of a party to appeal from an order relieving one under section 473 of the Code of Civil Procedure from presenting, within the time allowed by law, a bill of exceptions to be used upon appeal.

The petition for rehearing is therefore denied.

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CALLAHAN et al. v. HARM et al.★
(Civ. 6599.)

District Court of Appeal, First District, Division 2, California. April 29, 1929.

As Modified on Denial of Rehearing May 29, 1929. Hearing Denied by Supreme Court June 27, 1929.

1. Master and servant 🔑330(3)—Evidence held to sustain finding of negligence of defendant's employee whom plaintiff was assisting in lowering trailer when injured.

In action for injuries received by plaintiff while assisting defendant's employee in lowering trailer of truck, evidence of employee's knowledge of trailer, its lack of brakes, and employee's gross carelessness in ordering plaintiff, who had no knowledge of such things, to take position of danger in lowering trailer, *held* to sustain finding that employee was negligent.

2. Master and servant 🔑330(3)—Plaintiff injured while assisting defendant's employee in lowering trailer held not shown guilty of contributory negligence.

In action for injuries received by plaintiff while assisting defendant's employee in lowering trailer of truck, evidence *held* not to show that plaintiff was guilty of contributory negligence; especially in view of plaintiff's unfamiliarity with handling of trailer.

3. Judgment 🔑199(3)—Trial 🔑139(1)—Motion for nonsuit and judgment notwithstanding verdict was properly denied, where evidence sustained verdict.

Defendant's motion for nonsuit and for judgment notwithstanding the verdict was properly denied, where evidence was sufficient to sustain verdict.

4. Master and servant 🔑330(3)—Evidence that truck and driver were rented by month to defendant, and that defendant exercised entire control over driver, held to sustain finding that driver was servant of defendant.

In action for injuries to plaintiff while assisting driver of truck in lowering trailer, evidence that owner of truck had hired truck and driver to defendant at stipulated monthly rental, that owner furnished gasoline and oil and kept truck in repair and paid driver's wages but gave no instructions whatever to driver, that driver was engaged solely in work of defendant and was acting entirely under direction of defendant, and that trailer belonged to defendant, *held* to sustain finding that driver was servant of defendant.

5. Master and servant 🔑88(5)—Plaintiff injured while assisting defendant's employee pursuant to orders of plaintiff's foreman and under direction of employee held not volunteer.

Where plaintiff was directed by his foreman to assist in loading trailer of truck, and when truck driver, employed by defendant, arrived with trailer, he directed plaintiff to help him lower trailer, and instructed him how to do it, and in following such instructions plaintiff was injured, *held*, that plaintiff was not a volunteer to whom defendant owed no duty except not to willfully injure him.

★Rehearing denied. Hearing denied by Supreme Court.

6. Negligence ⚷89(1)—Plaintiff injured while assisting defendant's employee under direct order of such employee held not engaged in joint enterprise.

Plaintiff injured while assisting defendant's employee in lowering trailer was not engaged in joint enterprise with employee, where plaintiff was acting under direct order of such employee and had no right whatever to direct movements of employee.

7. Master and servant ⚷361—Plaintiff injured while assisting defendant's employee held not fellow servant of such employee with sole remedy of compensation.

Plaintiff, directed by his foreman to assist defendant's employee in lowering trailer under directions of such employee, did not thereby become special employee of defendant and fellow servant of defendant's employee with sole remedy of compensation.

8. Master and servant ⚷332(5)—Special findings in action for injuries received while assisting defendant's employee held not inconsistent with general verdict for plaintiff.

In action for injuries to plaintiff while assisting defendant's employee in lowering trailer of truck, special findings of jury that employee was negligent in lowering trailer without sufficient help or equipment, and that there was no danger apparent to person lowering trailer, *held* not inconsistent with general verdict for plaintiff.

9. Trial ⚷252(1)—Requested instruction not applicable to facts was properly refused.

Requested instruction which was not applicable to the facts of the case was properly refused.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by John E. Callahan and another against George Harm, F. M. Hodge, and others, copartners doing business under the firm name and style of the San Joaquin Valley Transportation Company, and another. From the judgment, plaintiffs and defendant Transportation Company appeal. Affirmed.

W. I. Gilbert, of Los Angeles, and Lasher B. Gallagher, of San Francisco, for appellants.

Peckinpah & Carter, David E. Peckinpah, and F. W. Docker, all of Fresno, and Frank J. Creede and W. J. O'Connor, both of San Francisco, for respondents.

BURROUGHS, Justice pro tem. This is an action for personal injuries. The cause was tried with a jury and a verdict returned in favor of the plaintiff and against the defendants F. M. Hodge, John Kwis, and H. S. Rose, copartners doing business under the firm name and style of San Joaquin Valley Transportation Company, and against the defendant W. B. Lott in the sum of $4,500. The jury also returned a verdict in favor of the defendant George Harm. The transportation company made a motion for a nonsuit, which was denied. It also made a motion for judgment notwithstanding the verdict, which was denied, and judgment was thereupon entered in conformity with the verdict. The transportation company appeals from said judgment in so far as it affects them. The plaintiff has appealed from the judgment in favor of the defendant Harm. Both appeals are before the court upon one record and will be considered together. The appellant transportation company presents four grounds of alleged prejudicial error which may be considered together. The first of these is that the evidence fails to disclose any negligence on the part of the defendants. Second, even conceding that there is evidence of negligence, the plaintiff was guilty of contributory negligence. Third, the court erred in denying its motion for a nonsuit, and, fourth, in refusing to enter judgment in favor of the appellant notwithstanding the verdict.

A proper consideration of these objections requires a statement of the evidence. The record discloses that on the 1st day of July, 1925, the plaintiff John E. Callahan was an employee of the Edward A. Soule Company in Fresno; that said company was engaged in the business of furnishing to the general public structural iron; that the defendant George Harm was engaged in the general trucking business in the city of Fresno; that Hodge, Kwis, and Rose were copartners engaged in the business of hauling freight from Fresno to other points in the San Joaquin Valley and were operating said business under the fictitious name of San Joaquin Valley Transportation Company. They will be hereinafter referred to as the transportation company. The defendant H. B. Lott was the driver of a motortruck belonging to the defendant Harm. That defendant Harm employed and paid the wages of defendant Lott to operate said truck; that Harm had a contract with the transportation company by which the truck in question with the driver Lott was rented to the transportation company for hauling freight for the latter within the city limits of Fresno; that they paid Harm the sum of $260 per month for the services of said truck and man. It was also the duty of Harm to furnish all the gasoline and oil for said truck and to keep the same in repair. The evidence also discloses that Lott received his orders from the defendant Rose; that the transportation company had an office in what is called the Union Terminal Depot in Fresno and that Lott had a box in said office, where orders were placed for him by Rose instructing him where to go and get freight. On the morning of July 1, 1925, Lott found an order in his box to go to the place of business of the Edward L. Soule Company and haul some structural iron to the Union Terminal Depot for shipment to Bakersfield

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

over the line of the transportation company. Lott took a trailer belonging to the transportation company and hooked it to the rear of the truck belonging to Harm and thus equipped went to the place of business of the Soule Company. Upon his arrival there he stopped his truck on the opposite side of the street from the entrance door of the shed of the Soule Company where the structural iron was to be loaded onto the trailer. He thereupon detached the trailer from the truck and proceeded to back it by hand across the street to the entrance of the shed. The street was level. The trailer weighed about three tons and was not equipped with brakes. When Lott had succeeded in pushing the trailer to the entrance of the door of the shed, he called upon a man by the name of Lang and the plaintiff Callahan, both of whom were in the employ of the Soule Company, to help him lower the trailer down a concrete incline to the floor of the Soule shed. Previous to Lott's calling upon the plaintiff Callahan and Lang to help him both men had been directed by the manager of the Soule Company to help load the iron. When Lang and Callahan appeared, Lott ordered Callahan to pick up a board which was lying near and block the wheel of the trailer. Callahan thereupon picked up the board, went to the rear of the trailer, and with the aid of the board under the rear wheel attempted to block the trailer. He held the board, which was about six or eight feet long, under the rear wheel at an angle of about 45 degrees. Lott then took Lang to the front of the trailer and together they pushed it over the entrance and down the incline leading to the floor of the shed. Neither Lang nor Lott could see Callahan when he was at the rear of the trailer nor could Callahan see them. As long as the front wheels of the trailer were on the level with the street there appeared to be no trouble in the descent of the trailer into the shed, but as soon as Lang and Lott pushed the front wheels from the street onto the incline the trailer began to gather momentum and Lott and Lang were holding back on it. At this juncture plaintiff Callahan called to Lang and Lott "to hold her." Both men immediately let go of the trailer, went to the rear, and found plaintiff Callahan on the ground with the board across his leg and the trailer on the board. It further appears that Lott was an experienced driver. He had been engaged in the business of driving and handling trucks and trailers for a period of seven or eight years and was familiar with the handling of both of them. The plaintiff had had no experience whatever. The trailer weighed about three tons and was not equipped with brakes. These facts were known to Lott and unknown to Callahan.

The evidence further discloses that the plaintiff was seriously injured, and as there is no question raised as to the amount of damage awarded it becomes unnecessary to set forth the evidence relating to the nature and character of the injury.

It is claimed by said appellant that under this evidence there was no justification for the implied finding of the jury that the defendant Lott was negligent, but if such a holding is possible the evidence also shows that the plaintiff was guilty of contributory negligence, and therefore in either event plaintiff was not entitled to a verdict.

[1] In the determination of this question it must be borne in mind that this court is not sitting as a jury; its only function is to determine whether there is substantial evidence to support the verdict. If so, then the question must be determined adversely to the appellant. Lott was familiar with trucks and trailers. He knew that this particular trailer weighed upwards of three tons and, further, that it was not equipped with brakes. He ordered the plaintiff to take the board and block the wheel. Thereafter, without further inquiry or investigation and at a point where he could not see plaintiff Callahan, he proceeded to roll the trailer down the incline and he and Lang began to hold it back. He said this was not difficult to do; that the trailer seemed to go down without trouble. He heard the plaintiff call to them to hold it, but instead of holding it both Lott and Lang let go of the trailer and went to the rear, where they found plaintiff on the ground with the board on his leg and the trailer on it. As illuminative of the attitude of the jury on the question of negligence, in addition to the general verdict, they answered certain interrogatories, one of which was: "Q. What act or acts did Lott do in connection with the management of the trailer that you found to be negligence? A. Lower the trailer down the incline without sufficient help or equipment." This answer we believe covers Lott's knowledge of the trailer, its lack of brakes, and implied gross carelessness in ordering one who the evidence shows had no knowledge of these things to take a position of danger in lowering the trailer. We are of the opinion that the evidence is sufficient to support the verdict of the jury.

[2] We are also of the opinion that the claim of said appellant that plaintiff was guilty of contributory negligence is not sustained by the evidence. Defendant Lott was in charge of the work of lowering the trailer. He ordered the plaintiff to take the board and block the wheels, and as heretofore stated plaintiff was unfamiliar with the handling of the trailer, and his conduct under such circumstances did not in itself constitute contributory negligence.

[3] There being sufficient evidence to sustain the verdict of the jury, the court was also right in denying the motion for a nonsuit and denying the motion for a judgment notwithstanding the verdict. The authorities

cited by appellant, Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38; Depons v. Ariss, 182 Cal. 485, 188 P. 797; Hagenah v. Bidwell, 46 Cal. App. 556, 189 P. 799, are authority upon the point that negligence is not presumed from the mere fact of injury, but are not applicable to the facts of this case.

[4] It is next claimed by said appellant that the evidence is insufficient to justify the finding that Lott was the servant of the transportation company. A brief epitome of the evidence on this subject shows that defendant Harm was in the truck business in Fresno; that he hired the truck and driver to the transportation company by the month and at a monthly rental of $260. Harm furnished the gasoline and oil and kept the truck in repair and also paid Lott his wages. The truck and driver were turned over to the transportation company, and Lott received his orders from defendant Rose, one of the members of the transportation company. Lott had an office with the transportation company and his orders were placed by Rose in a certain pigeonhole in a desk in that office. Harm gave no instructions whatever to Lott. On the day of the accident Lott took an order from the pigeonhole instructing him to go to Soule & Company's place of business and haul some structural iron to the transportation company depot for shipping over its line to Bakersfield. Lott took a trailer belonging to the transportation company, attached it to the Harm truck, and drove to the Soule place and proceeded to get ready to load some iron on the trailer preparatory to taking it to the depot of the Transportation Company. All of the foregoing acts were done in carrying out the order of Rose and solely in connection with the business of the transportation company. Defendant Harm was in no way interested in the transaction, except to the extent of his monthly remuneration. He had no control or direction over the defendant Lott in carrying out the business of the transportation company. Under similar circumstances it has been held that the general employer was not responsible for the negligence of his employee, but that such responsibility rested on the special employer, and we therefore hold that the implied finding of the jury that Lott was a servant of the transportation company is amply sustained by the evidence. We believe the case of Pruitt v. Ind. Acc. Comm., 189 Cal. 459, 209 P. 31, is in point. It was there held that an award against the owner of a motor truck for the death of the driver while the truck and driver were under hire by a third party was unjustified in the absence of any evidence that the owner exercised the slightest degree of control over the driver in connection with the employment by the third party. This doctrine is also laid down in Stacey Bros. Co. v. Ind. Acc. Comm., 197 Cal. 164, 239 P. 1072; Famous Players Lasky Corp. et al. v. Ind. Acc. Comm., 194 Cal. 134, 228 P. 5, 34 A. L. R. 765; Ind. Indemnity Co. v. Ind. Acc. Comm. (Cal. Sup.) 262 P. 757. The cases cited by appellant are distinguishable from the case at bar. In Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721, cited by appellant, one Stevens, who was engaged in the business of "teaming and grading," offered to furnish for a compensation of $6 per day teams and drivers to a contractor engaged in performing work for the city and county of San Francisco in connection with its municipal railway line. Thereafter Stevens was notified by the contractor that he required a team. One was furnished, Stevens driving it himself. About a week later he furnished another team and driver for $6 per day, employing the driver himself and paying him $3 per day. Stevens was injured and demanded compensation. The industrial accident commission found that Stevens was an employee of the contractor. After examining the evidence the Supreme Court annulled the award and held that under the evidence the power possessed by the foreman of the railway contractor over Stevens was not such control of Stevens as to make his status that of an employee. In Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241, also cited by appellant, it was held that the hirer of a truck and driver who was a general employer was liable for the negligence of his employee where the evidence showed without conflict that such employer never relinquished the right of control of the driver and truck while it was en route between given points hauling gasoline for the special employer when the accident occurred, and in addition that the general employer alone had authority to discharge the driver. In the case at bar the truck and driver were engaged solely in the work of the transportation company and the driver was acting entirely under the direction of Rose, one of the members of the transportation company, and, further, at the time of the accident Lott, the driver, was using a trailer belonging to the company and not the truck belonging to the defendant Harm.

Without further comment on the authorities cited, we are satisfied that Lott was the special employee of the transportation company and as such the transportation company was liable for Lott's negligence and not Harm.

[5] It is next claimed that plaintiff was a volunteer so far as the transportation company was concerned and that it owed him no duty except not to willfully injure him. In support of this claim counsel have cited Giannini v. Campodonico, 176 Cal. 548, 169 P. 80. In that case it was held that a stableman performing only menial duties had no implied authority to delegate his work or engage another to assist him and his request to a boy of 14 years to clean the stable could not impose any additional duties on the owner. But

we are of the opinion that Fike v. San Joaquin Light, etc., Corp., 73 Cal. App. 712, 239 P. 344, states the rule applicable to the facts of the case at bar. In that case Fike, the deceased, was an employee of the Valley Ice Company engaged in general work around the plant. The defendant had high-power electric wires on the roof of the building occupied by the Valley Ice Company. The roof needed patching because of some holes which had been drilled in the roof by the defendant in the course of arranging its electrical equipment on the roof of said building. Nichols, the foreman of the defendant, requested Whitney, the foreman of the ice company, to have these holes closed up, which Whitney agreed he would have done. Whitney thereupon sent Fike to the roof to do the work. Fike went upon the roof to perform this service, came in contact with a live wire, and was killed. It was held in response to the same plea here made that the power company was liable for Fike's death.

In the case at bar Callahan was directed by his own foreman to assist in loading the trailer. When Lott, the employee of the transportation company, arrived on the scene, he directed Callahan to help him lower the trailer and told him just how to do it and in following these orders Callahan was injured. We think, under the circumstances, Callahan was not a volunteer under the holding in the case last cited, and the point is not well taken.

[6] It is contended by the transportation company that Lott, Lang, and Callahan were engaged in a joint enterprise, and under such circumstances even though Lott was negligent in the management, operation, and control of the trailer, his negligence is imputed to the plaintiff because plaintiff was actively and physically participating in the lowering of the trailer, the very act which resulted in his injury. As we understand, the rule on this subject is concisely stated in 20 Ruling Case Law, § 122, p. 149, where it is said: "If two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for or in respect to the control of the means or agencies employed to execute such common purpose, the negligence of the one in the management thereof is imputed to the others." This rule is cited with approval in Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 P. 236. While it is true as asserted by appellant that Callahan participated in lowering the trailer, he was acting under the direct order of Lott, the agent of appellant, and he had no right whatever to direct the movements of Lott or Lang with respect thereto. The point is not well taken.

[7] The next objection to the judgment may be stated in the language of the appellant transportation company, as follows: "If Lott was a servant of Hodge, Kwis and Rose and authorized to request and arrange for the assistance of Callahan, then Callahan became the special employee of the partnership and sole remedy is compensation." We are of the opinion that the claim is answered by the case of Murray v. Dwight, 161 N. Y. 301, 55 N. E. 901, 48 L. R. A. 673, where the same claim was made. In that case the servant of the truckman had been sent with a horse of his master to the warehouse to use the horse in operating a derrick for hoisting goods under the direction of the foreman for the warehouseman and was injured through the negligence of the warehouseman's employees. It was contended that the truckman's servant became the fellow servant of the employees of the warehouseman and was thus barred from recovering, but it was held that he was not a fellow servant. We think the same rule applies to the relation of Callahan to the transportation company. He was not a fellow servant of Lott and therefore would not be entitled to compensation as claimed by the appellant.

[8] Appellant contends that the special findings of the jury and their general verdict are in conflict. The special findings referred to are: "What act or acts did Lott do in connection with the management of the trailer that you found to be negligence? Answer. Lowering the trailer down the incline without sufficient help or equipment. (2) Was there any danger which was apparent to a person using ordinary care for his safety in or about the lowering of the trailer into the shed? * * * Answer. No." If we have correctly construed the effect of the evidence in this case on the question of negligence, then there is no inconsistency between said special findings and the general verdict of the jury.

[9] One further point requires consideration. It is claimed that the court erred in refusing to give a certain instruction offered by the defendant transportation company. This instruction deals with the liability of a general employer where he has rented an instrumentality along with the personal services of his employee. But when this accident occurred the instrumentality being used by Lott belonged to the transportation company and not to Harm, the general employer. The instruction was therefore not applicable to the facts of the case. What we have heretofore said applies with equal force to the appeal by the plaintiff from the judgment in favor of defendant Harm.

No good reason has been shown why the judgment should be disturbed, and it is therefore affirmed.

We concur: **KOFORD, P. J.; STURTEVANT, J.**

98 Cal. App. 675

FARBER v. GREENBERG. (Civ. 3751.)

District Court of Appeal, Third District, California. May 7, 1929.

1. Landlord and tenant 🔑150(1)—Landlord is under no common-law duty to tenant to make repairs, in absence of fraud, concealment, or express covenant, and landlord is not liable for damages from defective condition of premises.

At common law in the absence of fraud, concealment, or express covenant in the lease, there is no duty owing from the landlord to the tenant to make repairs, and landlord is not liable to tenant for damages resulting from defective condition of leased premises.

2. Landlord and tenant 🔑106, 150(5)—Tenant on landlord's failure to repair may vacate premises or make repairs himself at landlord's expense after notice (Civ. Code, §§ 1941, 1942).

Under Civ. Code, §§ 1941, 1942, requiring lessor of building intended for human occupation to put it in fit condition and repair subsequent delapidations, tenant may, in case of landlord's failure to repair, treat lease as breached and vacate premises or make repairs himself at the landlord's expense after notice to the landlord.

3. Landlord and tenant 🔑177½—Lessee's assignee held not entitled to damages from lessor's grantee for forced eviction from leased apartment house by health authorities, where lease contained no covenant relating to repairs or warranty of fitness of premises for habitation.

Assignee of lessee of apartment house *held* not entitled to recover damages from lessor's grantee for forced eviction by city and governmental authorities under notice requiring vacation of premises as unfit for human habitation, where lease contained no express or implied warranty requiring landlord to put premises in fit condition or repair subsequent delapidations and there was no covenant relating to repairs and no fraud or concealment on the part of the lessor.

4. Landlord and tenant 🔑177½—Lessor's agreement to complete repairs so as to insure occupancy when inside painting was completed held not to support action by lessee's assignee against lessor's grantee for damages for eviction by health authorities.

Agreement of lessor to complete repairs so as to insure occupancy of leased apartment house when inside painting was completed did not impose obligation upon lessor to make leased premises fit for human occupancy or to repair subsequent delapidations rendering premises untenable, so as to support cause of action by assignee of lessee against lessor's grantee for damages for forced eviction by city and governmental health authorities.

5. Landlord and tenant 🔑177½—Assignee of apartment house lease held not entitled to damages against lessor's grantee under statute for eviction by health authorities (Civ. Code, §§ 1941, 1942).

Assignee of lessee *held* not entitled to recover damages against lessor's grantor for forced eviction from apartment house by governmental and city health authorities, under Civ. Code, § 1941, requiring lessor to put building intended for occupation of human beings in fit condition for such occupation and repair subsequent delapidations rendering it untenable, where no notice to repair was given to original lessor or defendant as required by section 1942, and where there was no showing that any repairs were actually made or money expended in putting premises in tenable condition.

6. Landlord and tenant 🔑150(5)—Notice to repair must be given lessor or his assignee before lessee can recover for putting premises in tenantable condition (Civ. Code, §§ 1941, 1942).

Notice to repair must be given original lessor or his assignee before lessee can recover from lessor or his assignee expense of putting premises in condition fit for occupancy, under Civ. Code, §§ 1941, 1942.

7. Landlord and tenant 🔑152(6)—Lessor's grantee was not liable for breach of covenant to make repairs, where breach occurred before grantee acquired interest in premises (Civ. Code, § 1466).

If lease contained covenant to make repairs which ran with the land, lessor's grantee was not liable in damages for breach thereof resulting in eviction from apartment house under order of city and governmental health authorities, where grantee acquired no interest in property until long after the breach had occurred under Civ. Code, § 1466.

8. Landlord and tenant 🔑79(2)—There is no privity of contract between assignee of lease and landlord.

In absence of fresh contractual stipulations, there is no privity of contract between the assignee of the lease and the landlord.

9. Landlord and tenant 🔑152(8)—Lessor's grantee is under no duty to assignee of lessee to repair.

Grantee of lessor is under no duty to assignee of lessee to repair leased premises, since there is no privity of contract between them, but only privity of estate.

10. Appeal and error 🔑681—Reversal will not be granted for refusal to permit amendment of complaint, where record fails to show changes desired or that such changes were made known to trial court.

Reversal will not be granted for trial court's refusal to permit amendment of complaint, where record fails to show in what manner plaintiff desired to amend or that plaintiff disclosed to trial court nature of proposed amendments.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Israel I. Farber against A. L. Greenberg. Judgment for defendant, and plaintiff appeals. Affirmed.

Lissner, Roth & Gunter and Loewenthal, Lissner, Roth & Gunter, all of Los Angeles, for appellant.

John E. Biby, of Los Angeles, for respondent.

PRESTON, Justice pro tem. Plaintiff brought this action to recover damages from defendant for being evicted by governmental authority from an apartment house occupied by him under a written lease, executed by defendant's predecessor in ownership.

The complaint is in two causes of action. A general demurrer was interposed to each cause of action upon the ground that said complaint, and each cause of action therein set forth, did not state facts sufficient to constitute a cause of action against defendant. The trail court sustained the demurrer to both causes of action and refused to allow plaintiff to amend, and rendered judgment for defendant. From this judgment the plaintiff, Israel I. Farber, prosecutes this appeal upon the judgment roll.

The first cause of action is based upon the following facts, which are set forth in the complaint: On July 5, 1919, one Isaac Burkhart was the owner of an apartment house situate in the city of Los Angeles, at 802, 804, 804½ and 806 Temple street, consisting of six apartments and twelve single rooms, with a cottage in the rear. On the said 5th day of July, 1919, Isaac Burkhart leased and let said apartment house and cottage to Emerson Turner. Said lease is in writing and, after omitting the formal parts, signatures and acknowledgments, is as follows: "That said party of the first part (Isaac Burkhart) hereby leases and demises unto the said party of the second part (Emerson Turner) that certain apartment house situated * * * together with the appurtenances of the same, for the term of ten (10) years beginning the 1st day of August, 1919, and expiring on the 31st day of July, 1929. The rent to be paid during the term of this lease is the sum of fifty-five ($55.00) dollars per month, payable in advance on the first day of each and every month. It is understood and agreed by both parties that in consideration of the first two months' rent, the said party of the second part is to paint and paper or calcimine the entire upper part of building at 804½ Temple Street, and the entire outside front of building, also rear porch floors and stairways, using good material, and in a workmanlike manner. It is also understood and agreed that the party of the first part is to pay one-half of water bill during the term of this lease, but party of second part is to see that faucets and toilets are kept in good repair at all times. It is also understood and agreed that the party of the second part shall have entire control of said apartment house and cottage in the rear during entire term of this lease. It is further understood and agreed, that the party of the first part is to complete in a reasonable time all new work and repairs, in a satisfactory manner, so as to insure occupancy of said apartment house when inside painting is completed. In the event the premises are destroyed by fire or the elements, the party of the second part will be relieved from paying further rent, and this lease will be considered terminated. Second party to keep house and yard clean. * * *"

The said lessee, Emerson Turner, after the execution of said lease, complied with all the terms, covenants, and conditions thereof and entered into possession of the leased premises and continued in possession under said lease until August 30, 1921, at which time he sold and transferred all his right, title, and interest in and to said lease to Israel I. Farber, the plaintiff and appellant herein. Appellant immediately went into possession of said leased premises, and continued in possession under and by virtue of said lease and assignment until on or about March 1, 1926. On October 1, 1923, said Isaac Burkhart, the lessor in said lease, sold the property leased to A. L. Greenberg, the defendant and respondent herein. The complaint, with reference to this purchase, alleges: "That thereafter, on or about the 1st day of October, 1923, prior to the commencement of this action, said Isaac Burkhart, lessor in said apartment house lease, sold the property leased and demised, and more particularly described in said apartment house lease, to A. L. Greenberg, defendant herein, subordinated to said apartment house lease, and said A. L. Greenberg purchased said property subordinated to said apartment house lease, and with notice of all its terms, covenants, conditions and stipulations, and did assume the same; that since said transfer from Isaac Burkhart to A. L. Greenberg, as aforesaid, said defendant Greenberg has been, and is now, the owner of said premises and all lessor's rights in said apartment house lease, and subject to, and responsible for, the full performance of all of lessor's covenants, stipulations and conditions therein contained."

During all the time that appellant was in possession of said premises, he kept and performed all of the terms and conditions of said lease and was at no time in default.

On February 3, 1926, the following notice was posted on said leased premises, to wit:

"Department of Health

"City of Los Angeles

"Notice

"Be it known to all parties concerned, that the building located at and known as No. 802–804 and 806 West Temple Street, situated in the City of Los Angeles, State of California, is hereby declared unfit for human habitation by reason of ordinance 50282 and is hereby ordered vacated within ten days from date hereof.

"This order is issued in accordance with the provisions of section 70 of Ordinance 30619 (N. S.) of the City of Los Angeles.

"George Parrish, M. D.
"Health Commissioner
"Dated February 3, 1926.
"By Ernest E. Huber."

On or about said 3d day of February, 1926, the duly authorized agent of the government of the city of Los Angeles and of the United States of America ordered and required appellant to give up and quit possession of said leased premises for the reason that said premises were not fit for human habitation, and pursuant to the order, and by direction of said governmental authorities of the city of Los Angeles and the United States of America, said appellant was forced to and compelled, and did, on or about March 1, 1926, vacate said leased premises. Appellant has not had the possession, use, or occupation of said premises since March 1, 1926, and pursuant to the order of said governmental authorities, said leased premises were, prior to the commencement of this action, destroyed and demolished.

Said complaint also contains this allegation:

"That at the time the said apartment house lease was made and executed, as aforesaid, the premises therein demised were and continued to be from the date of the execution of said lease until on or about March 1st, 1926, and were on or about February 3, 1926, the day on which said notice which is attached hereto and marked Exhibit 'B', was posted on said premises, unfit for human habitation, because of defects in the drainage, plumbing, ventilation and construction of the same, and specifically that because of said defects in the drainage, plumbing, ventilation and construction of said premises, said premises, and the whole thereof, did, on or about the date said lease was executed, as aforesaid, constitute and did continue to constitute from said date to on or about March 1st, 1926, and were on or about February 3, 1926, a rat harborage and a nuisance.

"That the ordinances referred to in said notice * * * entitled 'An ordinance providing sanitary regulations for the protection of the public health in the City of Los Angeles, and particularly to prevent the propagation and spread of bubonic plague through the medium of rats,' and Ordinance Number 30619 (New Series), entitled, 'An ordinance providing health, sanitary and quarantine regulations;' that each of said ordinances were duly enacted and ordained by the mayor and council of the City of Los Angeles, State of California. * * *"

The complaint further alleges that by reason of the facts alleged, plaintiff has been deprived of the possession, use, and occupation of said leased premises since March 1, 1926, without fault on his part and has sustained damages in the total sum of $10,250, etc.

Appellant makes this contention: "That section 1941 of the Civil Code reads into every contract made by a lessor, who has premises to demise which are expected to be occupied by human beings, the express warranty that such premises are at the time of their demise, in a condition fit to be used for that purpose." It must be remembered that defendant and respondent *did not execute the lease in question, but that he is the grantee of Isaac Burkhart, the original lessor.* However, for the purpose of the present discussion, we will assume that the allegations of the complaint are sufficient to bring respondent into the exact position of the original lessor.

[1] The rule is well settled that at common law, in the absence of fraud, concealment, or an express covenant in the lease, there was no duty owing from the landlord to the tenant to make repairs, and consequently no liability was incurred by the landlord to the tenant arising from the defective condition of the leased premises. Priver v. Young, 62 Cal. App. 405, 216 P. 966; Brewster v. De Fremery, 33 Cal. 341; Van Every v. Ogg, 59 Cal. 565; Sieber v. Blanc, 76 Cal. 173, 18 P. 260; Willson v. Treadwell, 81 Cal. 58, 22 P. 304; Daley v. Quick, 99 Cal. 181, 33 P. 859; Grazer v. Flanagan, 35 Cal. App. 724, 170 P. 1076; Callahan v. Loughran, 102 Cal. 476, 36 P. 835; Gately v. Campbell, 124 Cal. 520, 57 P. 567; DeMotte v. Arkell, 77 Cal. App. 610, 247 P. 254; Carty v. Blauth, 169 Cal. 713, 147 P. 949; 15 Cal. Jur. 704; Smelzer [Smelser] v. Kirche (Cal. App.) 263 P. 838; Nelson v. Myers (Cal. App.) 270 P. 719.

In Grazer v. Flanagan, supra, the court said: "At the common law a lessor is not liable to make repairs to a structure rented as a dwelling-house unless by force of an express contract or covenant; the tenant takes the premises for better or worse, and cannot involve the landlord in expense for repairs without his consent."

In Gately v. Campbell, supra, the Supreme Court, in discussing a similar question, thus states the law: "The controlling question left in this case is whether or not the landlord, in the absence of fraud, concealment, or covenant in the lease, is liable to the tenant for an injury suffered by him during his occupancy by reason of the defective condition or faulty construction of the leased premises. At the common law the lessor is not liable for such injury. (Keates v. Earl of Cadogan, 10 Com. B. 591; Howard v. Doolittle [10 N. Y. Super. Ct.] 3 Duer, 464; Taylor on Landlord and Tenant, secs. 175a, 382.) And, this court has often laid down the same

rule. (Brewster v. De Fremery, 33 Cal. 341; Van Every v. Ogg, 59 Cal. 565; Sieber v. Blanc, 76 Cal. 173 [18 P. 260]; Wilson v. Treadwell, 81 Cal. 58 [22 P. 304]; Daley v. Quick, 99 Cal. 181 [33 P. 859].)"

Robinson v. Leighton, 122 Me. 309, 119 A. 809, 30 A. L. R. 1386, was a case involving liability between landlord and tenant, and the rule is similarly stated as follows: "A rule similar to that of caveat emptor applying, it certainly may be defined as a general proposition applicable to premises actually let, that the lessor, in his relation to the lessee, does not warrant their condition, and that he is not liable for any injury suffered by the tenant during his occupancy by reason of defects. There must be proof of exceptional circumstances to make the landlord liable in such cases; some proof of fraud or misrepresentation, or direct concealment of a fact known to the lessor, which the lessee did not have any reasonable opportunity of discovering. There must be proof of some direct omission by the lessor of the performance of a duty which he owed to the lessee, in order to make the landlord liable. Libbey v. Tolford, 48 Me. 316, 77 Am. Dec. 229; McKenzie v. Cheetham, 83 Me. 543, 22 A. 469; Whitmore v. Orono P. & P. Co., 91 Me. 297, 39 A. 1032, 40 L. R. A. 377, 64 Am. St. Rep. 229; Bennett v. Sullivan, 100 Me. 118, 60 A. 886, 18 Am. Neg. Rep. 108; Hill v. Day, 108 Me. 467, 81 A. 581, Ann. Cas. 1913C, 971."

[2, 3] In the case at bar no fraud or concealment is alleged; neither is there any express covenant in the lease that the lessor should place the leased premises in a fit condition to be occupied by human beings, or that the lessor should make or keep the premises in repair. Therefore, the right of appellant to any relief in damages against the lessor, by reason of the defective condition of the leased premises at the time the lease was executed, or at the time of the eviction, is purely statutory and such right must be measured solely by the provisions of the statute. 15 Cal. Jur. p. 704, and authorities above cited.

Section 1941 of the Civil Code provides that the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenable. Section 1942 of the same Code gives the option to the tenant, after notice to the landlord, to make repairs not requiring an expenditure of more than one month's rent, the same to be deducted from the rent, or to vacate the premises and be discharged from performance of the conditions of the lease.

In the absence of an express contract relating to repairs, sections 1941 and 1942 control; and in such case it is held that the statutory liability of the lessor declared in section 1941 is limited by the provisions of section 1942, so that for failure to repair, the lessee has either one of two remedies, viz.: (a) Treat the failure to repair as a breach of the lease and vacate the premises; (b) himself make the repairs at the expense of the landlord, after notice to him, provided they do not entail an expenditure of more than one month's rent. Van Every v. Ogg, supra; Grazer v. Flanagan, supra, Priver v. Young, supra; Gately v. Campbell, supra.

Therefore, in the case at bar it seems clear that no warranty exists, either express or implied, requiring the landlord to put the premises in a fit condition for human habitation, or repair subsequent dilapidations which make the premises unfit for human habitation; and the lease containing no express covenant relating to repairs, and no fraud or concealment by the lessor being alleged, the complaint fails to state a cause of action.

[4] For a second and distinct cause of action plaintiff, after repeating all of the allegations of the first cause of action, alleges: "That at the time said apartment house lease was executed, lessor therein expressly warranted to lessee that said premises, and the whole thereof, would be so improved and repaired as to insure to said lessee the occupancy of said premises and the whole thereof, from the beginning of the term of said apartment house lease to the end of the term thereof. That said express warranty is incorporated in said apartment house lease and is in words and figures as follows, to wit: 'It is further understood and agreed that the party of the first part (lessor) is to complete, in a reasonable time, all new work and repairs in a satisfactory manner so as to insure the occupancy of said apartment house when inside painting is completed.'"

From this allegation appellant relies upon what he terms "expressed warranty contained in the lease itself." It is apparent that the language relied upon in the lease, and set forth in the complaint, relates to an agreement on the part of the original lessor to do certain things by the time the lessee had completed the inside painting, to the end that the lessee would not be delayed in taking actual possession, beyond the time required for him to do the inside painting. No claim is made that the respondent, or even the original lessor, breached this agreement.

We have already seen that there is no express or implied covenant in the lease imposing any obligation upon the lessor to make the demised premises fit for human occupancy; therefore, the second alleged cause of action is wholly insufficient.

[5, 6] It is also clear that neither of the alleged causes of action set forth in the complaint states a cause of action under sections 1941 and 1942 of the Civil Code, because there is no allegation in the complaint that *any notice to repair was ever given by* *appellant, or the original tenant, to respondent or to the original lessor.* Such notice must be given before a tenant can enforce the remedies provided by said sections 1941 and 1942. Raynor v. Drew, 72 Cal. 307, 13 P. 866; Sieber v. Blanc, supra; Green v. Redding, 92 Cal. 548, 28 P. 599.

Furthermore, had the giving of notice been alleged, still the complaint would not state a cause of action based on said sections of the Civil Code, for the reason it is not alleged that any repairs were actually made or money expended in putting the premises in tenable condition, nor does appellant ask reimbursement for any money expended.

The whole theory of appellant's complaint is based on the contention that he was ousted from possession of the leased premises through *a breach of duty imposed upon respondent.*

[7] The respondent makes this contention: "The complaint does not state a cause of action *against respondent* for the further reason that it appears therefrom that the breach relied upon by appellant occurred more than four years *before respondent* became the owner of the property."

We think this contention must be sustained. There is no express covenant in the lease to be performed by the lessor relating to any repairs, or imposing any obligation upon him to make the premises fit for human habitation, except the one above mentioned, and that covenant shows upon its face that it was to be performed at once; but if we assume there was such a covenant by the original lessor, and such covenant was one running with the land, still, *no obligation for the breach thereof was imposed upon respondent because the breach alleged occurred long before respondent acquired any estate in the demised property.*

Section 1466 of the Civil Code provides: "No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits." Gardner v. Samuels, 116 Cal. 84, 47 P. 935, 58 Am. St. Rep. 135; Bailey v. Richardson, 66 Cal. 416, 5 P. 910; Handleman v. Pickerill, 84 Cal. App. 218, 257 P. 890.

[8, 9] Furthermore, the law is also well settled that, in the absence of fresh contractual stipulations, there is no privity of contract between the assignee of the lessee and the landlord. Bonetti v. Treat, 91 Cal. 223, 27 P. 612, 14 L. R. A. 151; 15 Cal. Jur. p. 753; Realty & Rebuilding Co. v. Rea, 184 Cal. 569, 194 P. 1024. No such stipulations are alleged in the complaint. Therefore, under the allegations of the complaint in this case, there could be no privity of contract between appellant, who is the assignee of the lessee, and respondent, who is the grantee of the lessor. Privity of estate only exists between them, and this relation alone would impose no duty upon respondent to repair the leased premises for appellant.

It follows from what has been said that we are of the opinion that neither count of the complaint states a cause of action against respondent.

[10] Appellant also complains that the trial court abused its discretion in denying him the right to amend. The record does not show in what manner appellant desired to amend—what changes or additions he proposed to make to his complaint. There is nothing in the record to indicate that he specified in the trial court the nature of the proposed amendment or amendments. Under these circumstances, we cannot say that the court below abused its discretion in denying leave to amend. Kleinclaus v. Dutard, 147 Cal. 252, 81 P. 516; Dukes v. Kellogg, 127 Cal. 563, 60 P. 44; Burling v. Newlands, 112 Cal. 476, 44 P. 810; Hansen v. Carr, 73 Cal. App. 518, 238 P. 1048; Lapique v. Walsh, 50 Cal. App. 86, 195 P. 296. Indeed, we are unable to perceive, if the facts alleged in the complaint be true, how appellant could amend his complaint to state a cause of action against respondent.

We think the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

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98 Cal. App. 604

VAN NOY et ux. v. GOLDBERG et al.

(Civ. 3753.)

District Court of Appeal, Third District, California. April 30, 1929.

1. Usury ⚷115—Parol evidence is admissible to show actual transaction on charge of usury (Deering's Gen. Laws 1923, Act 3757).

On charge of usury, under Deering's Gen. Laws 1923, Act 3757, parol evidence is admissible to show actual nature of transaction.

2. Usury ⚷117—Existence of usurious agreement must affirmatively appear from evidence (Deering's Gen. Laws 1923, Act 3757).

Existence of illegal agreement, in violation of Usury Law (Deering's Gen. Laws 1923, Act 3757), must of necessity appear affirmatively from evidence adduced on trial on charge of usury.

3. Usury ⚷113—Person challenging note as usurious had burden of showing note provides for usurious interest (Deering's Gen. Laws 1923, Act 3757).

Burden of showing that note provides for usurious interest is on him who challenges transaction as illegal under Deering's Gen. Laws 1923, Act 3757.

4. Appeal and error 🔑931(1)—Appellate court will assume usurious agreement was not made, where evidence of usury was conflicting and judgment went for defendant (Deering's Gen. Laws 1923, Act 3757).

Where evidence, in action to set aside trust deed on ground that Usury Law (Deering's Gen. Laws 1923, Act 3757) was violated, was conflicting, and judgment went for defendant, District Court of Appeal will assume that no usurious agreement was made.

5. Bills and notes 🔑525—Mortgages 🔑270—Usury 🔑117—Evidence held not to show direct loan from defendant to plaintiff and execution of trust deed to dummy to avoid usury law, but sustained finding that plaintiff was bona fide purchaser (Deering's Gen. Laws 1923, Act 3757).

In action to set aside trustee's conveyance of real property on ground that trust deed was usurious, under Deering's Gen. Laws 1923, Act 3757, evidence *held* not to show that trust deed for $7,000 was made to dummy for purpose of avoiding usury laws, and that transaction was in effect loan of $6,300 from defendant with bonus of $700, but sustained finding that defendant was innocent purchaser of note secured by trust deed.

6. Usury 🔑6—Usury Act is intended to prevent excessive interest, and may not be used to perpetrate injustice (Deering's Gen. Laws 1923, Act 3757).

Usury Act (Deering's Gen. Laws 1923, Act 3757) is intended to prevent charge of excessive rate of interest, and may not be used as engine to perpetrate injustice.

7. Mortgages 🔑345—Sale under trust deed may be set aside when debt has not matured at time of alleged default.

Sale under trust deed may be set aside when it appears that debt had not matured at time of alleged default.

8. Bills and notes 🔑129(2)—Note may provide for payment in installments and authorize holder to declare entire amount due on default in installment of principal or interest.

Note may appropriately provide for payment of principal in installments and authorize holder thereof to declare entire amount due on default in payment of any installment of either principal or interest.

9. Usury 🔑42—Note at 8 per cent. providing for payments of principal in installments, and maturity at option of holder on default of payments of principal and interest, held not usurious (Deering's Gen. Laws 1923, Act 3757).

Note for $7,000 at 8 per cent. interest payable quarterly, and providing for payments of principal in installments of $100 or more monthly, and that on default in payment of installments of principal and interest entire unpaid portion might become due at option of holder, *held* not to provide for payment of illegal interest under Deering's Gen. Laws 1923, Act 3757.

10. Usury 🔑76—Agreement to pay usurious interest does not vitiate entire note nor prevent recovery of principal at maturity (Deering Gen. Laws 1923, Act 3757).

Agreement to pay usurious interest will not vitiate entire note nor prevent holder from recovering valid principal sum at time of its maturity under Deering's Gen. Laws 1923, Act 3757.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by A. Van Noy and wife against Ann Goldberg and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Leslie H. Kranz, of Los Angeles, for appellants.

Pacht, Pelton & Warne, of Los Angeles, for respondents.

THOMPSON, J. This is an appeal from a judgment in favor of the defendants in a suit to set aside a trustee's conveyance to real property which was executed upon foreclosure sale for default in the payments of principal and interest secured by a trust deed. The appellants contend that the trust deed was executed in violation of the California "Usury Law" (Deering's Gen. Laws of 1923, Act 3757, p. 1384), and therefore void.

The appellants were the owners of lot 3, block C of Kurtz and Bradshaw's subdivision of the Schumacher tract of Los Angeles, Cal., which was subject to a mortgage of $11,000, upon which lot they had constructed a four-family dwelling flat. The builder of this house was George J. Diebolt. After the completion of the dwelling considerable indebtedness remained unpaid for the security of which a number of mechanics' liens had been filed. To complete the financing of this structure, R. F. Boyles, the son-in-law of appellants, who held their power of attorney for that purpose, negotiated the execution by appellants of a subsequent note dated September 18, 1925, to George J. Diebolt, for $7,000 at 8 per cent. interest, payable quarterly, secured by a deed of trust on said premises. By the terms of this note the principal became payable in installments of $100 or more on the first day of each month beginning with November, 1925, and continuing to and including September 18, 1926, at which last-mentioned date the whole principal and interest became due. For default in the payment of any installments of principal or interest, the entire unpaid portion became due at the option of the holder. This note and trust deed were executed subject to the prior mortgage for $11,000. Default in the payment of any installment of principal or interest due upon this first mortgage lien authorized the holder, by the terms of the trust deed involved in this litigation, to pay such deferred installments, and, after demand for repayment thereof, to also declare this entire second note due on that account. This $7,000 note and trust deed were subsequently sold and assigned to the respondent, Ann Goldberg, by Mr. Boyles through a broker by the name of Leon Shevitz for the sum of $6,300, which was paid in cash to the Union Bank & Trust Company of Los Angeles, named in said deed as trustee.

Five payments of $100 each were subsequently made upon this note discharging the installments due thereon only to the first day of March, 1926. On the first day of August, 1926, appellants were in default of the payment of two quarterly installments of interest aggregating approximately $170; five $100 installments of principal, and about $800 delinquent payments due upon the first mortgage lien. The respondent, Goldberg, made a fruitless demand upon appellants for the payment of these sums. August 7, 1926, due notice of default and sale of the premises pursuant to the provisions of the trust deed was given and published. August 31, 1926, the property was sold to the respondent Goldberg and a trustee's deed of conveyance was executed and delivered to her September 2, 1926. This suit was then commenced September 22, 1926.

Appellants' theory of the transaction is that respondent Ann Goldberg agreed to loan them $6,300 at 8 per cent. interest, in consideration of an additional bonus of $700, which is represented by the difference between the face amount of the note and the actual cash paid; that the note and trust deed are therefore in violation of the Usury Act of California and void, or at least that the appellants were not in default for the reason that the $700 bonus should have been applied to the payment of the deferred installments of principal and interest, and that the foreclosure sale was therefore premature and void. Appellants' theory is expressed in their brief in the following language: "The transaction was a loan from respondent Ann Goldberg to appellants of the sum of $6300.00, negotiations for which were handled by agents of the respective parties, Leon Shevitz being the agent for Ann Goldberg and R. F. Boyles being the agent for appellents, and George J. Diebolt being a mere dummy; that the purpose of using a dummy was to avoid the usury laws of California."

The court, however, adopted specific findings against the appellants on each of these issues, and the evidence amply supports these findings to the effect that they did not borrow $6,300, or any other sum *from the respondent* Ann Goldberg; that the $7,000 note and trust deed were not executed at the request of said respondent, but that she was a subsequent innocent purchaser thereof for a valuable consideration; that it is not true that the said George J. Diebolt, the payee named in said note and trust deed, was a mere dummy or nominal beneficiary thereof, but that upon the contrary the appellants executed and delivered said instruments to him at his request for an adequate consideration; and that said beneficiary thereafter sold and assigned them to the respondent at a discount for the sum of $6,300; that said instruments were not executed in violation of the Usury Law of California; and that the appellants defaulted in the payments of both principal and interest on account of which the respondent as a bona fide holder thereof declared the entire indebtedness to be due, whereupon the trustee foreclosed and sold said equity to the respondent Ann Goldberg pursuant to the terms of the trust deed, she being the highest and only bidder therefor. Respecting the original sale of this note and trust deed Mr. Shevitz testified: "Mr. Levy * * * told me that he knew of a party that had a trust deed for $7000 that could be bought at a discount. * * * Mr. Boyles * * * explained that he sent him (Levy) to me in regard to that trust deed. He told me that he had built a four-flat building and had gotten heavily in debt and that in settlement with the contractor he had given the contractor a trust deed in payment for the building of the property. * * * The name of the contractor was Diebolt. * * * He told me that there were liens on the property; that he was being annoyed, as well as the contractor, and that * * * the contractor would have to sell the trust deed immediately. * * * One or two days after (this) * * * he took me over to * * * Mr. Diebolt * * * (who) verified the statements made by Mr. Boyles. * * * I had called Miss Goldberg and told her that there was a trust deed for sale on a four-flat building, * * * a $7000 trust deed, to be bought for $6300."

[1-6] It does not appear from the terms of the note or trust deed that there was an agreement to pay illegal interest which is prohibited by the Usury Law of California. Upon a charge of usury, however, parol evidence is admissible to show the actual nature of the transaction. 27 R. C. L. 212, § 13. The existence of such an illegal agreement must of necessity appear affirmatively from the evidence adduced at the trial. The burden of showing that a note provides for usurious interest is upon him who challenges the transaction as illegal. 27 R. C. L. 268, § 71. Since the evidence upon this subject is conflicting, this court will be required to assume that no such agreement was made. The appellants' theory of the transaction is supported only by the testimony of their own attorney in fact and son-in-law, Mr. Boyles, and his contractor, Diebolt. It is a significant fact that neither of the appellants was called as a witness to deny the respondent's assertion that she was a bona fide purchaser of the note for the sum of $6,300. The trial court evidently assumed that a conspiracy may have existed between the makers of the note and their son-in-law and his contractor to finance the

troublesome indebtedness for construction of the dwelling by the execution and sale of a promissory note, and to then attempt to defeat it by a claim of usury. At least the circumstances indicating this situation are suspiciously unfortunate. The Usury Act is intended to prevent the charge of an excessive rate of interest, and may not be used as an engine to perpetrate an injustice. Haines v. Commercial Mtg. Co., 200 Cal. 609, 621, 254 P. 956, 255 P. 805, 53 A. L. R. 725.

[7] The appellants contend for a strict construction of the Usury Law, for the reason that the courts do not look with favor upon the harsh method of terminating the interest of a debtor in real property, by means of the foreclosure of a trust deed which reserves no right of redemption. Hodgkins v. Wright, 127 Cal. 688, 60 P. 431; More v. Calkins, 85 Cal. 177, 188, 24 P. 729, and 25 Cal. Jur. 83, § 67, are cited in support of this claim. A sale under a trust deed may be set aside when it appears that the debt had not matured at the time of the alleged default. Huene v. Cribb, 9 Cal. App. 141, 98 P. 78. The binding validity of trust deeds and their provisions for forfeiting the interest of a debtor for default in its payment have, however, been recognized by numerous California authorities. 25 Cal. Jur. 6, § 2.

[8-10] In the present case the default of the appellants for failure to pay both the installments of principal and interest was properly declared by the respondent. A promissory note, by its terms, may appropriately provide for the payment of the principal in installments, and authorize the holder thereof to declare the entire amount due upon default in the payment of any installment of either principal or interest. Haines v. Commercial Mtg. Co., supra. There existed in neither the note nor any secret agreement on the part of respondent concerning the payment of the original loan any provision for the payment of illegal interest. This disposes of appellants' contention that the entire note is void for the reason that it provided for the payment of an illegal rate of interest. But even if this were true, an agreement to pay usurious interest will not vitiate the entire note, nor prevent the holder from recovering the valid principal sum at the time of its maturity. In Haines v. Commercial Mtg. Co., supra, at page 622 of 200 Cal. (255 P. 806), it is said: "Even a casual reading of the statute itself shows that the legislative intent was not to declare the whole contract void, but only the portion thereof relating to interest." Rice v. Dunlap (Cal. Sup.) 270 P. 199.

The alleged defect in the notice of foreclosure also depends upon appellants' contention that there existed an agreement to pay an illegal rate of interest. For the reasons heretofore assigned, this claim is also without merit.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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98 Cal. App. 796

Ann GOLDBERG, Plaintiff and Respondent, v. A. VAN NOY et al., Defendants; A. Van Noy, W. D. Van Noy, R. F. Boyles, and Mrs. R. F. Boyles, Defendants and Appellants. (Civ. 3754.)

District Court of Appeal, Third District, California. April 30, 1929.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Leslie H. Kranz, of Los Angeles, for appellants.

Pacht, Pelton & Warne, of Los Angeles, for respondent.

THOMPSON, J. This case was tried and determined on the same evidence which was presented in the case of A. Van Noy et al. v. Ann Goldberg et al., in which an opinion of this court was rendered and filed this day (see 277 P. 538, supra), and upon the determination of which this appeal depends. Both appeals affect the same real property. In that case a judgment upholding the validity of the foreclosure proceedings and the conveyance of the property to this respondent, Ann Goldberg, was affirmed. No new issues are raised on this appeal. It follows that this respondent is entitled to the possession of the property, together with damages awarded for the unlawful detention thereof.

Upon the authority of A. Van Noy et al. v. Ann Goldberg et al., supra, the judgment in this case is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

207 Cal. 259

DOWNS v. ATKINSON. (L. A. 9516.) ★

Supreme Court of California. May 16, 1929.

Rehearing Denied June 13, 1929.

Highways ⚷113(4)—Complaint on contract for construction of highway did not disclose fatal variance, in that proofs showed only part performance.

Complaint to recover for performance of contract for construction of highway, whereby plaintiff was to receive 10 per cent. of the net profits, *held* not to disclose fatal variance with proof, in that plaintiff did not perform all the work contemplated by the contract, where essence of performance under the contract required plaintiff to be ready and willing to perform such work at such place and in such capacity as the other contracting party should determine, and latter directed that plaintiff work part of time elsewhere, which was done, and plaintiff was at no time discharged.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Millson William Downs against Lulu Atkinson, as executrix of the estate of Lynn S. Atkinson, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

James S. Jarrott and John T. Gose, both of Los Angeles, for appellant.

Harry W. Hanson and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for respondent.

PRESTON, J. The judgment is affirmed, and we justify this action as follows:

The suit is upon three disallowed claims against the estate of appellant's intestate. Plaintiff had judgment in the sum of $4,491.19, interest and costs. The attack by appeal is upon the judgment as a whole; hence it is not necessary to consider the items that make it up.

The basis of the suit is a contract dated March 29, 1921, between plaintiff and the decedent, wherein decedent agreed to pay plaintiff 10 per cent. of the net profits received from a contract held by him for the construction of a section of the California state highway between Mojave and the Los Angeles county line; this payment to be made to respondent upon the proviso that he give his "entire time to the work in such capacity" as decedent "shall determine and direct." A further proviso was that plaintiff should advance to decedent $5,000 without interest, said sum to be repaid him at the time of final cash settlement in full upon the completion of said public work. It was further agreed that plaintiff should be credited with $100 per month during the life of the road contract, the amount due to be paid upon final settlement, and, lastly, decedent agreed to pay respondent's expenses and to purchase

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★Rehearing denied.

his Ford automobile for the sum of $350, likewise payable upon final settlement of the contract.

The complaint, among other things, charged "that plaintiff complied with all and singular the provisions of said contract to be kept and performed by plaintiff, giving his entire time to the work contemplated by said contract as determined and directed by said Lynn S. Atkinson. * * *" The answer denied "that plaintiff complied with all the provisions of said contract to be kept or performed by him"; denied "that plaintiff gave his entire time to the work contemplated by said contract as determined and directed by said Lynn S. Atkinson"; but, on the contrary, defendant averred therein "that in compliance with said order (an order alleged to have been given by the state highway engineer), and by reason of plaintiff's incompetence, inefficiency, improper conduct and inability to perform his duties as aforesaid, and in order that said Lynn S. Atkinson might fulfill his said contract with the California Highway Commission, the said Lynn S. Atkinson did discharge plaintiff and relieve him from all duties in connection with said work on or about October 1st, 1921. Thereafter plaintiff performed no services whatsoever in connection therewith."

The court made findings supporting in all respects the above allegations of the complaint and against the general and special allegations above quoted from the answer. The evidence showed that fourteen months were required for completion of the work and plaintiff worked for only about the first six months upon this particular road work; decedent then directed him to go elsewhere to seek information as to other work and similar contracts for highway construction for the joint account of himself and decedent. The court specifically found that plaintiff was never discharged from his employment, but, on the contrary, was ready and willing at all times to obey and did obey the directions of decedent.

The whole contention for reversal is contained in appellant's assertion that the proofs are at variance with the allegations of the complaint. This, she says, arises because the complaint mainly counts upon full performance of the contract, whereas the proofs show only a part performance and, at most, an excuse for nonperformance. Appellant cites cases regulating the pleadings where performance is not shown but an excuse for nonperformance is relied upon. This principle is to the effect that where a party does not perform a contract, but relies upon the consent of the defendant as an excuse, he must set up these facts in his complaint. Daley v. Russ, 86 Cal. 114, 116, 117, 24 P. 867; Estate of Warner, 158 Cal. 441, 445, 111 P. 352; Krotzer v. Clark, 178 Cal. 736, 738, 739, 174 P. 657, and the recent case of Kirk v. Culley, 202 Cal. 501, 505, 261 P. 994. Respondent, on the contrary, contends that this rule is inapplicable and that in point of fact respondent did perform all covenants and conditions on his part to be kept and performed under this contract; that all he was required to do was to be able, ready, and willing to perform such work at such time and such place and in such capacity as decedent might "determine and direct."

The question really is, then: Is the fact that plaintiff did not perform all the work contemplated by the contract upon this particular portion of the highway to be considered a failure to perform within the rule of pleading relied upon? It seems that the essence of performance under the contract was to be ready and willing to perform such work at such place and in such capacity as decedent should determine and direct and that he determined and directed that plaintiff work part of the time elsewhere, which was done. Plaintiff was at no time discharged. The fact that his work may have been unsatisfactory to the engineer of the highway commission, and that for this reason decedent directed him to work elsewhere, does not alter the situation so long as decedent retained respondent in his employment. The loan of respondent to decedent was at all times prior to final settlement unpaid, and this fact in connection with the joint efforts to secure other contracts may have been factors affecting the action and conduct of decedent towards respondent.

We therefore hold that the evidence and the findings of the court under the pleadings as made bring the case within the rule announced in Stone v. Bancroft, 112 Cal. 652, 657, 44 P. 1069, 1070, where a contract of employment was under consideration and, among other things, the court said: "And even conceding that during a great portion of this time plaintiff was not working at all, yet, if he was ready, and willing to work at all times if work had been offered, and no work was offered, and he had not been discharged, then the contract was in full force, and his right of action upon it cannot be gainsaid. It is no defense to an action upon the contract under such circumstances to say that plaintiff has not performed his duties thereunder." To the same effect, see Stone v. Bancroft, 139 Cal. 78, 80, 81, 70 P. 1017, 72 P. 717; Sexton v. Richardson, 6 Cal. App. 459, 92 P. 395; Webster v. Wade, 19 Cal. 291, 79 Am. Dec. 218.

These considerations have induced the conclusion above announced.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

207 Cal. 227

Ex parte BATTELLE. (Cr. 3239.)

Supreme Court of California. May 14, 1929.

1. Constitutional law 🔑79—Each branch of Legislature has power to conduct investigations to determine necessity and expediency of contemplated legislation, notwithstanding separation of governmental powers (Const. art. 4, §§ 7, 9, 17, 18).

Each branch of the Legislature necessarily has the power to conduct investigations to determine the necessity or expediency of contemplated legislation, and this power is not excluded or abridged by the constitutional provision for separation of governmental powers, except as expressly permitted by Const. art. 4, §§ 7, 9, 17, 18.

2. States 🔑40—Branch of Legislature has power to require and compel attendance of witnesses and production of documents before it or its duly accredited committees, and to punish as for contempt contumacy of witnesses.

The power of legislative bodies to conduct investigations in aid of prospective legislation carries with it the power, in proper cases, to require and compel attendance of witnesses and production of books and papers by means of legal process, and to punish as for contempt contumacy of witnesses in such proceedings, whether conducted by legislative body or a branch of it, directly or through properly constituted committees.

3. Constitutional law 🔑55—That legislative bodies customarily pursue judicial procedure in investigations and punishing witnesses for contempt is not invasion of powers of judicial department.

That legislative bodies, in conducting investigations and punishing contumacy of witnesses, customarily adhere to judicial procedural methods, does not constitute an invasion of powers intrusted to judicial department of government.

4. States 🔑39½—Power of Legislature to make investigations in aid of prospective legislation must be as broad as subject to which inquiry properly entered upon has relation.

The power of the Legislature, in enacting laws, to remedy wrong or defect of former laws to conduct whatever inquisitions are required, must be as broad as the subject to which the inquiry properly entered upon has relation.

5. Constitutional law 🔑52—Senate resolution for investigation of cement trust held not usurpation of judicial powers (Pol. Code, §§ 300–304; Cartwright Act, as amended by St. 1909, p. 593).

Senate resolution reciting conditions indicating existence of combination to control prices of cement, and appointing special committee to investigate and ascertain whether such illegal combination or conspiracy exists, and expressly referring to provisions of Pol. Code, §§ 300–304, and Cartwright Act (St. 1907, p. 984, as amended by St. 1909, p. 593), and requiring committee to report results of its investigation with such recommendations as it may deem proper, *held* to contemplate, not a purely judicial inquiry of past illegal practices in usurpation of judicial powers, but a legislative inquiry in aid of future legislation.

6. Constitutional law 🔑52—That senate resolution contemplated investigation of single industry is not indicative that it is invasion of judicial powers.

That senate resolution contemplated investigation of single industry to determine existence of conspiracy or combination to fix prices is not indicative that contemplated investigation is purely judicial in usurpation of judicial powers.

7. States 🔑40—Stipulation that contemnor was accorded opportunity before bar of senate to purge himself of contempt will not be treated as waiver of other defects on face of adjudication.

A stipulation, in habeas corpus proceedings to procure petitioner's release from custody for contempt in refusing to testify before senate committee, that it may be assumed to be a fact that, prior to contempt resolution, petitioner was afforded opportunity to purge himself of contempt before bar of senate by answering questions and producing documents, will be given effect, but not as waiving any other defects in the contempt proceedings in so far as validity of order and adjudication of contempt upon the face thereon is called in question.

8. Constitutional law 🔑52—Power to punish contempt is not purely judicial which state senate is precluded from exercising.

The power to punish witnesses for contempt is not a purely judicial power which state senate is precluded by Constitution from exercising.

9. States 🔑40—State senate in punishing witnesses for contempt must follow statutory rules of procedure (Code Civ. Proc. §§ 1209, 1211).

Power of the state senate to punish witnesses for contempt must be exercised in strict conformity with rules of procedure which statutes provide, particularly Code Civ. Proc. §§ 1209, 1211.

10. States 🔑40—Senate contempt resolution not reciting facts constituting contempt held fatally defective, in view of stipulation that contemnors were afforded opportunity to purge contempt (Code Civ. Proc. §§ 1209, 1211; Practice Act, § 481).

In habeas corpus proceedings to procure release from custody for contempt in refusing to testify before senate committee, in view of stipulation that contemnor was afforded opportunity before bar of senate to purge himself of contempt, order or resolution adjudging contemnor in contempt, which did not contain statement of facts constituting the contempt as required by Code Civ. Proc. §§ 1209, 1211, and original Practice Act, § 481 (St. 1851, p. 127), was fatally defective; the stipulation characterizing the contempt as one committed in the immediate view and presence of senate.

11. Contempt 🔑63(4)—Order adjudging contempt of witness for refusal to answer questions or produce documents must recite questions, identify documents, and show materiality and pertinency to issues (Code Civ. Proc. §§ 1209, 1211).

In view of Code Civ. Proc. §§ 1209, 1211, a witness before court or other inquisitorial body, who is otherwise orderly and respectful, cannot be adjudged guilty of contempt for failure or refusal to answer questions or produce documents, in absence of express recital in contempt order of facts affirmatively showing not only precise questions which he has declined to answer, or precisely specified documents which he has refused to produce, and also affirmatively setting forth facts showing materiality and pertinency of each of these forms of evidence to the issue before the tribunal.

12. States 🔑40—Senate contempt resolution, referring to excerpts from transcript of testimony for questions which witness refused to answer, held insufficient (Code Civ. Proc. §§ 1209, 1211).

Senate contempt resolution, referring to excerpts from transcript of testimony submitted by committee for questions which witness refused to answer, *held* insufficient to satisfy precise requirement of Code Civ. Proc. §§ 1209, 1211, requiring order to recite facts constituting contempt.

13. States 🔑40—Senate contempt resolution held insufficient, in not reciting that investigation in which contempt was committed was legislative in character.

Senate contempt order for witness' refusal to testify and produce documents was defective, in not reciting that investigation in which contempt was committed was so far legislative in character as to have empowered committee to ask and require answer of questions propounded to witnesses and to have required production of documents in question, notwithstanding sufficiency of original resolution authorizing investigation.

In Bank.

Original habeas corpus by H. T. Battelle against the Sergeant at Arms of the State Senate to secure petitioner's release from custody on charge of contempt for refusing to answer certain questions. Order of contempt vacated, and petitioner discharged.

Pillsbury, Madison & Sutro, of San Francisco, and Devlin & Devlin & Diepenbrock, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., Charles A. Wetmore, Jr., Deputy Atty. Gen., and J. M. Inman, of Sacramento (W. A. Augustine, of San Francisco, of counsel), for respondent.

RICHARDS, J. The petitioner herein applies for release upon a writ of habeas corpus. His application is accompanied with those of eight other applicants who have separately presented petitions, similar in the main, for release from their alleged illegal detention, as a result of certain proceedings affecting all of said applicants and which are sought in each case to be reviewed. On January 17, 1929, the state senate, the California Legislature being then in session, adopted a resolution providing for the appointment by the president of the senate of five members thereof for certain purposes and with certain powers hereinafter to be set forth. The resolution itself was preceded by certain recitals which, briefly summarized, provided that, whereas the state of California and its political subdivisions have under way certain public improvements in the way of the construction of highways, bridges, dams, and other structures, certain of which are specifically set forth and which will require the expenditure of large sums of public money; that in the modern construction of such structures cement is one of the elements most used and most largely entering into the cost of such construction; that the experience of many years has shown that free competitive bidding is the best means of obtaining the materials for both public and private structures at the lowest cost, and that accordingly the laws of California provide that all supplies for public improvements shall be purchased upon competitive bids and from the lowest bidder; and that in order that this policy may be carried into effect it is necessary that monopolies, trusts, and conspiracies in restraint of trade affecting the prices of commodities, if any such exist, should be regulated and suppressed, to the end that the people may have the benefit of lower prices of material by free competitive bidding; "and whereas, there is a reputed cement trust in this state, composed of manufacturers and dealers in cement forming a combination to control and maintain high and uniform prices, by stifling free competition, thereby increasing the costs of all improvements in which cement is used, which is evidenced by reports from the State Purchasing Department, showing bids of all manufacturers bidding to be the same, thereby depriving the department of the benefit of advantageous prices through free competition, and the same conditions are reported in municipal purchases and by private contractors, now, therefore, be it resolved by the senate of the state of California, that a special committee of five members of the senate be appointed by the president of the senate to ascertain the fact whether or not an illegal combination or conspiracy exists among the manufacturers and dealers in cement, to control the market price of cement in the state of California by limiting production, suppressing free competition or other means, and upon the conclusion of such investigation to report to the senate the results thereof, together with such recommendations as the committee shall deem proper." The resolution then proceeded to define the authority and powers of the committee thus to be appointed: "That said committee be and it is hereby authorized and empowered to do any and all things necessary to make a full and complete investigation of the matters and subjects hereinbefore enumerated, or recited, and to that end to employ all necessary clerical, expert and legal assistants, and said committee is hereby authorized and empowered to summon witnesses, require the production of persons, books, accounts, agreements, minutes of meetings, documents, records and papers of every kind, to issue subpœnas and to take all necessary means to compel the attendance of witnesses and to procure testimony; and the members of said committee are, and each of them is, hereby authorized to administer oaths; and all the provisions of article VIII of chapter 2, title 1, part III of the Political Code of this state, relative to the attendance and examination of witnesses before the legislature and committees thereof, shall apply to the committee appointed under this resolution." The sergeant at arms of the senate was made the executive officer of the committee, with power to serve any and all subpœnas and orders that may be issued by said committee. The resolution finally provided: "That said committee be given leave to sit during the sessions of the senate and during the recess, at such place or places as the committee may determine; that it reported as speedily as possible, the results of its investigation to the senate, with such recommendations as it may deem proper, relative to abuses or wilful violation of the anti-trust law (Cartwright Act [St. 1907, p. 984, as amended by St. 1909, p. 593]), and the particulars, if any, wherein said law should be strengthened and made more effective to prevent illegal combinations or conspiracies in restraint of trade."

Pursuant to the foregoing resolution the president of the senate appointed the following five members thereof to constitute and function as such committee, viz.: Senators H. C. Jones, J. M. Inman, J. I. Wagy, F. S. Boggs, and Henry E. Carter. The committee presently organized by the selection of Senator H. C. Jones as the chairman thereof and the appointment of the necessary clerks, reporters, and others assistants. Later during the sessions of the committee Senator Jones became ill and unable to be present, and Senator Inman was thereupon somewhat informally selected to act as vice chairman of the committee. The sessions of the committee opened in San Francisco on January 24, 1929, whereupon it was made to appear that a communication had been sent by the chairman to a large number of companies or corporations manufacturing or dealing in cement, notifying them of the dates upon which the hearings of the committee would be held in San Francisco and also in Los Angeles, to the end that they might be present or represented by their officials or other representatives. There were a few appearances from among the number thus notified on the first day set for these hearings and others appeared later, until by their officials or counsel practically all of those who had been sent the foregoing notice had appeared. The committee opened its hearings on the day appointed therefor in San Francisco by receiving certain testimony and tabulations from members of the state purchasing department, showing that during the years 1926 to 1928 bids had been asked by the state through said department for supplying cement upon some 18 construction projects throughout the state of California; that as to these projects for public construction which had their situs in Northern or Central California the bidders were cement producers or dealers having their plants or offices in Northern or Central California, and as to these the testimony and tabulations of the state purchasing agencies showed that the bids of these were practically identical upon each and all of these projects. As to the projects which had their location in Southern California the bidders were in the main southern producers or dealers in cement and as to these it appeared that with certain minor exceptions a similar identity in the figures of the several bids was in each instance shown. It was further made to appear that the bids for cement to be furnished the state harbor commission of San Francisco made by these northern bidders were identical throughout. As to bids furnished upon state projects undertaken during the year 1926 a like identity in the figures of the several bidders was disclosed. Certain testimony with reference to the construction work of the East Bay municipal utility district was to the same general effect in so far as it disclosed similar identities in the bids offered upon the building projects of that organization. In the course of the foregoing branch of the committee's investigation it was made to appear that upon several occasions wherein identical bids were offered all of these bids were rejected for no other apparent reason than that their identical figures aroused among those calling for bids the suspicion of a concert among the bidders. In one instance an interesting and possibly suggestive variation occurred. That was in the case of the calling for bids in May, 1924, for the construction of the Exchequer dam on the Merced river not far from the city of Merced by the Merced irrigation district, the amount of cement required being estimated at 350,000 barrels. Bids were tendered by five Central California cement companies, which upon being opened were found to be identical in the amount bid, which was $3.69 per barrel. These bids were rejected and a new advertisement for bids for cement was ordered and had on behalf of the district. When this second set of bids was opened the same practical identity from the same set of bidders appeared. These bids were also ordered rejected and another advertisement was ordered and had. When this third set of bids was opened there was a marked variance in the amounts of the several bids, the bid of the Pacific Portland Cement Company being $3.32 per barrel of cement, which was 5 cents lower per barrel than that of the Henry Cowell Lime & Cement Company, its nearest competitor. The Pacific Portland Cement Company was awarded the contract for the full amount of cement then required. Mr. Robert B. Henderson, president of the Pacific Portland Cement Company, and who had responded to the request of the committee, and was present without further subpœna, was next called upon to testify, and without being then sworn was questioned at considerable length and gave his answers freely and without objection to a wide range of inquiry into matters affecting the production and marketing of cement more especially by his own organization. He was then asked certain particular questions hereinafter to be identified and each of which, upon the advice of his counsel, he declined to answer. He was also requested by the committee to produce before it certain of the books, records, reports, and files of the corporation of which he was president for its inspection, or, in lieu of such production, to permit the inspection and examination of these by the expert auditors and accountants appointed to assist the committee in its said investigation. With each of these requests Mr. Henderson, upon the advice of counsel, refused to comply. He was then excused and was not recalled or subjected to further inquiry or subpœna; but at a later stage of the investigation H. T. Battelle, the petitioner herein and the secretary of the Pacific Portland Cement Company, was required to attend as a witness, under a subpœna and subpœna duces tecum and, being sworn, was asked by the committee through its acting chairman practically the same questions which had formerly been asked of Mr. Henderson, and which, upon the advice of counsel, he also declined to answer; and there was also demanded of him under said subpœna duces tecum the production or permission to inspect and examine the same books, documents, and papers which Mr. Henderson had refused to produce or give access to, and he also upon the advice of counsel repeated such refusal. During the course of the investigation and the sittings of the committee held in San Francisco, Los Angeles, and Sacramento, various other persons, including those representatives of the several cement companies who have also contemporaneously filed their applications for writs of habeas corpus, appeared before it, and submitted themselves and the organizations which certain of them in varying capacities represented, to the questionings of the chairman and members generally of the committee, and in the main responded cheerfully and willingly to inquiries extending over a wide range of inquest into the practical activities of the cement industry, and only declined to answer questions and furnish information or means of information concerning the same matters to which, in the main, the questions asked and the information sought by subpœna duces tecum had relation. Whether the questions asked and answered by these various persons other than the petitioner herein had or have a material bearing upon the right of this petitioner to stand upon his refusal to answer the inquiries or furnish the information or the means for obtaining it required by the committee will be hereinafter considered. The investigation having thus far proceeded, the committee, on March 8, 1929, made and presented to the state senate, then in session, the following report:

"Senate Chamber, Sacramento,
California, March 8, 1929.

"Mr. President: We, the undersigned, your committee to whom was referred the investigation of a reputed illegal combination or conspiracy among manufacturers and dealers in cement in the state of California for the control of the market price of cement and the suppression of free competition, with full power to act in the premises and to issue subpœnas and bring witnesses before it and examine them as to the facts or the purported facts as to such reputed combination or conspiracy, and to compel the production for examination by your committee of all necessary books, papers, documents, records and information, all as more fully and particularly set forth and provided in that certain resolution adopted by the senate on the seventeenth day of January, 1929, under and pursuant to which resolution we were appointed a committee, hereby report to your honorable body, the senate of the state of California:

"That we, your committee, undertook to make said investigation and held meetings in San Francisco on January 24 and 25, 1929; in Los Angeles on February 4, 5 and 6, 1929, and in Sacramento on February 25 and 26 and March 5 and 7, 1929, for the purpose of examining witnesses, and examining books, papers, documents, records, and information; that in the case of each witness and prior to his attendance we caused a subpœna duces tecum to be duly and regularly issued and served and the same was duly and regularly issued and served upon him requiring his presence to testify and requiring him to bring with him certain books, papers, documents, records and information in his possession or under his control, designated and described in the subpœna, and that the following named persons were present and appeared before your committee, viz.:

"Robert B. Henderson, W. H. George, George R. Gay, E. E. Duque, John Treanor, C. C. Merrill, C. A. Low, Arthur B. Shelby and A. Emery Wishon; that said witnesses hereinabove named were examined individually, and required to give certain testimony and to produce certain documents, records, and information for examination by your committee;

"That said witnesses and each thereof contumaciously refused and declined to answer questions material to the issues and refused to produce material and proper books, papers, documents, records and information required of them and in their possession or under their control, all as more particularly appears from the transcript of testimony given and proceedings had upon said investigation, which said transcript, consisting of five volumes, is filed herewith and by this reference as fully and completely made a part hereof as if fully set forth herein at length.

"Wherefore, we, your said committee, hereby render and file this report of said refusal of said witnesses so to testify or to produce said books, papers, documents, records and information, for such action as may be deemed necessary by the senate.

"Respectfully submitted,

"J. M. Inman,
"J. I. Wagy,
"F. S. Boggs,
"Henry E. Carter,
"Committee."

Accompanying the report of the committee, and expressly made a part thereof, there was filed and presented to the senate a voluminous transcript of the testimony taken and proceedings had before the committee during its said several sessions, and also the originals of the subpœnas and subpœnas duces tecum issued and served under the direction of the committee. Thereafter and on March 14, 1929, the senate in regular session adopted the following resolution:

"Whereas, this honorable Senate has undertaken to investigate as to the existence or nonexistence of a reputed illegal combination or conspiracy among manufacturers and dealers in cement in the state of California, for the control of the market price of cement and the suppression of free competition; and

"Whereas, on January 18, 1929, the president of this honorable Senate, pursuant to the resolution of said senate, adopted on January 17, 1929, appointed Senators Boggs, Carter, Inman, Herbert C. Jones and Wagy as a committee to investigate as to the existence or nonexistence of such reputed illegal combination or conspiracy, with full power to issue subpœnas and bring witnesses before it and examine them as to the facts or the purported facts as to such reputed combination or conspiracy, and to compel the production for examination by said committee of all necessary books, papers, documents and records material thereto; and

"Whereas, said committee so appointed by this senate undertook to discharge its said duty of investigation as to the existence or nonexistence of such reputed illegal combination or conspiracy; and

"Whereas, subpœnas duces tecum were duly and regularly issued and duly and regularly served upon Robert B. Henderson, W. H. George, George R. Gay, E. E. Duque, John Treanor, C. C. Merrill, C. A. Low, Arthur B. Shelby, H. T. Battelle and A. Emery Wishon, requiring each of the said persons to appear before said committee to testify, and requiring each of them to bring with him certain books, papers, documents and records, such being in his possession or under his control, and designated and described in the subpœna; and

"Whereas, in pursuance of said subpœnas duly and regularly issued and served, said persons appeared before said committee of investigation of this senate, and refused and declined to answer certain questions material to the issues and refused to produce proper books, papers, documents and records required of them, such being in their possession or under their control and material to said issues, all as more particularly appears from the report of said committee presented to and filed with this senate, on March 8, 1929, and from the supplemental report of said committee presented to and filed with this senate on March 11, 1929, said questions being also set forth in the 'Excerpts from the transcript of testimony' submitted to the senate, March 8, 1929, to which reference is hereby made; and

"Whereas, the truth as to the existence or nonexistence of such reputed illegal combination or conspiracy is supposed to rest and be within the knowledge of these said witnesses, or in the proper books, papers, documents and records required of them, such being in their possession, or under their control; and

"Whereas, the said committee has reported to this senate the contumacious refusal of said witnesses to answer questions material to the issues propounded to them by said committee and to produce proper books, papers, documents and records material to said issues, for such action as may be deemed necessary by the senate, now, therefore, be it

"Resolved, That the said Robert B. Henderson, W. H. George, George R. Gay, E. E. Duque, John Treanor, C. C. Merrill, C. A. Low, Arthur B. Shelby, H. T. Battelle and A. Emery Wishon be and they are hereby declared to be guilty of contempt of this senate; and be it further

"Resolved, That the said Robert B. Henderson, W. H. George, George R. Gay, E. E. Duque, John Treanor, C. C. Merrill, C. A. Low, Arthur B. Shelby, H. T. Battelle and A. Emery Wishon be taken into custody by the Sergeant-at-Arms of the Senate and that they be committed to the county jail in the county of Sacramento, State of California, until they shall have purged themselves of this contempt by answering the questions which were propounded to them by said committee and by producing the proper books, papers, documents and records material to said issues required of them; that a copy of this resolution, duly attested by the Secretary of State, be the authority of the Sergeant-at-Arms of the Senate, and the Sheriff of the county of Sacramento."

Under the direction of the foregoing resolution the sergeant at arms of the senate placed the petitioner herein under arrest and was detaining him thereunder and by authority thereof when the writ sought by the petitioner herein was issued. Subsequent to said arrest and detention and the issuance of said writ the following stipulation was entered into between counsel for this and the other several petitioners for similar writs and the Attorney General representing the state senate, in his official capacity:

"It is understood and agreed by the parties hereto that this court [the Supreme Court] in the consideration and determination of this matter, may assume it to be a fact that prior to the passage of the resolution by the Senate reciting that the petitioner was in contempt of the Senate, petitioner appeared before the bar of the Senate and was there given opportunity to purge himself of the alleged contempt by answering the questions and producing the books, papers, documents and information which had been previously refused by him, and not otherwise; and that he did not do so upon advice of counsel, for each and every reason assigned in the petition herein."

The sergeant at arms of the senate made in due course his return to said writ, which merely set forth that he was holding the petitioner under and by virtue of a warrant of arrest issued pursuant to the foregoing resolution of the state senate, and which resolution was made a part of his said return. A traverse to said return was filed, which presented no issue of fact, but the same questions of law as were urged in his said petition. The matter came before this court for hearing upon the record as thus made up, and, after argument and the filing of elaborate briefs, has been submitted for decision.

The basic contention which the petitioner herein urges against the validity, from their very inception, of the proceedings out of which his alleged unlawful detention has arisen, is that neither the State Legislature nor either branch of it had power to adopt the resolution which the state senate did adopt, calling into being a committee composed of certain of its membership for the purpose of conducting the proceedings provided for in the body of said resolution. This contention is predicated upon the following provision of the State Constitution:

"The powers of the government of the state of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." Const. art. 3, § 1.

[1] It is argued by the petitioner that the only exceptions which are embodied in said Constitution to the complete and exclusive segregation of these separate departments of the state government specified in the foregoing provision thereof are those which permit each house (1) to adjudge the qualification and election of the members thereof (section 7, art. 4), (2) to expel a member (section 9, art. 4), and (3) to sit as a court of impeachment (sections 17, 18, art. 4), and that outside of these express exceptions the Legislature may not go in the attempted exercise of any judicial or quasi judicial function. We are of the opinion, however, that this contention, if adopted by us in the full measure of its strictitude, would draw the line too narrowly about the powers of the Legislature in respect to its prime and exclusive function, viz., that of legislation. The power and duties reposed in the Legislature and in each and every member of both houses thereof is obviously that of enacting, and hence, necessarily, of preparing and proceeding to enact wise and well-formed and needful laws. An essential prerequisite to the proper exercise of these powers and duties on the part of each member of the lawmaking body during the comparatively brief and hurried period of its biennial sessions is the possession of a degree of general intelligence; this of course. But in regard to the many and, to be particular, the most important matters which in this age of new ventures and of large concerns occur and recur as the most insistent subjects of legislation, this is not enough; and hence, in many instances, in order to the preparation of wise and timely laws the necessity of investigation of some sort must exist as an indispensable incident and auxiliary to the proper exercise of legislative power. This has been recognized from the earliest times in the history of American legislation, both federal and state, and from even earlier epochs in the development of British jurisprudence. See notes to Marshall v. Gordon, 243 U. S. 521, 37 S. Ct. 448, 61 L. Ed. 881, L. R. A. 1917F, 279, Ann. Cas. 1918B, 371; and Burnham v. Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676; Wilckens v. Willet (App.) 4 Abb. Dec. (N. Y.) 596; Anderson v. Dunn, 6 Wheat. 204, 5 L. Ed. 242; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 786; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 S. Ct. 115, 53 L. Ed. 253; In re Chapman, 166 U. S. 661, 17 S. Ct. 677, 41 L. Ed. 1154; Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377.

[2-4] We do not deem it necessary to deal in detail with the foregoing line of authorities, for the reason that this has been sufficiently done in certain later decisions to which we shall presently refer. Before doing so, however, we deem it proper to state that, under the foregoing authorities, the inherent and auxiliary power reposed in legislative bodies to conduct investigations in aid of prospective legislation has always been held to carry with it the power, in proper cases, to require and compel the attendance of witnesses and the production of books and papers by means of legal process and to institute and carry to the extent of punishment contempt proceedings in order to compel the attendance of such witnesses and the production of such documentary evidence as may be legally called for in the course of such proceedings, whether conducted by the legislative body or a branch of it, directly or through properly constituted committees thereof. We deem it timely, also, to state at this point in our inquiry that, by uniform custom, more or less rigidly adhered to, every official inquisition has from the earliest times made use of procedural methods which resemble those obtaining in judicial tribunals. This is because, in the nature of things, as exemplified by human experience, such methods have been found to furnish the surest means of arriving at the truth of the particular matter involved in the inquiry. It does not follow, however, that legislative bodies or administrative agencies or municipal organizations or executive officials by the mere employment of methods of procedure which resemble those employed or required in judicial tribunals must be held to be engaged in the exercise of a judicial function and to be thereby trenching upon the area exclusively assigned to the judicial department of the state government. There has been some confusion in judicial decisions touching this subject which it is beyond the scope of our present inquiry to clear away, but it may not be inapt at this point to refer to the comment of Cooley in his great classic on constitutional limitations, wherein, after reviewing many authorities, he draws the conclusion: "That that which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions." In the opinion of Mr. Justice Holmes in the comparatively recent case of Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150, it is thus stated: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." That the method of each may resemble that of the other in the course of their respective inquests having these two different ends in view is not the important or determining factor, since the same underlying consideration operates to guide the procedural steps of both. Legislatures in enacting laws, like courts in interpreting such laws when enacted, must have in regard the former law, if any, the wrong or defect requiring remedial action, and the nature and extent of the needed and appropriate remedy. In the application of this principle it follows necessarily that the power of these co-ordinate branches of government, in conducting whatever inquisitions the proper exercise of their respective functions require, must be as broad as the subject to which the inquiry properly entered upon by either has relation. Such we understand to be the rule enunciated by the later authorities, to which we shall now refer. In the case of McGrain v. Daugherty, 273 U. S. 135, 47 S. Ct. 319, 71 L. Ed. 580, 50 A. L. R. 1, the Supreme Court of the United States was called upon to decide two main questions, each germane to the inquiry here under review. The first of these related to the broad powers of the Congress of the United States, or of either branch thereof, to institute and conduct investigations when it reasonably appeared that the purpose thereof was an essential and appropriate auxiliary to the legislative function. In deciding this primary question, the court, Mr. Justice Van Devanter writing the opinion, entered upon a most careful and exhaustive review and restatement of the leading cases in both state and federal jurisdictions touching the subject, including those above cited, and many others, and in which cases the right to the exercise of these powers by legislative bodies of both jurisdictions was granted or denied, depending upon the facts of the individual case, but in which the principle was quite uniformly asserted as to the existence of such powers in all proper cases as essential, incidental, and auxiliary to the exercise of the legislative function. In the course of this review of cases the learned justice gave due consideration to the case of Kilbourn v. Thompson, which both counsel in the instant inquiry have relied upon as upholding their opposing contention, and showed that, while it contained some language of doubtful import, and while it denied to a congressional committee the asserted right in the individual case, it did so upon the express ground that the particular inquiry and the resolution of the house of representatives which authorized it embraced no suggestion of contemplated legislation, and that the matter sought to be elicited was one in respect to which no valid legislation could be had. Otherwise the case of Kilbourn v. Thompson is not at variance with

the general line of decision upon the possession of the foregoing authority as being auxiliary to the legislative grant of power. It will be seen from the authorities cited in the McGrain decision that it is quite immaterial whether the power of inquiry is to be exercised by a state or a federal legislative body, and that it is equally immaterial in the exercise of that power whether the legislative arm of the government is acting under or by virtue of granted or reserved authority; and that it is also quite immaterial what the particular constitutional limitations may be which separate legislative from judicial functions of government and which forbid the trespass of the one upon the domain of the other; since, if it is to be conceded that the possession and exercise of the power of preliminary inquiry is an essential incident and auxiliary to the legislative function, it follows irresistibly that the legislative arm of government is not to be restricted in the exercise of this power under limitations hereinafter to be defined by the fact that methods and processes, judicial or quasi judicial in character, are employed in the course of the inquiry. In the McGrain Case the learned justice closes this branch of the decision with the following significant statement:

"A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."

The second subject of consideration in the McGrain Case which is germane to the instant proceeding was the question erroneously decided by the inferior federal tribunal and transferred to the court of last resort for review. That was the question as to whether the purpose of the investigation was to determine the guilt of the Attorney General of the United States of the shortcomings and wrongdoings set forth in the resolution authorizing the inquiry, and which might submit him to prosecution, or was the purpose also foreshadowed in the resolution of "obtaining information necessary as a basis for such legislation or other action as the senate may decree necessary and proper." In discussing this phrasing of the resolution directly under criticism the court says: "This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of 'other action' if deemed 'necessary or proper' is of course open to criticism in that there is no other action in the matter which would be within the power of the senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed." The applicability of the foregoing language to the instant matter will be seen when the precise terms and proper interpretation of the resolution of the state senate which is assailed in the present proceeding comes under review. In the above case, also, certain limitations attending the exercise of the foregoing powers by legislative bodies or their committees were set forth with sustaining authorities. It is, however, in the more recent case of Sinclair v. United States, just decided by the Supreme Court of the United States (49 S. Ct. 268, 73 L. Ed. ——), that both the foregoing powers and the definite limitations attending their exercise are most clearly and conclusively stated. This case in its main aspects has a most important bearing upon the matter before us by virtue both of its similarities and of its points of divergence. It arose out of the same series of situations which gave rise to the case of McGrain v. Daugherty, supra, but it presents as to its facts a case having certain significant resemblances to the instant proceeding. In the case just cited Sinclair had been summoned as a witness to give testimony respecting certain leases of oil and gas bearing lands which had been entered into between the Secretaries of the Navy and of the Interior Departments of the federal government and certain corporations of which, at the time thereof, Sinclair was in control, and which said leases were being assailed in both judicial and legislative proceedings as surcharged with fraud in their procurement. The immediate investigation in which he was being required to give testimony was being conducted by the committee of public lands and surveys of the United States senate, acting under the authority of certain resolutions adopted by that branch of Congress of the United States, directing it "to investigate this entire subject of leases upon naval oil reserves with particular reference to the protection of the rights and equities of the government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the senate." There were several such resolutions adopted by the senate before the committee got finally into action, and in one of the latter of these, designated as Senate Resolution 147, the committee was given the further direction to "ascertain what, if any, other or additional legislation may be advisable, and to report its findings and recommendations to the senate." Upon being summoned before the committee and asked certain questions, which the court finally decided were pertinent to the matter under inquiry Sinclair declined to give his testimony in response to such questions and submitted a statement in justification of his refusal to testify, wherein he asserted "that the committee could not thus investigate the matters covered by the authorization because the senate by the adoption of the joint resolution had exhausted its power and congress and the president had made the whole matter a judicial question which was determinable only by the courts." The "joint resolution" to which Sinclair referred was "Joint Resolution 54," wherein the Congress had theretofore directed certain legal proceedings to be instituted and which were then pending to set aside the leases in question. The senate committee persisted in its inquiry, with the result that Sinclair, upon his persistent refusal to testify, was indicted under the federal procedure (R. S. § 102, U. S. C. tit. 2, § 192 [2 USCA § 192]), and his case came finally before the United States Supreme Court for review in this recent case. The court first gave its consideration to the case of McGrain v. Daugherty, supra, fully affirming the possession by the Congress and each of the houses thereof of "not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective." The court next proceeded to define the limitations upon the exercise of these auxiliary powers as outlined in the McGrain decision, stating that "that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry." The court proceeded to a review of certain cases wherein the last-named doctrine was elucidated and enforced and to some of which we shall later refer. In the course of its discussion the court proceeded to dispose of the contention that the committee had been bereft of power to conduct the immediate inquiry by the fact that judicial proceedings had been instituted and were then pending for the avoidance of the leases in question; the court holding that, notwithstanding the pendency of such litigation and the possible aid which might be afforded thereto by the prosecution of the senatorial inquiry, these facts would not suffice to show "that the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable." The court further stated that: "The validity of the lease and the means by which it had been obtained under existing law were subjects that properly might be investigated in order to determine what if any legislation was necessary or desirable in order to recover the leased lands or to safeguard other parts of the public domain." Having thus disposed of the foregoing consideration having a direct bearing upon the first branch of the cause now before us, to wit, the validity of the senate resolution authorizing the committee to institute the investigation out of which the pending application for a writ of habeas corpus arose, the court in the Sinclair Case proceeded to pass upon the vital question of the pertinency of the question which the witness refused to answer to the matter under inquiry before the committee. In deciding this question the court in that case made certain observations to which we shall later refer.

[5] We are thus brought to a consideration of the precise scope of the senate resolution as evinced by its terms under the authority of which its committee undertook to conduct the investigation out of which the instant proceeding arose. The resolution, in the several recitals which precede it, refers to the conceded fact that the state of California directly, and also through its several subordinate subdivisions and agencies, is engaged in the making of certain extensive public improvements in the way of street and highway construction, the building of dams and reservoirs for water conservation and flood control, and of bridges and other structures, into all of which the increasing use of cement enters as one of the main elements of cost. The resolution proceeds to further recite that experience has shown that free competitive bidding upon both public and private work is the best means of obtaining the lowest cost of construction, and hence that the laws have provided for competitive bidding upon all public work, and that in order that such laws may be effective it is necessary that monopolies, trusts, and conspiracies in restraint of trade, and affecting the prices of commodities should be regulated and dissolved through actions to be instituted by the Attorney General; and whereas there is a reputed cement trust in this state, composed of manufacturers and dealers in cement, forming a combination to control and maintain high and uniform prices by stifling free competition, thereby increasing the cost of all improvements in which cement is used, it is therefore resolved that a special committee of five members of the senate be appointed by the president thereof to "ascertain the fact whether or not an illegal combination or conspiracy exists

among the manufacturers and dealers in cement to control the market price of cement in the state of California by limiting production, suppressing free competition, or other means, and upon the conclusion of such investigation to report to the senate the results thereof, together with such recommendations as the committee shall deem proper." The resolution proceeds to define the powers and procedure of the committee in the course of making such investigation, and in so doing expressly refers to and makes the provisions of article 8 of chapter 2, title 1, part 3, of the Political Code of California, applicable to the procedure of the committee. The resolution concludes with the statement that: "Said committee be given leave to sit during the sessions of the senate and during the recess, at such place or places as the committee may determine; that it report as speedily as possible the results of its investigation to the senate, with such recommendations as it may deem proper, relative to abuses or wilful violation of the anti-trust law (Cartwright Act), and the particulars, if any, wherein said law should be strengthened and made more effective to prevent illegal combinations or conspiracies in restraint of trade." It is contended by the petitioner herein that the foregoing terms of this resolution render plain the intention of its framers that a purely judicial inquiry into the existence of past illegal practices on the part of manufacturers and dealers in cement was to comprise the sole and exclusive function of the committee thus to be constituted and of the investigation to be conducted under its authority and auspices. We are unable to so interpret the terms of said resolution nor to so narrow the scope and functions of the committee created to carry its purpose into effect. It is true that the scope of the investigation was, by the terms of said resolution, defined as having relation to the inquiry as to whether there was in existence within the state of California an unlawful combination of the manufacturers and dealers in cement, having for its reputed purpose the prevention of competitive bidding among its members and others upon both public and private work in which cement was largely employed, and counsel for this and the other like petitioners have strenuously insisted that this was its only purpose, and that this being so, its attempted action was a usurpation of judicial powers. The record, however, disclosed that the further purpose of the inquest was that of enabling the committee to make recommendations to the Legislature respecting future legislation for the prevention of these and other restraints of trade, and that from time to time during the sessions of the committee this latter purpose was expressly referred to by one or the other of the members of the committee.

[6] It is also true that by the terms of the resolution the inquiry was to be limited to the operations of a single great industry, but such was also the situation in the case of Sheppard v. Bryant, 191 Mass. 591, 78 N. E. 394, 6 Ann. Cas. 802, wherein the Supreme Court of Massachusetts held that a legislative investigation into the retail coal business in certain sections of that commonwealth during the occurrence of the great coal strike of 1902 was of proper legislative cognizance and that answers given by a witness in the course of such investigation were privileged so as to exempt such witness from a suit for slander. Such was also the case of Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 786, wherein the operation of a single great industry or combination of allied industries was made the subject of legislative inquiry. Other instances among the many cases we have been asked to review might well be cited, but it will suffice to state that the general subject of this investigation was a matter of public concern; that is to say, it was an inquiry into a situation wherein the state and its subordinate agencies and activities, being largely engaged and interested in certain lines of public improvement to be carried on by means of money derived from numerous forms of taxation, was directly concerned in lessening, if possible, the burden of such taxation by diminishing the cost of such public work, and hence was clearly within its proper province in seeking to confine within legitimate channels the contact by means of competitive bidding through which the great and growing cement industry would come into the relation of a supplier of its product for use in the development and advancement of such public work. Every inquiry into alleged defects or evils which are supposed to owe their origin and existence to ineffectual laws must have their beginning somewhere and in some particular inquest, which is usually directed either in the courts or in the domain of legislation against some conspicuous offender, or set of offenders, and by means of which investigation, and the recommendations which follow it, some scheme of general legislation or law enforcement is evolved.

It may not be untimely to recall the fact that the resolution here under review directly refers to the Cartwright Law, and that industrious counsel for one or other of the assailants of this resolution have cited us to the case of Cline v. Frink Dairy Co., 274 U. S. 445, 47 S. Ct. 681, 71 L. Ed. 1146, wherein the Supreme Court of the United States, in a quite recent opinion, has held the Colorado anti-trust law, which is in terms a replica of the Cartwright Act, to be unconstitutional in respect to the very matter sought to be covered by the terms of the resolution herein assailed. This fact of itself might well furnish a very excellent reason for the insertion in said resolution of the closing clauses thereof, which may not be ignored, and wherein the committee created by it is directed to report to the senate, its creator, at the conclusion of its inquest, "such recommendations as it may deem proper relative to abuses and violations of the anti-trust law (Cartwright Act) and the particulars, if any, wherein said law should be strengthened and made more effective." It is needless to pursue this subject at greater length for the purpose of reaching the conclusion that in the adoption of said resolution and in the constitution of the committee thereunder, with the powers and procedure specified therein, the senate was exercising a legitimate legislative function, and that the assault which the petitioner herein, and others having like applications, make upon it, and upon the legality of the committee constituted under and by virtue of it, are of no avail.

Having thus determined that the legislative committee was legally constituted and, being so, was entitled to hold its several sessions and to request and later require the attendance of witnesses and the production of books and documents before it, and having recited in the earlier stages of this opinion that the committee undertook to exercise these powers, and having found that in the exercise thereof the committee did cause to appear, in the capacity of a witness, the petitioner herein, and also the several other persons who have presented identical applications for the issuances of writs of habeas corpus herein, and that, having done so, did require of this petitioner and also of said other persons that he and they should answer certain questions concerning the cost, prices, and profit of producing and disposing of cement, which several sets of questions he and they refused to answer, and having also required of this petitioner and of said other persons that he and they should produce before the committee certain books, documents, and records of those certain cement corporations, of which said petitioner and such other persons were, respectively, the officials, and which he and they each, in turn, declined to produce, and having seen that said committee thereupon made and presented to the state senate its report of the aforesaid proceedings, contained in several large volumes, embracing the reporter's transcript thereof, and that having received said report the senate proceeded to make its order and adjudication that said petitioner and said other persons were guilty of contempt, consisting in their and each of their refusal to answer those certain questions which were set forth in said report, and in further refusing to produce those certain books, records, and papers, the production of which was required through the issuance of and service of subpœna duces tecum, as is also set forth in the terms of said report, and having therein directed that the petitioner and said other persons be arrested by the sergeant at arms of the senate and be confined in the custody of the sheriff of the county of Sacramento until such time as they and each of them should purge themselves of said contempt, and the petitioner and said other persons having been so arrested and immediately threatened with such confinement, and having thereupon applied for and had issued upon each of their petitions a writ of habeas corpus, and this court having held a hearing upon the appearance of the petitioner and return to said writ, the primary question in the orderly course of procedure upon this branch of our inquiry is that of determining whether or not the aforesaid order and adjudication of contempt is sufficient upon its face to justify the arrest and detention of this petitioner, and, incidentally, of each of the other of said petitioners; since, if this court should determine that said order and adjudication of contempt is void upon its face, it would be immaterial to this inquiry whether or not the petitioner and the other persons were legally justified in their refusal to answer the questions asked and to produce the books, records, and papers in question and which constitute the gravamen of the charge that each of them was guilty of contempt.

[7-10] At the outset of this inquiry it is to be noted that after the arrest of this petitioner and the others, in pursuance of said adjudication of contempt and the order for their arrest and confinement therein contained, and also for the issuance of this and of the other writs of habeas corpus as ordered by this court, a certain stipulation was entered into between each of said petitioners and the Attorney General, representing the respondent, the text of which is hereinbefore stated. The purpose of this stipulation was to supply a fatal hiatus in the proceedings as thus far undertaken, and consisting in the admitted fact that none of these petitioners had, prior to the senate resolution adjudging them and each of them to be guilty of contempt, been accorded the opportunity to appear before that body and purge themselves of said contempt. We permitted that stipulation to be filed herein for that sole purpose, but we cannot give to it any broader effect, nor treat it as in any manner waiving any other defects which may inhere in these contempt proceedings in so far as the validity of the order and adjudication of contempt upon the face thereof is herein called in question. It is urged by the petitioner, and even more strenuously by certain of the other petitioners for similar writs, that the power to punish for contempt is a purely judicial power, which this legislative body, under the restraints of the Constitution, has no jurisdiction to employ. We think, however, that this question is covered by what has heretofore been said herein and by the authorities already referred to. We are, however, clearly of the opinion that the power of the state senate to adjudge this and the other petitioners named in its resolution to be guilty of contempt and to order his and their confinement is a power which can only be exercised in strict conformity with the rules of procedure which

the laws of this state provide as a prerequisite to the validity of an adjudication of contempt. Section 1209 of the Code of Civil Procedure defines what acts or omissions are contempts of court, and this definition also applies to and defines what are contempts before any tribunal exercising the functions of a court. Section 1211 of said Code divides contempts into two classes, viz.: (1) Those committed in the presence of the court and which may be punished summarily and for the punishment of which a specific procedure is outlined, and (2) those not committed in the immediate view and presence of the court and for which another and different procedure is provided. The contempt in this proceeding sought to be adjudged and punished must be considered as coming within one or the other of these classes and as controlled by the foregoing provisions relative to each. While it would seem to be clear that prior to the making and presentation of the foregoing stipulation the alleged contempt in these several proceedings was what is known to the law as a constructive contempt—that is to say, a contempt not committed in the immediate view and presence of the court, and hence to be such a contempt as would come within the second clause of section 1211 of said Code—it appears to us to be equally clear that in view of the presence and terms of said stipulation the contempt for several contempts with respect to which the petitioner and said other persons here are charged with having committed, is to be treated as a contempt committed in the immediate view and presence of the state senate, and hence to be covered and controlled by the precise requirements of the first clause in the foregoing section of the Code, which, as we have seen, requires that as a prerequisite to the punishment of an alleged offender thereunder "an order must be made, reciting the facts as occurring in such immediate view and presence." The foregoing provision of the Code of Civil Procedure appears to have been taken bodily from the original Practice Act adopted during the very early years in the history of California jurisprudence, and to have been contained in identical language in section 481 of said Practice Act (St. 1851, p. 127), which required the court in cases of contempt committed in the immediate view and presence of the court to make an order "reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt." The foregoing provision of the Practice Act came under review by this court in the very early case of Ex parte Rowe on Habeas Corpus, 7 Cal. 181, wherein it appeared that the grand jury was inquiring into a certain matter wherein the petitioner was sworn as a witness and certain questions propounded to him which he refused to answer, and that the facts were thereupon presented to the court by the grand jury and the petitioner required by the court to answer, and, upon his refusal then and there so to do, he was committed for contempt. The order of the court recited that the petitioner was committed for contempt in refusing to answer certain questions propounded to him by the grand jury. What these questions were did not appear upon the face of said order otherwise than as above set forth. Upon his application for a writ petitioner was discharged, and the court in ordering his discharge said: "In requiring that the act to be performed should be specified in the warrant of commitment, the statute must have had some object in view. What could that object be, except to afford the means of judging of its correctness by other courts? * * * In the present case it should have been stated that the grand jury were inquiring into a certain question, stating it; that the prisoner was sworn as a witness and certain questions propounded to him, stating them; that he refused to answer; that the facts were thereupon presented to the court by the grand jury, and the prisoner required by the court to answer, which being refused, he was committed for contempt."

[11-13] The foregoing decision in this early case has been expressly approved by this court in later cases, notably in Ex parte Clarke, 126 Cal. 235, 240, 243, 58 P. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176; Overend v. Superior Court, 131 Cal. 280, 285, 63 P. 372, wherein the precise language quoted from Ex parte Rowe is set forth; and by the District Court of Appeal in the matter of In re Shortridge, 5 Cal. App. 371, 375, 90 P. 478; and it and the foregoing cases are also quoted with approval in 5 Cal. Juris, 950, wherein it is stated that: "The rule is declared in the code and followed in the decisions that an order adjudging and punishing a contempt committed in the immediate view and presence of the court must contain a recital of the acts constituting the contempt. This requirement is jurisdictional and an order which assumes to punish summarily a direct contempt of court is void unless it shows on its face acts sufficient to constitute a legal contempt. The order must contain a statement of facts equivalent to those which the law says must be incorporated in an affidavit for constructive contempt and such facts must prove the contempt. Mere conclusions are not sufficient. In such cases the rule that presumptions and intendments are to be indulged in support of ordinary judgments does not apply." In the light of the foregoing provision of the Code of Civil Procedure and of the cases above referred to and which have consistently interpreted its meaning, we are constrained to hold that a witness before a court or any other inquisitorial body who is otherwise orderly and respectful cannot be adjudged guilty of contempt committed in the presence of such tribunal for his failure or refusal to answer any question or to produce any record, book, or paper, in the absence from the order so adjudging him to be guilty of contempt of an express recital of the facts affirmatively showing not only the precise questions which he has declined to answer, or the precisely specified books or papers which he has refused to produce, but also affirmatively setting forth the facts which show the materiality and pertinency of each of these forms of evidence to the issue before the court or other tribunal. Bearing in mind this fundamental principle of procedure in contempt cases of this character, when we refer to the order and adjudication of contempt which the senate purported to adopt and enforce in the instant case, we find it to be entirely lacking in that precision of statement which the law requires. It is true that the order in question contains the recital that: "In pursuance of said subpœna duly and regularly issued and served said persons appeared before said committee of investigation of this senate and refused and declined to answer certain questions material to the issues, and refused to produce proper books, papers, documents and records required of them, such being in their possession or under their control, and material to said issues, all as more particularly appears from the report of said committee presented to and filed with this senate on March 8th, 1929, and from the supplemental report of said committee filed with this senate on March 11th, 1929, said questions being also set forth in the 'Excerpts from the transcript of testimony' submitted to the senate March 8th, 1929, to which reference is hereby made." We are of the opinion, however, that the mere "reference" which is thus made to the report of the committee and to certain "questions being also set forth in the 'Excerpts from the transcript of testimony'" are and each of them is insufficient to so far embody the content of such report or the "Excerpts from the transcript of testimony" therein contained in the order of commitment so as to satisfy the precise requirement of the aforesaid section of the Code of Civil Procedure with respect to what the "recitals" in said order must contain. We are further of the opinion that, notwithstanding the original resolution was sufficient in form to justify the investigation which was conducted by said committee, the order of commitment herein should have shown upon its face that said investigation was so far legislative in character as to have empowered the committee to ask and to have answered the questions propounded by it to the witnesses and to have required the production of the books, records, and documents in question. The necessity for such a recital in the order and commitment for contempt is that of showing upon the face of said order the materiality and pertinency of the questions which were put to these several witnesses and which they declined to answer and of the requirement for the production of the books which they refused to produce. We are therefore impelled to the conclusion that the order and adjudication of contempt involved in this immediate proceeding, and also in the like proceedings on the part of said other petitioners, is void upon its face. The conclusion thus arrived at renders unnecessary a determination of the several other issues presented and elaborately argued by respective counsel and which have relation to the pertinency and materiality to the inquiry before said committee of those several questions which this petitioner and his fellow petitioners declined to answer, and of the books, records, and papers of the respective corporations of which they are officials, and which, in turn, they and each of them refused to produce. We deem this branch of the discussion premature in the state of the record before us and in the face of our foregoing conclusion that the order of contempt and commitment of the petitioner herein is void upon its face.

The aforesaid order is therefore vacated, and the petitioner herein discharged.

We concur: CURTIS, J.; SHENK, J.; LANGDON, J.

PRESTON, J. (concurring). I concur in the judgment; also in the splendid outline given of the privileges and powers of a legislative body in search of material for legislative purposes; also in that portion of the opinion which deals with the technical insufficiency of the order of commitment. But I prefer to rest my concurrence mainly upon the ground that in this case the state senate was not pursuing a legislative purpose. Avowedly it was conducting an inquiry into the existence of an unlawful conspiracy in restraint of trade among the cement producers and dealers in the state for the purpose of basing thereon civil and criminal proceedings in the courts to be inaugurated by the Attorney General in the name of the people of the state. This is the plain and unmistakable import of the resolution itself. In fact, in the preamble of the resolution setting on foot the inquiry is found these words: "* * * It is necessary that monopolies, trusts, and conspiracies in restraint of trade, affecting the prices of commodities, if any exist, be regulated, and the attorney-general of the state requested to take steps to dissolve the same, and prosecute all guilty parties thereto, to the end that the people may have the benefit of lower prices of material by free competitive bidding. * * *"

However, should any doubt occur in the mind of any one on the matter, it is entirely dispelled by the resolution of commitment, which repeatedly declares the purpose of the investigation to have been "to investigate as to the existence or nonexistence of a reputed illegal combination or conspiracy," or, as again stated therein, the committee was "to discharge its said duty of investigating as to the existence or nonexistence of such reputed illegal combination or conspiracy"; or, again, the purpose may be found in these words: "Whereas, the truth as to the existence or nonexistence of such reputed illegal combination or conspiracy is supposed to rest and be within the knowledge of these said witnesses, or in the proper books, papers, documents, and records required of them, such being in their possession or under their control. * * *"

No argument is required to show that whether a combination exists or does not exist is a judicial question. To say that the existence or nonexistence of criminal conspiracy in the commerce in one article will aid legislation upon the general subject of monopolies in business is to tax credulity to the breaking point. Can it be said that legislation on this subject is necessary if this combination in the cement business exists and is unnecessary if it does not exist or vice versa? If in the investigation of a legislative subject such as the regulation of intrastate business, witnesses were produced who would give testimony on this subject, such testimony, of course, could not be refused upon the ground that it would also disclose a violation of the law.

But we have no such situation here. The inquiry before us is not clothed with even the pretense that its purpose is a legislative one. The senate is, therefore, in the present proceeding transgressing upon the exclusive province of the judiciary and hence is without jurisdiction under the resolution as framed to pursue the inquiry attempted.

We reach the same conclusion for the same reason if we consider alone the resolution of commitment. Treating the resolution as the pleadings, findings, and judgment in a constructive contempt proceeding or treating it as the order of commitment in a proceeding for contempt committed within the presence of the court, the commitment is illegal for all the reasons pointed out in the main opinion and on the ground that none of the questions propounded nor any of the documents sought are material because the inquiry is therein defined as a judicial and not as a legislative one. Hence, in any aspect of the matter, no contempt is shown.

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207 Cal. 787

In the Matter of the Application of W. H. GEORGE for a Writ of Habeas Corpus. (Cr. 3233.)

Supreme Court of California. May 15, 1929.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Sergeant at Arms of the Senate of the State of California to secure release of petitioner from custody on a charge of contempt for refusing to answer certain questions. Order of contempt vacated. Petitioner discharged.

Thelen & Marrin, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Charles A. Wetmore, Jr., Deputy Atty. Gen., and J. M. Inman, of Sacramento (W. A. Augustine, of San Francisco, of counsel), for respondent.

PER CURIAM. Upon the authority of the Application of Battelle for Writ of Habeas Corpus (Cal. Sup., filed May 14, 1929) 277 P. 725, the order for commitment herein is vacated, and the petitioner discharged.

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207 Cal. 788

In the Matter of the Application of A. Emory WISHON for Writ of Habeas Corpus. (Cr. 3234).

Supreme Court of California. May 15, 1929.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Sergeant at Arms of the Senate of the State of California to secure release of petitioner from custody on a charge of contempt for refusing to answer certain questions. Order of contempt vacated. Petitioner discharged.

Murray Bourne, of Fresno, and Thelen & Marrin, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Charles A. Wetmore, Jr., Deputy Atty. Gen., and J. M. Inman of Sacramento (W. A. Augustine, of San Francisco, of counsel), for respondent.

PER CURIAM. Upon the authority of Matter of the Application of Battelle for Writ of Habeas Corpus (Cal. Sup., filed May 14, 1929) 277 P. 725, the order for commitment herein is vacated, and the petitioner discharged.

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207 Cal. 788

In the Matter of the Application of John TREANOR for Writ of Habeas Corpus. (Cr. 3235.)

Supreme Court of California. May 15, 1929.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Sergeant at Arms of the Senate of the State of California to secure release of petitioner from custody on a charge of contempt for refusing to answer certain questions. Order of contempt vacated. Petitioner discharged.

O'Melveny, Tuller & Myers, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Charles A. Wetmore, Jr., Deputy Atty. Gen., and J. M. Inman, of Sacramento (W. A. Augustine, of San Francisco, of counsel), for respondent.

PER CURIAM. Upon the authority of the Application of Battelle for Writ of Habeas Corpus (Cal. Sup., filed May 14, 1929) 277 P. 725, the order for commitment herein is vacated, and the petitioner discharged.

207 Cal. 789

In the Matter of the Application of E. E. DUQUE for Writ of Habeas Corpus. (Cr. 3236.)

Supreme Court of California. May 15, 1929.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Sergeant at Arms of the Senate of the State of California to secure release of petitioner from custody on a charge of contempt for refusing to answer certain questions. Order of contempt vacated. Petitioner discharged.

Asa V. Call and Chandler, Wright & Ward, all of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Charles A. Wetmore, Jr., Deputy Atty. Gen., and J. M. Inman of Sacramento (W. A. Augustine, of San Francisco, of counsel), for respondent.

PER CURIAM. Upon the authority of the Application of Battelle for Writ of Habeas Corpus (Cal. Sup., filed May 14, 1929) 277 P. 725, the order for commitment herein is vacated, and the petitioner discharged.

207 Cal. 790

In the Matter of the Petition of George R. GAY for a Writ of Habeas Corpus. (Cr. 3237.)

Supreme Court of California. May 15, 1929.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Sergeant at Arms of the Senate of the State of California to secure release of petitioner from custody on a charge of contempt for refusing to answer certain questions. Order of contempt vacated. Petitioner discharged.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Charles A. Wetmore, Jr., Deputy Atty. Gen., and J. M. Inman, of Sacramento (W. A. Augustine, of San Francisco, of counsel), for respondent.

PER CURIAM. Upon the authority of the Application of Battelle for Writ of Habeas Corpus (Cal. Sup., filed May 14, 1929) 277 P. 725, the order for commitment herein is vacated, and the petitioner discharged.

207 Cal. 790

In the Matter of the Application of Arthur B. SHELBY for Writ of Habeas Corpus. (Cr. 3238.)

Supreme Court of California. May 15, 1929.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Sergeant at Arms of the Senate of the State of California to secure release of petitioner from custody on a charge of contempt for refusing to answer certain questions. Order of contempt vacated. Petitioner discharged.

Lloyd Baldwin and Robert L. McWilliams, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Charles A. Wetmore, Jr., Deputy Atty. Gen., and J. M. Inman, of Sacramento (W. A. Augustine, of San Francisco, of counsel), for respondent.

PER CURIAM. Upon the authority of the Application of Battelle for Writ of Habeas Corpus (Cal. Sup., filed May 14, 1929) 277 P. 725, the order for commitment herein is vacated, and the petitioner discharged.

207 Cal. 791

In the Matter of the Application of C. A. LOW for Writ of Habeas Corpus. (Cr. 3240.)

Supreme Court of California. May 15, 1929.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Sergeant at Arms of the Senate of the State of California to secure release of petitioner from custody on a charge of contempt for refusing to answer certain questions. Order of contempt vacated. Petitioner discharged.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Charles A. Wetmore, Jr., Deputy Atty. Gen., and J. M. Inman, of Sacramento (W. A. Augustine, of San Francisco, of counsel), for respondent.

PER CURIAM. Upon the authority of the Application of Battelle for Writ of Habeas Corpus (Cal. Sup., filed May 14, 1929) 277 P. 725, the order for commitment herein is vacated, and the petitioner discharged.

207 Cal. 792

In the Matter of the Application of C. C. MERRILL for a Writ of Habeas Corpus. (Cr. 3241.)

Supreme Court of California. May 15, 1929.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Sergeant at Arms of the Senate of the State of California to secure release of petitioner from custody on a charge of contempt for refusing to answer certain questions. Order of contempt vacated. Petitioner discharged.

Robert B. Murphey and Hunsaker, Britt & Cosgrove, all of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Charles A. Wetmore, Jr., Deputy Atty. Gen., and J. M. Inman, of Sacramento (W. A. Augustine, of San Francisco, of counsel), for respondent.

PER CURIAM. Upon the authority of the Application of Battelle for Writ of Habeas Corpus (Cal. Sup., filed May 14, 1929) 277 P. 725, the order for commitment herein is vacated, and the petitioner discharged.

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98 Cal. App. 745

In re MORGAN. (Cr. 1794.)

District Court of Appeal, Second District, Division 1, California. May 14, 1929.

Habeas corpus ⚷87—Some of essential facts, on basis of which writ of habeas corpus was issued, being misrepresented in petition, writ was discharged.

Where petitioner for writ of habeas corpus, who was confined in jail for contempt of court on failure to pay alimony, attorney's fees, and costs in divorce action, misrepresented to his counsel some of essential facts contained in petition which was verified by counsel on information and belief, and on basis of which writ was issued, writ was discharged and petitioner remanded to custody.

Application by Earl D. Morgan for a writ of habeas corpus against the Sheriff of Los Angeles County. Writ discharged, and petitioner remanded to custody.

Medler & Wood, of Los Angeles, for petitioner.

J. W. Barbee, of Long Beach, for respondent.

CONREY, P. J. The petition herein on behalf of the applicant for writ was verified by an affidavit of E. L. Medler, one of the applicant's attorneys. In the affidavit Mr. Medler stated that his verification was upon information and belief, and was based upon statements made to him by Mr. Morgan, the applicant in whose behalf the petition was filed. This court, somewhat inadvertently, disregarded the defects in the affidavit, and assumed that the statements contained in the petition were regularly verified.

It was stated in the petition that the applicant was committed to jail for contempt of court, in that he failed to pay certain alimony, attorney fees, and court costs which he had been required to pay pursuant to an order made after a hearing before the court on an order to show cause in a divorce action. It was stated in the petition that at the time of the making of said order of the superior court of Los Angeles county the applicant, Earl D. Morgan, defendant in said action, was not the lawful husband of the plaintiff, Effie L. Morgan; that in fact the said Effie L. Morgan at the time of her alleged marriage with Earl D. Morgan was the wife of another man, from whom she did not yet have a divorce; that, in response to the order to show cause, the defendant appeared in person and with his counsel, and offered to prove the facts last above stated, which offer was denied by the court; and that the alimony order was made without receiving any evidence concerning said alleged facts on which the denial of the marriage relation between said parties was based. It was alleged that, after the making of said order, the defendant moved the court to set aside said order for the payment of alimony, etc., basing the motion upon the ground that it appeared from the allegations of the pleadings then on file that no valid marriage had ever existed between said Earl D. Morgan and the said Effie L. Morgan; that the court was without jurisdiction to make said order without hearing the testimony and proof as to the validity of said marriage; and that the order for alimony payment was unconstitutional, in that it was a confiscation of property without due process of law; that said motion was denied without permitting defendant to offer evidence in support thereof.

The attorney who verified the petition herein was not the attorney for the defendant in the divorce action at the time of the first proceedings above mentioned. It now appears by uncontradicted evidence that, at the hearing on the order to show cause in the superior court, the defendant did not make any offer to produce any evidence concerning the facts, which in his petition herein he alleges that he offered and alleges that the court refused to receive; that the only questions presented to the court were those concerning the support and maintenance of the plaintiff and her minor children, and those concerning the request of the defendant that the temporary care, custody, and control of said children be assigned to him. The applicant's petition admits that he was personally in court at the time of the proceedings to which we have referred. The inference is unavoidable that he misrepresented to his attorney some of the essential facts contained in the petition for the writ, and which led us to order that the writ be issued.

The writ is discharged, and the said Earl D. Morgan is remanded to custody.

We concur: HOUSER, J.; YORK, J.

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98 Cal. App. 557

DAVIS v. DAY et al. (Civ. 6735.)★

District Court of Appeal, First District, Division 1, California. April 27, 1929.

Rehearing Denied May 27, 1929. Hearing Denied by Supreme Court June 24, 1929.

1. Taxation 🔑415—Assessment of lots, listed below lot opposite which owner's name appeared, without repetition thereof opposite each lot, held not invalid.

Assessment of lots, listed on assessment book below lot opposite which owner's name appeared, without repetition thereof opposite each lot, *held* not invalid on ground that name of owner of such lots did not appear on assessment roll.

2. Evidence 🔑48—That name of individual, with reference to whom tax listings are made ordinarily appears but once, is matter of common knowledge.

It is a matter of common knowledge and ordinary practice that, wherever listings of property for taxation are made with reference to an individual, his name appears but once, and need not be repeated.

3. Taxation 🔑430—Assessment of lots, separately listed and valued, held not invalid because sums chargeable against each were not carried over into tax columns.

Assessment of lots *held* not invalid because sums chargeable against each were not carried over into tax columns, instead of gross figure showing entire amount to be paid, where each was separately listed and valued; amount of tax against each being mere matter of computation from information readily obtainable from assessment roll itself.

4. Taxation 🔑319(2)—Courts do not presume that entire tax system is unlawful, but recognize that requirements as to manner and form are founded on adequate and reasonable legal principles.

While certain established requirements are necessary to valid assessment of property for taxation, courts do not presume that entire system of taxation is unlawful or harmful, but recognize that taxation is essential and that requirements as to manner and form are founded on adequate and reasonable legal principles.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Luman Davis against V. L. Day and others, in which defendants filed a cross-complaint against Charles A. Wilhelm and another, as trustees for plaintiff. Judgment for defendants, and plaintiff appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant.

L. A. Kottinger, of Oakland, for respondent Kottinger.

Julian H. Biddle, of San Francisco, for respondent Droste.

Marcus D. Wolff, of Oakland, for respondent Day.

Marcus D. Wolff, of San Francisco, in pro. per.

PARKER, Justice pro tem. This is an appeal by plaintiff from an adverse final judgment, in a suit to quiet title after a motion for a new trial had been denied. It will be unnecessary to describe the property involved other than to state that the said property comprises certain city lots in the city of Oakland. For the purposes hereof the lots may be described as lots 6, 10, 11, in block 2 as said lots appear upon that certain map entitled "Map of the R. F. Knox Tract, Brooklyn, Alameda County, California, etc.," filed October 9, 1880, in the office of the county recorder of Alameda county. The separate claim of the defendants as affecting the property need not be recited, inasmuch as plaintiff makes the same claim to each lot, and, if plaintiff prevails as to one, it will determine his right to all. The sole point involved in this appeal is as to the validity of certain tax proceedings and the effect of a deed following. Willis M. Arnett on and before the first Monday in March was the owner of all the property involved. The assessment book of the property of Alameda county for the year 1919 shows the assessment of the property involved as follows: The taxes due under this assessment, or claimed to be due, were not paid and upon such failure of payment of taxes the property was listed as delinquent upon the delinquent rolls of Alameda county. Such listing upon the delinquent roll is in the manner as follows, to wit: (See pages 742 and 743.)

[1, 2] It is the contention of the appellant that the property here in question, namely, lots 6, 10, 11, in block 2, were never legally assessed, and that, as an assessment "is an essential prerequisite to the validity of all subsequent proceedings," the lack thereof would render ineffective any attempted sale following an alleged failure to pay taxes claimed. The basis of the contention is that the assessment itself shows that the name of the owner of lots 6, 10, 11 does not appear upon the roll. In other words, it is appellant's contention, in this respect, that from the appended examplar it is self-evident that the only parcel of land that shows the name of the owner is lot 4, and the contention is supported by the claim of appellant that, as the name of the owner "Willis M. Arnett" appears but once, and then opposite and to

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★Rehearing denied. Hearing denied by Supreme Court.

ASSESSMENT BOOK OF THE PROPERTY OF
ASSESSED TO ALL OWNERS WHEN KNOWN

TAXPAYER'S NAME AND POSTOFFICE ADDRESS	ROAD DISTRICT	SCHOOL DISTRICT	DESCRIPTION OF PROPERTY IN CITY OF OAKLAND		Mt. Diablo Base and Meridian			City or town Lots			Number of Acres	1
			Real Estate other than City and Town Lots—Subdivisions of Sections, or Metes and Bounds. City and Town Lots; Improvements; Personal Property. All subdivisions of Land referred to in any subdivision in this Assessment Roll by name of such subdivision or map thereof have a map of the same of record in the Recorder's Office of Alameda County.		Section	Township (N. or S.)	Range (E. or W.)	Fraction	LOT	Block		Value of Real Estate City and Town Lots
Willis M. Arnett 38621		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					4	2/786		$ 500
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					5	2/786		600
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					6	2/786		650
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					7	2/786		575
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					10	2/786		575
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					11	2/786		700

DELINQUENT ROLL OF THE PROPERTY OF
ASSESSED TO ALL OWNERS WHEN KNOWN

TAXPAYER'S NAME AND POSTOFFICE ADDRESS	ROAD DISTRICT	SCHOOL DISTRICT	DESCRIPTION OF PROPERTY IN CITY OF OAKLAND		Mt. Diablo Base and Meridian			City or town Lots			Number of Acres	1
			Real Estate other than City and Town Lots—Subdivisions of Sections, or Metes and Bounds. City and Town Lots; Improvements; Personal Property. All subdivisions of Land referred to in any subdivision in this Assessment Roll by name of such subdivision or map thereof have a map of the same of record in the Recorder's Office of Alameda County		Section	Township (N or S.)	Range (E. or W.)	Fraction	LOT	Block		Value of Real Estate City and Town Lots
Willis M. Arnett 38621		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					4	2/786		$ 500
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					5	2/786		600
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					6	2/786		650
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					7	2/786		575
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					10	2/786		575
		Oakland formerly Fruitvale	Map of the R. F. Knox Tract	Map filed of Record in the office of the Recorder of Alameda County					11	2/786		700

ALAMEDA COUNTY FOR THE YEAR 1919
AND WHEN UNKNOWN, TO UNKNOWN OWNERS
Approved by State Board of Equalization September 30, 1905

2 Value of Improvements Thereon	3 Value of Personal Property exclusive of Money and Solvent Credits	4 Amount of Money and Solvent Credits	5 Exempt under sec. 1¼ Art. XIII of State Constitution	6 Total Value of all Property after Deductions changes by the County Board of Equalization to be noted in red ink	7 Total Value after Equalization by the State Board of Equalization	Total Tax	Special School Tax	First Installment, Tax on Personal Property and half of Real Estate		When Paid	15 per cent Penalty on First Installment	Number of Tax Bills	Second Installment (Remainder on Real Estate)		When Paid	Remarks
$	$	$	$	$	$	$ cts.	$ cts.	$	cts.				$	cts.		
1300																
				4700				58	51	Sold to State		38621	58	51	Sold to State	Sold to State June 27, 1918

ALAMEDA COUNTY FOR THE YEAR 1919
AND WHEN UNKNOWN, TO UNKNOWN OWNERS

2 Value of Improvements Thereon	3 Value of Personal Property exclusive of Money and Solvent Credits	Amount of Money and Solvent Credits	Total Value of all Property after Deductions	Special School tax	First Installment, Tax on Personal Property and half of Real Estate		15%	5%	When Paid	NUMBER OF BILL	Second Installment (Remainder on Real Estate)		5%	Advertising	When Paid	Amount Sold for		When Sold	Redeemed
$	$	$		$ cts.	$	cts.	$ cts.	$ cts.			$	cts.	$ cts.			$	cts.		
1300															64995	14	51	Sold for Taxes Jun 28 1920	Sold at Auction Jul 15 1925 E. F. Garrison Redeemed........
															64996	50	92	Sold for Taxes Jun 28 1920	Sold at Auction Jul 15 1925 E. F. Garrison Redeemed........
															64997	15	90	Sold for Taxes Jun 28 1920	Sold at Auction Jul 14 1925 E. F. Garrison Redeemed........
															64998	16	61	Sold for Taxes Jun 28 1920	Sold at Auction Jul 15 1925 E. F. Garrison Redeemed........
															64999	16	61	Sold for Taxes Jun 28 1920	Sold at Auction Jul 25 1925 E. F. Garrison Redeemed........
			4700		58	51				38621	58	51			65000	20	11	Sold for Taxes Jun 28 1920	Sold at Auction Jul 13 1925 E. F. Garrison Redeemed........

the left of lot 4, that the ownership by the specified name is to be restricted to the lot. Before pursuing the arguments further we might state that the remaining pages of the assessment roll show that in each assessment the method followed was to insert the name of the owner but once and to include under the one name all property assessed or attempted to be assessed as the property of the owner. Appellant cites us many authorities but none which we deem in themselves controlling herein. It may be conceded that tax proceedings, from the very inception thereof down to enforcement of payment, are deemed in invitum, and the authorities cited by appellant go no further than to support the rule of law. Conceding the strictness of the rule and mindful of the caution necessary lest the principle be destroyed, nevertheless its preservation, and the protection of the rights of taxpayers, does not demand the construction contended for here. The assessment book must show the name of the owner of property assessed. In this case, and by the method here employed, it can easily be seen that all of the property assessed in the block to the right of the name Willis M. Arnett belongs to that individual. It is a matter of common knowldege and ordinary practice that, wherever listings are made with reference to an individual, the name appears but once and is not a matter of unnecessary repetition. It may be true that in some of the older cases the theory of taxation proceedings being in invitum was made specially strict, but when we analyze the facts of each case it must be conceded that no ruling goes as far as the one here sought. In People v. Sierra B. Q. M. Co., 39 Cal. 513, an early case, it is said: "We think the objection that the name of the corporation defendant is not found in the proper column, under the head of 'Tax-Payers' Names' because some portion of the name extends beyond the line of that column, is hypercritical. The name is found in the proper place, is easily read and the circumstances create no confusion or trouble. If such objections were fatal, very few assessments would be held valid." See, also, Baird v. Monroe, 150 Cal. 568, 89 P. 352; Knobloch v. Associated Oil Co., 170 Cal. 144, 148 P. 938; Marysville Woolen Mills v. Smith, 178 Cal. 790, 175 P. 13.

[3, 4] It seems to us, with reference to the point, that the name of the owner does not appear on the roll with reference to the lots in question here, that the contention is frivolous and without the slightest merit. The method here adopted seems so obviously proper and systematic that we cannot but feel that the same method is in general use, and for us to hold invalid an assessment so made on that ground alone would tend to upset every assessment roll in the state. Concluding that the assessment itself was regular and valid, we pass to the next ground of appeal, stated as follows: No delinquent taxes ever accrued against any of the lots in controversy, because there was no tax ever extended against, or apportioned to, any one of the lots separately. The claim goes to the extension of the amounts due. In other words, it is appellant's contention that, in the extension, the sum chargeable against each lot should be carried over into the tax columns, rather than a gross figure showing the entire amount to be paid by the taxpayer. In support of the argument the following cases are cited: Terrill v. Groves, 18 Cal. 149; People v. Clunie, 70 Cal. 504, 11 P. 775; Cadwalder v. Nash, 73 Cal. 43, 14 P. 385; Stege v. Richmond, 194 Cal. 305, 228 P. 461.

In each of these cases noted it will be seen that the defect was in the joint assessment or joint valuation of the lots in question. The extension of these holdings would be that if, in the instant case, the lots had been assessed as a group and one total valuation placed on the whole, the assessment would have been invalid. That is not the case here. Each lot is separately assessed and a separate valuation place therein, and the amount of tax against each is merely a matter of computation. The question is flatly decided in Gottstein v. Holmes (Cal. App.) 264 P. 310, wherein is is said: "The sale to the state was for the delinquent taxes of 1917. The assessment roll for that year was introduced in evidence by defendant-appellant. This showed that the lots were assessed separately to the same owner, but the auditor extended the tax on the sum of their assessed valuations, the total tax being $1.59. This total he divided into two parts, one of 80 cents, the other of 79 cents, and entered them in the several columns as first and second installments of the tax, respectively. It is the contention of appellant that this invalidated the assessment, and therefore made void the deed to the state. This contention cannot be sustained. In the first place, the extension of the tax by the auditor is no part of the assessment of the property, and, assuming that it was improperly done, it is one of the proceedings, of the regularity of which section 3787 of the Political Code provides that the deed to the state shall be conclusive evidence."

The contention of appellant is that, irrespective of what the assessment and its extensions might show, it was lacking in effect because there was no mathematical diagram of the process by which the total was reached. Without showing or claiming injury or chance of being misled, he argues that with the tax rate a thing fixed, established and known, the validity of the assessment upon the roll showing just how much tax was collectible against each piece, separately valued and separately listed. This information is readily obtainable from the roll itself, and becomes, as indicated, a mere matter of calculation. In the instant case there is not the slightest semblance of claim that the properties or any portion thereof were sold for even a penny more or less than the amount actually due thereon by reason of the delinquency following the regular assessment. While we again concede that there are certain established requirements necessary to a valid assessment of property, it must be true that each of the requirements is founded upon some adequate and reasonable principle of law. The courts do not start with the presumption that the entire system of taxation is unlawful or harmful. On the other hand, it is universally recognized that taxation is essential to our welfare and maintenance, and requirements as to manner and form are always founded on some reason. See Davis v. Pacific Imp. Co., 137 Cal. pages 250, 251, 70 P. 15. Finally appellant attacks the constitutionality of the sections of the Political Code under which the sales of the property were held. The contentions of appellant in this regard have been fully considered in the case of Jacoby v. Wolff, 198 Cal. 667, 247 P. 195, and the detriment adverse to his claim here. Such other grounds for reversal urged by appellant, which are not repetition of those already considered, we deem without merit. Particularly is this so because no authority is cited, but an attack on the entire law is made from shifting premises and too general conclusions.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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98 Cal. App. 723

Ex parte McVEITY. (Cr. 1791.)

District Court of Appeal, Second District, Division 1, California. May 11, 1929.

1. Automobiles ⚷359—Statute limiting authority to impose sentence after jury's recommendation and statute authorizing court granting probation to impose fine, must be construed together (Vehicle Act, § 112 as amended by St. 1927, p. 1436; Pen. Code, § 1203 as amended by St. 1927, p. 1493).

Amendment of Vehicle Act (St. 1923, p. 553), § 112 (St. 1927, p. 1436), limiting authority to impose sentence after recommendation of sentence by jury, and amendment of Pen. Code, § 1203 (St. 1927, p. 1493), authorizing court, in granting probation, to impose fine as condition of probation, which went into effect simultaneously, must be construed together and harmonized as far as their language permits.

2. Fines ⚷11—Imposing fine as condition of probation is not "judgment imposing fine" within statute authorizing imprisonment until fine is satisfied (Pen. Code, § 1205).

Imposition of a fine as a condition of probation is not "judgment imposing fine" within meaning of Pen. Code, § 1205, providing that judgment that defendant pay fine may also direct that he be imprisoned until fine be satisfied.

3. Criminal law ⚷982—Nonpayment of fine imposed as condition of probation results in loss of right to probation.

Only permissible effect of nonpayment of fine imposed as condition of probation is that by reason of such nonpayment right to be admitted to probation is thereby lost, and thereupon probation may be revoked and court may proceed to impose sentence, or, if sentence has been pronounced, carry it into execution.

4. Automobiles ⚷359—Court may impose fine as condition to probation of one violating Vehicle Act, provided punishment resulting is not greater than that jury recommends (Pen. Code, § 1203, as amended by St. 1927, p. 1493; Vehicle Act, § 112, as amended by St. 1927, p. 1436).

In order admitting defendant, convicted of violating Vehicle Act, to probation, court may, as condition of probation, impose fine in accordance with authority conferred by Pen. Code, § 1203, provided terms of order do not in themselves clearly amount to imposition of punishment greater than that recommended by jury as prohibited by section 112 of Vehicle Act (St. 1923, p. 553, as amended by St. 1927, p. 1436).

5. Criminal law ⚷982—Court has wide discretion in admitting persons to probation (Pen. Code, § 1203 as amended by St. 1927, p. 1493).

A very wide discretion is intended by Pen. Code, § 1203, as amended by St. 1927, p. 1493, to be vested in court in exercising its power to admit to probation a person convicted of crime.

6. Criminal law ⚷982—Where jury recommended punishment for violating Vehicle Act at 90 days and court granted probation and ordered fine of $500 as condition and imprisonment of one day for each $2 of fine, defendant not paying fine was not entitled to peremptory discharge from custody (Vehicle Act, § 112 as amended by St. 1927, p. 1436).

Where petitioner was convicted of driving automobile on highway while under influence of liquor in violation of Vehicle Act, and jury recommended imprisonment in jail for 90 days as authorized by section 112 (St. 1923, p. 553, as amended by St. 1927, p. 1436), and court granted probation, but ordered fine of $500 as condition and that petitioner be imprisoned in jail at rate of 1 day for each $2 of fine until fine was paid, petitioner was not entitled to peremptory discharge from custody as one admitted to probation.

Application by Holland McVeity for a writ of habeas corpus to be directed to the Sheriff of San Diego County to secure petitioner's release from custody. Petitioner remanded to custody.

O. C. Ludwig, of San Diego, for petitioner.

Stephen Connell, Dist. Atty., and E. N. Clark, Deputy Dist. Atty., both of San Diego, for respondent.

CONREY, P. J. Upon information filed, petitioner was tried and convicted of the crime of driving an automobile upon a public highway while under the influence of intoxicating liquor. The jury in its verdict recommended that the defendant be punished by imprisonment in the county jail for a term of 90 days. The defendant applied for probation. The minutes of the court for March 1, 1929, show that the application for probation having been heard, "the court orders the application for probation submitted, and by the court it is ordered that the defendant be granted probation, and that he pay a fine in the sum of five hundred dollars, and on failure to pay said fine that he be imprisoned in the county jail of the county of San Diego at the rate of one day for each two dollars of the said fine, and the defendant is remanded to the custody of the sheriff of San Diego county, to be by him held until said fine is paid, as will more fully appear in the probation order signed and filed herein hereafter." The probation order signed by the judge, of the same date, contains the same statement of the conditions of probation, together with some other particulars and regulations of the conduct of the defendant while under probation. In the signed order it is recited that "the imposing of sentence upon the defendant" was suspended. The fine remains unpaid.

Upon application of petitioner to the Supreme Court, a writ of habeas corpus was issued and made returnable before this court, and the petitioner was admitted to bail pending the disposition of this proceeding.

Section 112 of the California Vehicle Act, as amended by St. 1927, p. 1436, after prescribing the limits of punishment by fine or imprisonment for an offense of the description here involved, provides that upon every verdict of guilty under said section "the jury shall recommend the punishment and the court in imposing sentence shall have no authority to impose a sentence greater than that recommended by the jury."

Section 1203 of the Penal Code, as amended by St. 1927, p. 1493, provides that, where the matter of probation is being considered, if the court shall determine that there are circumstances in mitigation of the punishment prescribed by law, or that the ends of justice would be subserved, "the court shall have power in its discretion to place the defendant on probation as hereinafter provided." It is further provided: "The court, judge or justice thereof, in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, except as hereinafter set forth, and upon such terms and conditions as it shall determine. The court, judge or justice, in the order granting probation and as a condition thereof may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case; may fine the defendant in such sum not to exceed the maximum fine provided by law in such case; or may in connection with granting probation, impose either imprisonment in the county jail, or fine, or both, or neither; may provide for reparation in proper cases; and may require bonds for the faithful observance and performance of any or all of the conditions of probation. * * *" Further on in the section it is provided that: "If the probationer should violate the terms and conditions of his probation and the court should deem it just or necessary to revoke such probation, then and in that event any period of time which such probationer may have served in jail or other detention place or any fine paid, under the terms and conditions of his probation shall be taken into consideration as a part of his punishment, and he shall have a credit therefor to be deducted from his term of confinement or from the amount of any fine imposed upon final judgment."

Where a defendant has been released upon probation, and the probation is being revoked and terminated, "the court may, if the sentence has been suspended, pronounce judgment after said suspension of the sentence for any time within the longest period for which the defendant might have been sentenced." It is further provided that the court shall have power at any time during the term of probation to revoke or modify its order of suspension of imposition or execution of sentence.

[1-3] The amendment of section 112 of the Vehicle Act, limiting the authority to impose sentence after recommendation of sentence by the jury, was approved May 25, 1927. The amendment of section 1203 of the Penal Code, authorizing the court in granting probation to impose a fine as a condition of probation, was approved May 26, 1927. The two statutes went into effect simultaneously. They should be construed together and harmonized as far as their language permits. It should be noted that the provisions of section 1203, while they authorize the imposition of a fine or imprisonment in the county jail as a condition of probation, do not state that there may be an order of imprisonment for nonpayment of the fine. Section 1205 of the Penal Code provides that *a judgment* that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. But the imposition of a fine as a condition of probation is not, in our opinion, a judgment imposing a fine, within the meaning of section 1205. The only permissible effect of nonpayment of a fine imposed as a condition of probation is that, by reason of such nonpayment, the right to be admitted to probation is thereby lost. Thereupon the probation may be re-

voked and the court may proceed to impose the sentence provided by law, or, if sentence has been pronounced, carry it into execution.

Considering the provisions of section 1203 of the Penal Code alone, and comparing them with the probation order made by the court below, it does not appear that the court exceeded its authority. There is, however, an additional question: Did the court, under the guise of an order granting probation, really attempt to subject the defendant to a punishment greater than that recommended by the jury? Here we may look to the substance of the matter, regardless of form. It has been held that the language of section 112 of the California Vehicle Act (that "the court in imposing sentence shall have no authority to impose a sentence greater than that recommended by the jury") is meant to be used in the sense of character of punishment. People v. Ray (Cal. App.) 268 P. 382. So, in that case, where the jury recommended "imprisonment in the county jail," without stating any time limit, the court was authorized to sentence the defendant to any term of imprisonment within the maximum lawful term of imprisonment in the county jail for the stated offense.

[4-6] In the present proceeding it appears that in the case against petitioner in the superior court the jury's recommendation of imprisonment was for a term limited to 90 days. In such case the court "in imposing sentence" would not be authorized to send the defendant to jail for more than 90 days. Also, the court would be without authority "in imposing sentence" to impose a fine, since that would change the character of the recommended punishment. But in an order admitting the defendant to probation it may well be that in this, as in other cases, the court is authorized, as a condition of probation, to impose a fine in accordance with the authority conferred by section 1203 of the Penal Code; provided, however, that the terms of the order do not in themselves clearly amount to the imposition of a punishment greater than that recommended by the jury in the instant case. A very wide discretion is intended by the statute to be vested in the court in exercising its power to admit to probation a person convicted of crime. If we are to hold here, as petitioner seeks to have us do, that he is entitled to a peremptory discharge from custody as one admitted to probation, we must do so upon the theory not only that the probation order is severable, but that the court presumably would have admitted the defendant to probation without regard to the fine and imprisonment. We think that in this case we should not indulge in such presumption. Without denying to petitioner any substantial right, the case may be left open for further proceedings in the court below, where an appropriate order may be made without causing the defendant to suffer imprisonment in the county jail for more than 90 days.

It is ordered that petitioner be remanded to the custody of the sheriff, and that petitioner, as defendant in the action against him, be brought before the superior court of San Diego county for admission to probation under appropriate conditions to be prescribed by the court, not in conflict with this decision, or for judgment upon the conviction, as the said superior court shall determine.

We concur: HOUSER, J.; YORK, J.

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98 Cal. App. 702

PEOPLE v. GARCIA. (Cr. 1776.)★

District Court of Appeal, Second District, Division 2, California. May 9, 1929.

Rehearing Denied May 18, 1929. Hearing Denied by Supreme Court June 5, 1929.

1. Jury ⟹29(6)—Waiver of jury trial in felony case must be made in open court wherein district attorney and defendant's counsel join (Const. art. 1, § 7, as amended in 1927; Pen. Code, § 1042).

Under Const. art. 1, § 7, as amended in 1927, relating to waiver of trial by jury, and Pen. Code, § 1042, in criminal actions involving charges of felony, the sovereignty represented by one of its regularly designated members as district attorney and the defendant may waive a trial by jury by expressing in open court their intention to that effect, and in such waiver defendant's counsel must join.

2. Jury ⟹25(3)—Defendant's failure to object to felony trial proceeding without jury held insufficient "waiver" of jury trial (Const. art. 1, § 7, as amended in 1927).

Defendant's failure to object to felony trial proceeding without a jury *held* insufficient to constitute valid waiver of right to trial by jury under Const. art. 1, § 7, as amended in 1927.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Waiver.]

3. Criminal law ⟹918(1)—Grant of new trial in felony case because defendant had not properly waived right to jury trial held proper (Pen. Code, § 1181; Const. art. 1, § 7, as amended in 1927).

Under Pen. Code, § 1181, relating to grant of new trial, grant of new trial in felony case because defendant had not personally announced or consented to a trial without a jury, as required under Const. art. 1, § 7, as amended in 1927, and that his counsel was without authority alone to give consent, *held* proper.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Tony Garcia was found guilty of grand theft. His motion for new trial was granted, and the People appeal. Affirmed.

★Rehearing denied. Hearing denied by Supreme Court.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker and William R. McKay, Deputy Dist. Attys., all of Los Angeles, for the People.

C. L. Belt and E. S. Green, both of Los Angeles, for respondent.

Henry G. Bodkin, of Los Angeles, amicus curiæ.

CRAIG, J. The respondent was charged by information filed by the district attorney of Los Angeles county with the crimes of grand theft and a violation of the Motor Vehicle Act. On the date set for trial the respective counsel announced that a trial by jury was waived. Witnesses were sworn and testified, and the court found the defendant guilty of grand theft only. Three days thereafter a motion for a new trial was filed, which was granted, upon the ground that the defendant had not personally announced, or consented to, a trial without a jury, and that his counsel was without authority alone so to do. The people appealed from said ruling, urging as reasons for reversal that the Penal Code does not authorize the granting of a new trial upon the ground asserted, that the defendant waived the right to a jury by submitting to the jurisdiction of the court, and that in any event section 4½ of article 6 of the Constitution requires that the judgment be restored because there was no miscarriage of justice in finding him guilty upon the evidence adduced.

[1, 2] Section 1042 of the Penal Code provides that: "Issues of fact must be tried by jury, unless a trial by jury be waived in criminal cases not amounting to felony." Prior to 1927 section 7, art. 1, of the Constitution provided that: "A trial by jury may be waived in all criminal cases not amounting to felony, by the consent of both parties, expressed in open court." The term "parties" is defined by section 684 of the Penal Code as meaning the people of this state and the person charged with the offense, and it has been held that it does not include counsel for the defendant. People v. Jung Qung Sing, 70 Cal. 469, 11 P. 755. Under the Constitution and statutes as then existing it was repeatedly held that neither the defendant nor his counsel could waive the right to a jury trial in a felony case. People v. Deegan, 88 Cal. 602, 26 P. 500; People v. Met. Surety Co., 164 Cal. 174, 128 P. 324, Ann. Cas. 1914B, 1181; Ex parte Bracklis, 52 Cal. App. 274, 198 P. 659; People v. Nakis, 184 Cal. 105, 193 P. 92; Amos v. Superior Court, 196 Cal. 677, 239 P. 317. In 1927 the section of the Constitution above mentioned was amended to embrace all criminal prosecutions, upon certain specified conditions, as distinguished from civil proceedings. It reads as follows:

> "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve, upon which the parties may agree in open court." See St. 1927, p. 2367.

The inviolate constitutional right to a trial by 12 of his peers, whose verdict upon conviction must be unanimous, is secured to every person charged with a felony. The Legislature may prescribe the methods of procedure in this respect in civil cases, but in criminal actions involving charges of felony, the sovereignty represented by one of its regularly designated members as district attorney, and the defendant, may waive a trial by jury by expressing in open court their intention to that effect, and in this waiver the defendant's counsel must join. From previous rulings and the express language of the Constitution, it is at once obvious that this inviolate constitutional right may not be taken away in disregard of the fundamental legal privilege and power of election guaranteed to the party charged, by attempting to vest in his representative the dual capacity and authority of counsel and accused. Not only is the Constitution explicit as to the parties who may consent to waive a trial by jury, but it is equally definite as to the form in which the consent must be given, for the provision is that it must be "expressed in open court." Nothing could be more clear than this language. To say that a mere failure to object to the trial proceeding without a jury is sufficient is to ignore the plain mandate of the Constitution in its use of the phrase last above quoted.

[3] Although apparently not heretofore ruled upon in this state, the question presented has in other jurisdictions, and we think properly, been urged as a ground for new trial. Section 1181 of our Penal Code provides that a new trial may be granted upon either of several specified grounds, one of which is error in the decision of any question of law arising during the course of the trial. In numerous instances our Supreme Court has held that every step after an issue of fact is joined, up to and including the rendition of a verdict or judgment, must be regarded as a step or proceeding "arising during the course of the trial." People v. Turner, 39 Cal. 370; Green v. Duvergey, 146 Cal. 379, 80 P. 234; Alpers v. Hunt, 86 Cal. 78, 24 P. 846, 9 L. R. A. 483, 21 Am. St. Rep. 17; Stow v. Superior Court, 178 Cal. 140, 172 P. 598; People v. Galloway, 202 Cal. 81, 259 P. 332. In Hasey v. McMullen, 109 Minn. 332, 123 N. W. 1078, it was held that an order denying a jury when the case was called in its regular order upon the calendar, was an

"error of law occurring at the trial," and a proper subject of a motion for new trial. In Alley v. State ex rel. Blenzinger, 76 Ind. 94, the same rule was applied. It is quite apparent that the respondent was deprived of a constitutional right which he did not waive in the manner required by the organic law of this state, and that the order entered pursuant to an attempted but abortive waiver was error which the trial court had power to rectify upon a motion for new trial.

The order appealed from is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

98 Cal. App. 686

COLLECTION SERVICE CORPORATION v. CONLIN. (Civ. 5124.)

District Court of Appeal, Second District, Division 2, California. May 8, 1929.

1. Appeal and error ⚷171(3)—Where plaintiff and court accepted allegation as putting question in issue, appellate court, on defendant's appeal, cannot determine that pleading was insufficient to put question in issue.

Where both court and counsel for plaintiff accepted defendant's allegation as putting in issue question whether there had been publication of certificate of plaintiff's fictitious name and a filing of affidavit of publication, appellate court, on defendant's appeal, could not determine pleading to be insufficient to put such question in issue.

2. Names ⚷10—Assignee of "Alles Printing Company" could not maintain action on account where assignor had not published certificate of fictitious name (Civ. Code, §§ 2466, 2468).

Assignee of "Alles Printing Company" could not maintain action on assigned book account in absence of a publication of certificate of fictitious name by assignor, as required by Civ. Code, §§ 2466, 2468, since designation used was fictitious so as to require certificate to be published.

3. Assignments ⚷137—Evidence held sufficient to justify finding of assignment of account.

Evidence *held* sufficient to justify finding of assignment of account by one conducting business under fictitious name.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Action upon an open book account by the Collection Service Corporation against Clarence B. Conlin. From a judgment for plaintiff, defendant appeals. Reversed.

Superseding former opinion in 275 P. 513.

E. R. Simon and William M. Morse, Jr., both of Los Angeles, for appellant.

A. P. Michael Narlian, of Los Angeles, Harold N. Nuzum, of Glendale, Joseph N. Beardslee, and A. Smallberg, of Los Angeles, for respondent.

IRA F. THOMPSON, J. The plaintiff recovered a judgment in the court below in the sum of $497.70 against the defendant upon an open book account, the plaintiff being the assignee of the "Alles Printing Company," and the defendant appeals therefrom.

[1] The first contention of appellant is that there is no finding that any certificate of fictitious name was ever published as required by sections 2466 and 2468 of the Civil Code, by the "Alles Printing Company," respondent's assignor, and no proof of compliance with those sections. The court did find as follows: "That at all times herein mentioned, Fred L. Alles was doing business under the registered fictitious name of Alles Printing Company." The answer not only denies the allegation of the complaint to which the finding is in form responsive, but also "alleges that the Alles Printing Company is a concern doing business under a ficititious name and that they have not complied with the statutes made and provided for in such cases." There is no finding upon this allegation, in so far as the statute relates to publication—conceding without deciding that the finding that the ficitious name was registered was equal to a finding that it was filed, as required by the statute—and no evidence in the record to justify a finding that the name was published. Our attention is naturally directed first to the indefinite and uncertain nature of the allegation of the answer. It is without doubt subject to criticism and should have been the object of an attack by the respondent in the lower court. However, it was not. In fact, at the very beginning of the trial, counsel for defendant resisted the introduction of any testimony until proof had been made of compliance with the sections of the Code already mentioned. Both court and counsel for respondent accepted the allegation as putting in issue the question whether there had been a publication of the certificate and a filing of the affidavit of publication. The theory upon which the cause was tried was that where the name of the party who owns the business is used in the name of the company, the name is not fictitious and compliance with the Code sections is unnecessary. Under such circumstances it would be manifestly improper for the appellate court to determine the pleading to be insufficient to put the fact in issue. Illinois Trust & Savings Bank v. Pac. Ry. Co., 115 Cal. 297, 47 P. 60; Gervaise v. Brookins, 156 Cal. 110, 103 P. 332; Fighiera v. Radis, 180 Cal. 660, 182 P. 418.

[2] Counsel for respondent after failure to produce to the trial court a case sustaining his theory that, where the name of the party who owns the business is used in a company name, compliance with the Code sections is not essential to the maintenance of the action,

offered in evidence a "certified copy of the record," which record consisted solely of a certificate signed by Fred L. Alles that he was doing business under the fictitious name of "Alles Printing Company" without any affidavit of publication as required. We are therefore brought directly to the question whether the designation used is in the eyes of the law fictitious so as to require the certificate to be published. It would serve no useful purpose for us to discuss at length the meaning of the word fictitious, for the reason that our Supreme Court has definitely established the law applicable to the instant situation. In North v. Moore, 135 Cal. 621, 67 P. 1037, it said: " 'Abrams Bros.' cannot be said to be a designation 'showing the names of the persons interested as parties.' The firm name might apply equally to a partnership composed of two or more and might embrace all or only some of the brothers of the name of Abrams." In Schwarz & Gottlieb, Inc., v. Marcuse, 175 Cal. 401, 165 P. 1015, in which case it was held that it was necessary to publish the certificate and file the affidavit where the name P. H. Murphy & Son was used, the court took occasion in commenting upon the opinion in Patterson v. Byers, 17 Okl. 633, 89 P. 1114, 10 Ann. Cas. 810, to say with reference thereto as follows: " * * * The last case * * * announces the remarkable conclusion that 'Patterson Furniture Company' shows that there is a company composed of persons whose surname is Patterson; and that 'it further shows that there are no other members of the firm except those whose surname is Patterson.' Evidently the learned justice who wrote that opinion overlooked the fact that commonly the title 'Patterson Furniture Company' might indicate a corporation or copartnership in which the stockholders or members might or might not be Pattersons." And again, in Andrews v. Glick (Cal. Sup.) 272 P. 587, it was held that those using the name "Andrews-Cordano Plumbing Company" could not maintain an action until after compliance with the sections of the Code for the reason that the name does not inform third persons of the exact membership of the company. These quotations are peculiarly pertinent to the designation under consideration and conclude respondent's argument in this particular. The farthest our courts have gone is to say that those partnership names are not assumed or fictitious in which the surnames of all the partners are used and joined together by the conjunction and, such, for example, as "Pendleton & Williams." The action cannot, therefore, be maintained in the absence of a compliance with the requirements of the sections already mentioned.

[3] The next contention of appellant is that an assignment to the respondent by the "Alles Printing Company" was not proved, the trial court having found that it was. There was proof that Fred L. Alles owned the business and operated under that name. There was proof that he signed and executed the assignment. This was sufficient to justify the finding complained of.

Other specifications of insufficiency of the evidence are made. We have examined each of them and find that there was sufficient to uphold every finding of the court attacked in this manner.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

98 Cal. App. 709

HARRIS v. REINGOLD. (Civ. 5319.)

District Court of Appeal, Second District, Division 2, California. May 10, 1929.

1. Accord and satisfaction 🔑25(4)—Evidence of agreement satisfying indebtedness and canceling note therefor held immaterial as showing accord and satisfaction not specially pleaded.

Testimony as to agreement, whereby indebtedness evidenced by note sued on was satisfied and note canceled, *held* immaterial as tending to prove accord and satisfaction, which was not specially pleaded.

2. Appeal and error 🔑237(2)—Objection to evidence of unpleaded accord and satisfaction, which court stated he would strike if inadmissible, held not waived by failure to move to strike.

Objection to evidence of unpleaded accord and satisfaction, which court stated he would hear and strike out if inadmissible, *held* not waived by failure to move to strike.

3. Appeal and error 🔑1039(13)—Admission of evidence of unpleaded accord and satisfaction held prejudicial error.

Admission of testimony as to agreement, whereby indebtedness evidenced by note sued on was satisfied and note canceled, though accord and satisfaction was not specially pleaded, *held* prejudicial error, especially in view of trial judge's statement that he was not greatly impressed with defendant's testimony, but that there was no one to contradict his two witnesses.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by S. H. Harris against M. N. Reingold. Judgment for defendant, and plaintiff appeals. Reversed.

Shapiro & Shapiro, of Los Angeles, for appellant.

Henry Haves, of Los Angeles, for respondent.

IRA F. THOMPSON, J. Plaintiff sued on a promissory note in the sum of $728.48. The defendant answered, admitting the execution of the note, alleging lack of consideration, and denying that there was any sum unpaid, due, or payable. At the trial the defendant offered to prove an agreement between the payee and the defendant whereby the indebtedness evidenced by the note was satisfied and the note canceled. An objection was interposed by the plaintiff on the ground that the testimony was incompetent, irrelevant and immaterial, and tending to vary the terms of a written instrument, attention being called to the fact that payment was not pleaded. The court overruled the objection with the statement: "I will hear the testimony and strike it out in the event it is not admissible." No motion to strike was made. The court found that the note had been paid and canceled and that no obligation from the defendant to the plaintiff existed. Judgment was accordingly rendered in favor of the defendant, and the plaintiff appeals therefrom.

[1] Appellant contends that the testimony admitted was proof of an accord and satisfaction, which must be specially pleaded before the same may be introduced, and that the evidence was therefore irrelevant and immaterial. In the case of B. & W. Engineering Co. v. Beam, 23 Cal. App. 164, 137 P. 624, the court said: "At one time, in this state, there existed a confusion if not a conflict of authority upon the question as to whether or not the defense of accord and satisfaction was required to be specially pleaded. * * * It was held in the case of Fitch v. [Brockmon] 2 Cal. 575, that it was error to consider the defense of accord and satisfaction unless specially pleaded" and in "Coles v. Soulsby, 21 Cal. 47, * * * it was held that the defense of accord and satisfaction involved new matter which, if established, would avoid the action, and therefore should be specially pleaded. Later this was declared to be so because under our practice as codified a general denial puts in issue only the allegations of the complaint, and consequently would not suffice to apprise the adverse party of the new matter which he would be required to encounter and overcome at the trial. (Glazer v. Clift, 10 Cal. 303.) * * * But the rule declared and followed in the series of cases commencing with Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692, has not only never been disputed or departed from, but it has been cited with approval in the comparatively recent case of Wilson v. California R. R. Co., 94 Cal. 166, 29 P. 861, 17 L. R. A. 685. *It may, therefore, be said with certainty that the settled rule of pleading in this state requires an agreement of accord and satisfaction to be specially pleaded before it can be availed of as a defense.*" (Italics ours.)

Since there can be no doubt that the testimony offered and adduced constituted an accord and satisfaction, we must say, under this authority, that the immateriality of the offered testimony and of the error resulting from its admission is established. This brings us to the question, Could the court, by committing error, lead counsel to waive his objection by failure to move to strike? In answering this question we shall treat the subject as if the court had said, "I will hear the testimony and counsel may later move to strike it out," although it will be noted that the court's language was very different, in form at least.

[2, 3] In the case of Clopton v. Clopton, 162 Cal. 27, 121 P. 720; 48 A. L. R. 493, it appeared that the trial judge received evidence subject to objection, reserving its ruling, and decided the case without reconsidering the matter. It was held that the admissibility of the evidence could be considered on appeal. It was said: "The court reserved its ruling, receiving the evidence subject to the objection. Apparently it has never formally ruled on this objection, except in so far as a ruling against the objection is to be inferred from the fact that the court has found upon the facts so testified to in favor of plaintiff. The matter must here be regarded as though defendants' objections had been formally overruled and exceptions noted to such rulings."

The court further says in the Clopton Case: "In passing, it is proper to say, as has been said before, that the practice of receiving evidence that is objected to, subject to the objection and without a ruling thereon, is not, except under very exceptional circumstances, to be commended. And where such a course is followed, certainly a ruling should be made prior to the conclusion of the trial and in time to enable the party to fully present his case in the light of such ruling."

In the case of Evangelical Synod v. Schoeneich, 143 Mo. 652, 45 S. W. 647, it appeared that the trial court admitted evidence over an objection, saying at the time that he would later consider the objection, but the matter was not brought to his attention again. The Supreme Court said: "The logical effect of the ruling of the court was to overrule the objection, and nothing more was required of defendant in order that he might have that ruling reviewed by this court than to save his exceptions thereto at the time, and call the attention of the court thereto in the motion for a new trial."

Likewise, in Root v. Kansas City So. R. Co., 195 Mo. 348, 92 S. W. 621, 6 L. R. A. (N. S.) 212, wherein it appeared that incompetent testimony, prejudicial to the defendant, was admitted over its objection, on the condition that the plaintiff would later connect the testimony with other testimony, which he never did, it was held that the plaintiff's motion for a new trial on account of the admission of such evidence should have been allowed, although he had made no motion to strike the evidence from the record after it appeared that it would not be made competent by connecting it with other testimony. The court said: "In this case, the motion for a new trial was overruled and in our opinion the trial court erred in that ruling. And this is so in spite of the insistence of respondent that appellant should have renewed its attack by a motion to strike out. Appellant was not in fault, why should it ask a second time for what was denied it at first, because of a promise of respondent broken thereafter? It was respondent who did the mischief, who tolled the court into error, and it was he who thence onward carried the burden of undoing the wrong and who must bear the blame."

In the New York case of Herzfeld v. Reinach, 44 App. Div. 326, 60 N. Y. S. 658, the court said: "The method adopted by the referee in reserving his decision upon objections and motions made by the respective parties during the progress of the trial, and then not disposing of such objections before the final submission of the case so that the party ruled against may have his exception to the ruling noted, if he so desires, cannot be sanctioned by this court. * * * We think it must be held, when objections are made during the progress of the trial to the reception of evidence or motions are made to strike out the same after it has been received, and the referee omits to rule upon such objections or motions at the time they were made or before the close of the trial, that then such objections and motions must be considered upon review the same as if they had been decided in favor of the successful party and an exception duly taken thereto, unless the successful party can show that the omission to make the rulings did not and could not by any possibility have injured the defeated party."

Our court has summarized the law very succinctly in the case of Short v. Frink, 151 Cal. 83, 90 P. 200, where it says: "It was not necessary for defendant, in order to save this point, to make a motion to strike out the testimony after it was read. It is only where it is not apparent from the question itself that the response thereto will, upon any theory of the case, be inadmissible, and the inadmissible evidence is for the first time disclosed by the answer that the rule declared in People v. Lawrence, 143 Cal. 148, 155, 76 P. 893, 68 L. R. A. 193, is applicable, and a motion to strike out is essential to preserve the right of the objector to complain. Where the question upon its face shows that the testimony called for is necessarily inadmissible, the rights of a party are fully preserved by his objection to the proposed evidence, and his exception to the ruling admitting the same. In fact, this is the only way in which he can preserve his objection where the question is of such a character, and the answer is strictly responsive to the question. See People v. Long, 43 Cal. 444; People v. Scalamiero, 143 Cal. 343, 345, 76 P. 1098." Nor can it be urged that appellant was not prejudiced. We must assume that he came into court prepared to try the case upon the issues which had been framed and unprepared to try any other or different issues. We have no way, it is true, of saying what might have been introduced in rebuttal of this new defense had appellant been prepared to meet it. But we do have the very significant statement of the trial judge, which throws into bold relief the prejudice suffered by the appellant by this erroneous admission of testimony. He said: "I will say very frankly that I am not greatly impressed with the testimony of the defendant, but there are two witnesses and nobody to contradict them." In the face of this statement it is impossible for us to say that the appellant did not suffer great damage.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

98 Cal. App. 690

WEINTRAUB v. WEINGART et al.

(Civ. 5294.)

District Court of Appeal, Second District, Division 2, California. May 8, 1929.

1. Landlord and tenant ⚷104—Agreement by lessee to hold lease in trust for corporation, whereby lessee parted with dominion over lease, though holding majority of corporate stock, held assignment of lease violating covenant against assignment (Civ. Code, §§ 2258, 2267).

In action in unlawful detainer against lessee for wrongful assignment of lease containing covenant against assignment without lessor's consent, evidence of agreement between lessee and corporation organized by lessee, constituting lessee naked trustee to hold lease for use and benefit of corporation to pay all rentals and obligations under lease intended to take place of assignment, showed assignment of lease to corporation under trust agreement whereby lessee parted with all rights of dominion over lease, under Civ. Code, §§ 2258, 2267, though lessee held majority of corporate stock, but there was nothing to prevent his disposing of stock to outsider.

2. Landlord and tenant ⚷104—Lessee's application to issue stock for lessee's assets, including lease, and permit to issue stock in consideration of assignment of such assets, held recognition that lease was assigned.

Application by lessee of hotel to corporation commissioner for permit to issue to himself shares of corporation in consideration of sale and transfer to corporation of lessee's assets, including hotel lease, and subsequent application reciting issuance of stock in conformity with terms of permit to issue stock in consideration of assignment by him of all property and assets listed, *held* recognition by lessee that transaction amounted to assignment of lease in violation of provision against assignment without lessor's consent.

3. Landlord and tenant ⚷104—Whether instrument is assignment of lease is determined by its legal effect, not form (Civ. Code, § 3528).

Whether or not instrument is to be deemed an assignment of lease is to be determined by legal effect, and not form of instrument under Civ. Code, § 3528.

4. Landlord and tenant ⚷104—Instrument, if substituting third party for lessee without providing reversionary interest in lessee, is "assignment."

If legal effect of instrument is to substitute third party for lessee, conferring on third party right to benefits, and subjecting him to burden of lease for balance of term, without providing for any reversionary interest in original lessee, it will be held to amount to an "assignment."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Assignment.]

5. Landlord and tenant ⚷112(2)—Landlord receiving checks from assignee of lessee while out of state, but falsely informed on return assignee had no interest in lease, held not estopped from terminating lease for wrongful assignment.

In action in unlawful detainer against lessee for wrongful assignment of lease containing covenant against assignment without lessor's consent, evidence that checks for lessor's interests in profits were drawn by assignee of lease, but that lessor was out of state at time and immediately on return inquired as to assignment, and evidence that lessee wrote lessor's attorney that assignee had no interest in lease, which statements were false, did not show lessor was estopped to terminate lease because of assignment.

6. Estoppel ⚷54—Estoppel is based on knowledge of facts and acquiescence in situation created.

Estoppel is based on knowledge of facts and acquiescence in situation developed thereby, on part of party against whom it is claimed; no estoppel being possible where facts are not known.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by S. L. Weintraub against Ben Weingart and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Ingall W. Bull and Harold Larson, both of Los Angeles, for appellants.

Willebrandt & Horowitz, Frank P. Doherty, and Girard F. Baker, all of Los Angeles, for respondent.

BURNELL, Justice pro tem. This is an appeal from a judgment in favor of plaintiff in an action in unlawful detainer. The cause of action set up in the complaint was grounded upon the alleged assignment by the defendant and appellant Weingart of a lease containing a covenant against assignment. The answer denied that there had been any assignment, and by way of a second defense pleaded estoppel.

The grounds urged by appellants in seeking a reversal of the judgment are: First, that the evidence is insufficient to support the finding that the lease had been assigned; second, that it is insufficient to support the finding that respondent was not estopped to question or complain of the assignment if in fact there was an assignment. The facts, in so far as they are necessary to be summarized for an understanding of the situation of the parties and their actions with respect to the lease in question, are as follows: January 20, 1922, respondent, by written lease, leased the Ponet Hotel, Los Angeles, to appellant Weingart for a term of 10 years commencing April 1, 1922, and ending March 30, 1932. Among other things this lease provided that: "Said leased premises are to be conducted and operated by said lessee as a hotel and office rooms, and as his compensation for so managing and operating said leased premises as such hotel, said lessee is to receive and be paid one-third of the net profits derived therefrom. * * *" The other two-thirds were to be "retained" by the lessor as rental. On or before the 10th of each month an accounting was to be had. The operating expenses were not to include "any salary or allowance to the lessee for his services in operating said hotel." The lessee covenanted "to keep said premises and all appurtenances thereto in a clean and wholesome condition and to comply faithfully" with all city and state laws during said term. The clause relating to assignment was as follows: "The said lessee hereby covenants that he will not assign this lease, or any part thereof, without the previous written consent of said lessor, his heirs, executors, administrators, or assigns; and that any assignment of said lease shall be voidable at the option of the lessor who may upon such breach, immediately reenter and take possession of said premises and the whole thereof without giving any notice."

Weingart went into possession, and in April and May of 1922 respondent received checks representing his share of the net profits, signed by Lincoln Investment Company. Early in June respondent left for Europe. During the early part of 1922 appellant Weingart, who was then operating a large number of hotels in Los Angeles, organized the Lincoln Investment Company for the purpose of carrying on his business affairs through that corporation, and in June, 1922, applied to the corporation commissioner for a certificate authorizing it to sell its securities. This application recited that the corporation "proposes to purchase and acquire from Ben Weingart property and assets of the value of $590,761.72" subject to certain liabilities "as per statement submitted herewith, for 5500 shares of the capital stock of this corporation." Listed among the assets to be so acquired is the lease of the Ponet Hotel, valued at $15,000. Appended to the application as an exhibit appeared a copy of an agreement executed by the corporation and Weingart which contained this language:

"Whereas, the party of the second part is the lessee of the following described premises under and pursuant to leases on the premises now owned and held by the party of the second part (listing a great many, including the Ponet Hotel).

"And, whereas, said leases are not transferable without the written consent of the lessor named in said lease; and

"Whereas, in some instances it will be impossible to get the consent of said lessor to the transfer and assignment of some of said leases (it was therefore agreed) that the party of the second part (defendant Weingart) will hold each and all of said leases in trust for the use and benefit of the party of the first part (Lincoln Investment Company) until the expiration of the term specified in each lease." Also: "That the party of the first part will pay all rentals and obligations assumed by the party of the second part, in, by or through said leases, and each of them."

On June 7, 1922, the corporation commissioner issued a permit to the corporation, authorizing the sale of its securities and "to issue to Ben Weingart 5500 shares of its capital stock in consideration of the transfer and assignment by him to applicant, first to be made, of all the property and assets set forth and described in its application, subject to liabilities of $1,930."

Up to this time the corporation, as conceded by both parties, had no interest whatsoever in the lease in question. Thereafter a statement was sent to respondent each month, accompanied by the check of the corporation for the amount thereby shown to be due him as his two-thirds of the preceding month's profits. During respondent's absence abroad these checks were indorsed by his son and cashed.

In October, 1922, respondent returned to Los Angeles. Thereafter and until May, 1925, respondent each month received the monthly statements and check of the corporation and indorsed and cashed the latter. Each of these statements showed a distribution of profits, two-thirds to respondent and one-third to the Lincoln Investment Company.

On December 15, 1922, respondent wrote a letter to appellant Weingart which contained the following: "I notice also that your letter is signed 'Lincoln Investment Company, by L. H. Hall, Secretary,' and I would like to be informed as to whether you are doing business under the name of Lincoln Investment Company, or whether you have turned over this lease to a company known as Lincoln Investment Company."

No reply to this inquiry seems to have been made, and on January 22, 1923, respondent signed and had served upon Weingart and the corporation a "notice of termination of tenancy," reciting the lease clause forbidding assignment without respondent's written consent and alleging a violation thereof "by the assignment of said lease by the original lessee, Ben Weingart, to Lincoln Investment Company." On January 25, 1923, Weingart wrote to respondent, acknowledging receipt of this notice and saying: "You are in error when you claim that I have assigned the lease of the Ponet Hotel, referred to in your notice. The same has not been assigned."

In reply to that letter respondent's attorneys wrote to Weingart on January 27, 1923, as follows:

"Your letter dated January 25th, addressed to Mr. S. L. Weintraub was handed to me for attention.

"I note that you state he is in error with respect to the assignment of the lease of the Ponet Hotel.

"Mr. Weintraub does not desire to terminate your lease, if it is not true that you have assigned the same. However, his information is that you have executed an instrument whereby you agreed to hold this lease in trust for the use and benefit of the Lincoln Investment Company, and according to the information given us we have construed this to be an assignment. However, if you will send us an exact copy of the agreement, I will reexamine it for the purpose of determining whether or not there is really any controversy between us."

The reply to this letter was brief and pithy. It was as follows: "Gentlemen: Replying to your letter of the 27th inst. I beg to state that the Lincoln Investment Company has no interest whatsoever in or to the Ponet Hotel, or anything therein contained."

Upon receipt of this missive, plaintiff, believing it spoke the truth, dropped the matter. As a matter of fact, during all this time the income from the Ponet Hotel was received by the corporation and accounted for by it on its income tax return. This was stipulated at the trial. Furthermore, all bills for the hotel were paid by the corporation.

Respondent testified that he believed the statements in Weingart's letter of January 25, and those in the reply to the letter written by his attorneys on January 27, and also a statement made to him verbally by Weingart in the early part of January, 1923, to the effect that sending out checks signed by the Lincoln Investment Company "was just his way of doing business, so that he could adjust his taxes or pay his taxes to the federal government," and that this belief was his only reason for not going ahead with proceedings in unlawful detainer following the service of the notice above referred to.

The first definite information received by respondent which caused this belief to be shaken was, according to his testimony, when he had an auditor examine the books of the hotel in May, 1925. Thereafter he refused to accept the checks representing his share of the net profits, and on May 27 caused another notice of termination to be served. On June 1, 1925, respondent's attorney wrote to Weingart's attorney as follows: "I will state that our information now is that Mr. Weingart has actually made an assignment of the lease to the Lincoln Investment Company. I would be willing, however, to hold up the filing of the complaint if permission were given me to freely examine the books and records of the Lincoln Investment Company. If such an examination would disclose the fact that the lease was not assigned to the Lincoln Investment Company, of course I would not proceed further with the suit." On June 2, 1925, this action was commenced.

[1] We agree with the court below in its conclusion that there was an assignment of the lease by Weingart to the Lincoln Investment Company.

In the first place, the language above quoted from the agreement between Weingart and the corporation indicates that it was intended to take the place of an assignment in the usual form, because of the difficulty or impossibility of securing the consent of the lessor to such an assignment. In the second place, it constitutes Weingart a mere naked trustee to hold the lease in trust for the corporation, and for the latter's *use and benefit*, the corporation to "pay all rentals and obligations" assigned by Weingart in the lease.

After the execution of the trust agreement Weingart parted with all rights of dominion over the lease and the premises thereby demised. His position as trustee was akin to that of a mere agent or employee of the Lincoln Investment Company, the beneficiary under the trust. Sections 2258, 2267, Civ. Code. The corporation took the lessee's share of profits from the operation of the hotel and accounted therefor in its income tax return. It paid all expenses.

As such trustee Weingart might have been removed and the trust terminated at any time by the sole beneficiary, Lincoln Investment Company.

In the case of Eakle v. Ingram, 142 Cal. 15, 75 P. 566, 100 Am. St. Rep. 99, the plaintiff brought suit to dissolve the trust and discharge the trustee. Judgment went for the plaintiff, the court stating: "The judgment, we think, is right. The plaintiffs are the only persons beneficially interested in the property (Civ. Code, sec. 866; Morffew v. S. F. etc. R. R. Co., 107 Cal. 595 [40 P. 810]; 1 Perry on Trusts, sec. 320; Young v. Bradley, 101 U. S. 787 [22 L. Ed. 1044]), and in such cases the rule is as stated by Mr. Underhill: 'If there is only one beneficiary, or if there are several and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished.' (Underhill on Trusts and Trustees, pp. 13, 370–375, and cases cited. See, also, 2 Perry on Trust, sec. 920; 1 Perry on Trusts, sec. 104; Civ. Code, secs. 2252, 2258; Lewin on Trusts, 684, 685; Hill on Trustees, 278; Tiffany & Bullard on Law of Trusts and Trustees, 815, 816.) The court below was therefore empowered to decree a dissolution of the trust, and a release of the trust property by the trustees; which is the effect of the judgment. * * * He [trustee] was a mere bare trustee, without interest, except that he might but for the decree have become entitled to compensation for services as trustee; but this furnishes no reason for the continuance of the trust."

True, Weingart held a majority of the stock of the corporation and while he so held it the corporation would not have been likely to have taken action to terminate the naked trust, but there was nothing to prevent Weingart from disposing of his stock to an outsider and nothing in law to at any time prevent the corporation—the separate legal entity known as Lincoln Investment Company—from seeking a termination of the trust and a merger of all rights in the lease in itself.

Appellants take the position that Weingart and the corporation were to all intents and purposes one and the same; hence, that a transfer to the corporation was in effect as though Weingart had merely taken the lease from one pocket and placed it in another. They argue that "for all practical purposes the corporation and Weingart personally are one," and that respondent "is exactly in the same postition as if defendant Weingart had never formed any corporation or transacted any business through the corporation and had never entered into the trust agreement." It is true that Weingart testified that he owned all of the corporation stock and that the certificates standing in the name of his wife, his foster-mother, and others had been indorsed by them and were in his possession, and that he considered himself the Lincoln Investment Company. On the other hand, there is the second application to the corporation commissioner signed by Weingart and verified, which states "that the following persons own all of the stock" (naming them). The corporation's statement of assets shows a value of $100 per share, and the stock standing in the names of others than Weingart had a value of approximately $232,666.

[2] If we are to adopt the view of counsel for appellants, as above set forth and as again stated in their closing brief, "that this was simply a one-man corporation with Weingart president, treasurer, general manager and in fact the whole corporation, and for all intents and purposes everything was as though Weingart personally owned all of the property of the corporation instead of the corpora-

tion owning it," we are faced with the fact that this "one-man corporation," in other words Weingart himself, according to his own theory as above stated, applied to the corporation commissioner for a permit to issue to Weingart 5500 shares of stock "*in consideration of the sale and transfer* to the corporation of the good will and assets of Ben Weingart *as per statement attached*," which statement listed the Ponet Hotel lease among the other assets, and pursuant to that application the corporation commissioner issued his permit "to issue to Ben Weingart 5500 shares of its capital stock in consideration of the transfer and assignment by him to applicant first to be made of all the property and assets set forth and described in its application, subject to liabilities of $1,930." (Italics ours.) A subsequent application to the commissioner recited the issuance of this stock "in conformity with" the terms of the first permit. Was not this a recognition by Weingart of the fact that the transaction amounted to an assignment? We think it was.

[3, 4] Whether or not an instrument is to be deemed an assignment of a lease is to be determined by the legal effect and not the form of the instrument. The law always respects form less than substance. Civ. Code, § 3528. If its legal effect is to substitute a third party for the lessee, conferring upon him the right to the benefits and subjecting him to the burden of the lease for the balance of the term thereof, without providing for any reversionary interest in the original lessee, it will be held to amount to an assignment.

Mr. Wood, in his work on Landlord and Tenant, § 258, thus states the rule: "An assignment, as contradistinguished from a sublease, signifies a parting with the whole term; and whenever the whole term is made over by the lessee, although in the deed by which that is done the rent and a power of re-entry for non-payment are reserved to himself, yet the instrument amounts to an assignment, and not a sublease."

"It is essential to a lease that some reversionary interest be left in the lessor, for if by an instrument purporting to be a demise he parts with his whole term, it will amount to an assignment of the term." Taylor, Landlord and Tenant, § 16.

In Craig v. Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236, it was held that whether or not an assignment of a lease had been made is a question of the legal effect and not of the form of the instrument. In that case the lessee had signed an instrument in the form of a sublease to a third party covering the whole of the premises demised under the original lease, and for the entire remainder of the term thereof. This was held to constitute an assignment.

In Walsh v. Martin, 69 Mich. 29, 37 N. W. 40, it was held that where the lessee turned over the lease and the premises to a third party, who thereupon went into possession and paid the rent to the lessor, "this constituted in law an assignment" although no instrument in form an assignment had been executed.

In the case of American Savings Bank v. Mafridge, 60 Wash. 180, 110 P. 1015, the court says: "'An assignment of a term for years occurs when the lessee transfers his entire interest therein without retaining any reversionary interest. If an instrument so transfers the lessee's interest, it constitutes an assignment regardless of its character and form.' (24 Cyc. 972). No particular form of assignment is necessary. Thus, as heretofore stated, a general lease, quitclaim, or other conveyance of the lease-hold premises may render the grantee an assignee."

Likewise, in the case of Taylor v. Marshall, 255 Ill. 545, 547, 99 N. E. 638, 639, the court says: "Where all of the lessee's estate is transferred the instrument will operate as an assignment notwithstanding that words of demise instead of assignment are used, and notwithstanding the reservation of rent and a right of reentry on the non-payment of rent or the non-performance of the other covenants contained in it. (Wood on Landlord and Tenant, sec. 330.)"

In Glendening v. Western Union Telegraph Co., 163 App. Div. 489, 148 N. Y. S. 552, the lessee had sold a half interest in the business he had been conducting on the leased premises and subsequently executed powers of attorney to the purchaser to carry on the whole business and to hold, sell, assign, or surrender any interest that he, the original lessee, might have in the lease. It was held that such an agreement amounted to an assignment of the lease. In that case great care was taken in the agreement between the parties to state that it was not an assignment. The court states: "To my mind, this recital is greater evidence of a cunning attempt on the part of the draftsman to conceal his real object than of an honest purpose to protect a bona fide interest."

Again, there is a presumption of assignment which follows occupancy of the leased premises by another than the lessee, especially when the occupant pays the rent and cost of maintenance. Ecker v. Chicago, etc., R. Co., 8 Mo. App. 223; Williams v. Woodard, 2 Wend. (N. Y.) 487; Acker v. Witherell, 4 Hill (N. Y.) 112. Speaking of this presumption, Mr. Jones (Landlord and Tenant, § 442) says: "That an assignment of a lease causes a forfeiture does not prevent the usual inference arising from an occupation. There is no reason why a presumption of an assignment would not arise, even in a proceeding to enforce the forfeiture. The fact that an assignment will forfeit the lease is a strong motive for concealing the fact of assignment, and the character of the possession of the assignee. Thus the existence of such a condition of forfeiture in the lease is, if anything, an additional reason why a third person in possession should be presumed to be an assignee of the lease and compelled to explain the character of his possession." To the same point is Dickinson v. Fitterling, 69 Minn. 162, 71 N. W. 1030.

For the reasons and on the authorities above set forth we are constrained to hold that the evidence supported the finding of the existence of an assignment.

[5] Upon the question of estoppel little need be here added to the statement of the facts with which this opinion commenced. The evidence shows without conflict, it is true, that from very first the checks for the lessor's two-thirds of the hotel profits, drawn by the Lincoln Investment Company, were received and cashed, but it is also uncontradicted that in April and May, 1922, the corporation had no interest whatsoever in the lease or premises. From early June to October of that year respondent was out of the state, and when, upon his return, he noticed that the statements read "Lincoln Investment Company, one-third," he immediately inquired of Weingart as to the meaning of this and was assured by the latter that there had been no assignment. Following this Weingart wrote the respondent's attorney, stating that the Lincoln Investment Company "has no interest in or to the Ponet Hotel or anything therein contained." As late as May 29, 1925, Weingart's attorney stated in a letter to respondent's attorney "that the Lincoln Investment Company has no interest of any kind or character in the Weintraub lease and the lease is still held by Mr. Weingart."

[6] Appellants seem to have successfully lulled respondent's suspicions of the true state of affairs up to the time of commencing this action. This they did by making evasive and even false statements. They are in no position to urge an estoppel on respondent's part. An estoppel is based on a knowledge of the facts and acquiescence with the situation developed thereby on the part of the party against whom it is claimed. "There can be no estoppel where the facts are not known, as no one can be presumed to have waived that the existence of which he has not known." Wheaton v. North British, etc., Ins. Co., 76 Cal. 429, 18 P. 765, 9 Am. St. Rep. 216; Puterbaugh v. Wadham, 162 Cal. 618, 123 P. 804; Norton v. Overholtzer, 63 Cal. App. 388, 218 P. 637. "There can be no estoppel in pais where the party against whom the attempt is made to invoke such estoppel does not know the full truth of the facts to which his conduct, declarations, or representations constituting the basis of the alleged estoppel relate." Bisconer v. Billing, 71 Cal. App. 779, 236 P. 329; Eaton v. Wilkins, 163 Cal. 742, 127 P. 71; Bashore v. Parker, 146 Cal. 525, 80 P. 707; Davis v. Winona Wagon Co., 120 Cal. 244, 52 P. 487; Murphy v. Clayton, 113 Cal. 153, 45 P. 267; Ions v. Harbison, 112 Cal. 260, 44 P. 572. There is evidence going to show that respondent was never informed of the "trust agreement," or of the fact that the Ponet Hotel lease was listed among the assets which Weingart was to sell and transfer to the corporation, or that the corporation had been permitted to issue part of its stock to Weingart "in consideration of the *transfer and assignment*" (italics ours) to it by Weingart of the lease in question as one of his assets, or of the fact that the corporation included one-third of the receipts from the hotel in its income tax report. His request for a copy of whatever agreement existed between Weingart and the corporation was not complied with; instead he received an unequivocal statement that the corporation had no interest whatever in the Ponet Hotel.

The trial court very properly found that no estoppel existed.

Judgment affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

98 Cal. App. 729

JENKINS v. SUPERIOR COURT, COUNTY OF SANTA CLARA, et al. (Civ. 6828.)

District Court of Appeal, First District, Division 1, California. May 13, 1929.

1. Costs ⚷132(5)—Petition by administratrix for leave to proceed in action for deceased's death in forma pauperis held properly denied, where cause of action was only asset, but petitioner did not show her brother could not advance costs and employed attorneys on contingent basis.

Petition by administratrix for leave to proceed in forma pauperis in action for deceased's wrongful death *held* properly denied, where cause of action was only asset of estate and petitioner received only $100 per month salary, but did not show that the other next of kin, her brother, was not in position to advance costs and petitioner had employed attorneys in action on contingent basis.

2. Costs ⚷130—Granting leave to sue in forma pauperis is largely discretionary.

Ordinarily, granting or denial of an application for leave to sue in forma pauperis is matter of discretion with court.

3. Costs ⚷132(5)—Leave to sue in forma pauperis should be granted only in clear case.

Leave should not be granted to sue in forma pauperis, unless a clear case is made for granting leave.

4. Mandamus 🔑143(2)—Application to compel court to grant leave to sue in forma pauperis, presented over year after denial of leave, was not seasonably made.

Application for writ of mandate to compel court to grant leave to sue in forma pauperis, presented a year and a half after denial of application for such leave, was not seasonably made and was not due diligence which law requires.

Application by Bess Virginia Jenkins, administratrix of the estate of Stanley Howard Jenkins, deceased, for a writ of mandate to be directed to the Superior Court of Santa Clara County, and the Judge thereof, to require respondent to permit petitioner to proceed in forma pauperis in a certain action pending therein. Writ denied.

Dowd & Reagh, of San Francisco, for petitioner.

D. T. Jenkins, of San Jose, for respondents.

TYLER, P. J. This is an original proceeding by mandamus to compel respondent judge to grant leave to petitioner to proceed in forma pauperis in a certain action pending in the superior court in and for the county of Santa Clara.

[1-3] It appears from the petition that petitioner is the administratrix of the estate of one Stanley Howard Jenkins, deceased, and that the only asset of said estate is a cause of action for his death. After the filing of a complaint for such alleged wrongful death, petitioner herein made application in the court below for leave to thereafter proceed in such action in forma pauperis, setting forth in her petition that the deceased, Stanley Howard Jenkins, left no estate, and that petitioner had no funds except such as she received from her employment, from which she derived the sum of $100 a month. It further appeared from the petition that the next of kin of the deceased is the petitioner and her brother, Charles Francis Jenkins. No showing was made that the brother was not in a position to advance the costs. It also appeared that petitioner had employed attorneys to represent her in the action upon a contingent basis. Upon the showing made the application was denied on the 28th day of October, 1927, and the present petition was filed in this court on March 4, 1929, about a year and a half thereafter.

We are of the opinion that respondent herein was justified in denying the petition. Applications for leave to sue in forma pauperis are not to be encouraged. Ordinarily, the granting or denial of such an application is largely a matter of discretion with the court, and while the granting of the privilege in a deserving case is perfectly just and proper, still it should not be extended by construction beyond its true scope and purpose. Leave should not be granted unless a clear case is made for its exercise. 15 Cyc. 236.

[4] Then, again, the present application is not seasonably made. As above set forth, the present petition is presented a year and a half after the denial of the application. This is not the due diligence that the law requires. 15 Cyc. 234.

The writ is denied.

We concur: KNIGHT, J.; CASHIN, J.

In re BUTTON'S ESTATE. (Civ. 6806.)★

District Court of Appeal, First District, Division 2, California. May 14, 1929.

Rehearing Denied June 13, 1929. Hearing Granted by Supreme Court July 11, 1929.

1. Wills 🔑104—Deceased's farewell letter to former husband and sons, containing statement that former husband should have house, held not to be will.

Letter of farewell by decedent, before committing suicide, written to former husband and her sons, containing paragraph as follows: "I'm wearing you out dear and when I am gone you can just breath one long sigh of contentment. I'd like to be cremated. You can have the house on 26th Ave. and all the things of value so you won't be out any money on burying me"—*held* not to be will, since such paragraph was not of such definite and certain language as would require holding that decedent intended to leave all her property to her former husband to exclusion of sons.

2. Wills 🔑206—Where it does not satisfactorily appear paper tendered for probate was intended by decedent to be will, it must be rejected.

Where it does not satisfactorily appear that very paper tendered for probate was intended by decedent to be will, it must be rejected.

3. Wills 🔑94—Legal rights of heirs should not be defeated by strained construction of paper as will, when existence of testamentary intention is not clear.

Legal rights of heirs at law should not be defeated by strained or unreasonable construction of paper as will, when existence of testamentary intention is not clear.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Application by Ralph James Button for the probate of a letter as the last will and testament of Grace Edna Button, deceased. From an order in favor of the contestants, Ralph James Button and another, denying the probate, proponent appeals. Affirmed.

Marshall Nuckolls and Monroe B. Kulberg, both of San Francisco, for appellant.

NOURSE, J. This is an appeal from an order of the probate court denying probate of a letter offered by petitioner as the last will

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★Rehearing denied. Hearing granted. 287 P. 964.

and testament of Grace Edna Button, deceased. The appeal is taken upon a bill of exceptions, and, though the two minor sons of the deceased are named as party respondents, no one appeared for them in the proceeding before the probate court, and the appellant has filed the only brief on this appeal.

The petitioner herein was the husband of the deceased until April 4, 1928, when they were separated by a final decree of divorce. On August 25, 1928, the deceased committed suicide, and at the time of her death owned a house and lot situated on Twenty-Sixth avenue in the city and county of San Francisco. She is survived by two sons, 14 and 8 years of age, respectively, who are named in the petition as her sole heirs at law. In the room where she was found dead a letter addressed to her former husband, petitioner herein, and dated August 25, 1928, was found. This letter consisted of two pages written on both sides of the paper. It was an expression of love and affection for her former husband and her two sons, expressions of gratitude to a number of individuals who had performed acts of kindness to her, and expressions of regret that she found it necessary to end her life and that she was unable to renew the former associations of her husband and the care of her two children. In the course of this lengthy letter the following paragraph appears, upon which the appellant relies as constituting a will: "I'm wearing you out dear and when I am gone you can just breath one long sigh of contentment. I'd like to be cremated. You can have the house on 26th Ave. and all the things of value so you won't be out any money on burying me."

For the purpose of determining whether the document offered was testamentary in character the probate court permitted the petitioner to introduce evidence covering the facts which have heretofore been stated. On the conclusion of the hearing the trial court found that the document was not a last will and testament and entered its order that its admission to probate be denied.

[1] The order is affirmed for the reason that the very nature of the document itself and the circumstances under which it was written negative the thought that it was intended to be a last will and testament. The expressions of love and affection to the two sons appearing throughout the letter are of such a character that it cannot be assumed that the decedent would have intentionally deprived them of all their interest in the estate without making any provision for them of any character. The paragraph relied on by appellant is not of such definite and certain language as would require a holding that the decedent intended to leave all her property to her former husband to the exclusion of her two sons, who, in the absence of a will, were the sole heirs at law of her estate. A more reasonable interpretation of the document is that it was a letter of farewell to the father and the two sons, with the incidental request that the father provide for the cremation of the deceased from the proceeds of the property which she left.

[2] When it does not satisfactorily appear that the very paper tendered for probate was intended by the decedent to be a will it must be rejected. Estate of Anthony, 21 Cal. App. 157, 131 P. 96; Estate of Kelleher, 202 Cal. 124, 129, 259 P. 437, 54 A. L. R. 913; In re Richardson, 94 Cal. 63, 29 P. 484, 15 L. R. A. 635.

[3] The probate court apparently drew the conclusion, from all the circumstances before it, that the letter was not written with testamentary intent and that it was unreasonable to suppose that the decedent would cut off her two sons from participation in her estate in the same document in which she repeatedly expressed for them the greatest love and affection. The authorities are numerous which hold that the legal rights of the heirs at law should not be defeated by a strained or unreasonable construction of a paper as a will when the existence of a testamentary intention is not clear.

For the reasons first given, the order is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

98 Cal. App. 714

In re BOOLE'S ESTATE. (Civ. 6805.)★

District Court of Appeal, First District, Division 2, California. May 11, 1929.

Rehearing Denied June 10, 1929. Hearing Denied by Supreme Court July 8, 1929.

1. Taxation ⟹900(5)—Order fixing inheritance tax held appealable, together with intermediate rulings involving merits or affecting substantial rights (Code Civ. Proc. §§ 956, 963, subd. 3).

Where court confirmed report of inheritance tax appraiser reporting that transfer by deceased of property to wife and children was made in contemplation of death, order fixing inheritance tax on estate was a judgment under Code Civ. Proc. § 956, from which appeal was permissible under section 963, subd. 3, to review order and verdict or decision and any intermediate ruling substantially affecting rights.

2. Appeal and error ⟹281(1)—Failure to properly move for new trial held immaterial, where appeal from final order fixing inheritance tax was valid (Code Civ. Proc. §§ 956, 963, subd. 3).

Where appeal from final order fixing inheritance tax was valid and permitted review of order and intermediate rulings involving merits or necessarily affecting judgment or substantial rights of party under Code Civ. Proc. §§ 956, 963, subd. 3, it was immaterial that

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★Rehearing denied. Hearing denied by Supreme Court.

motion for new trial was not properly made, since appellate power of appellate court was not thereby restricted.

3. Taxation 🔑893—Evidence held sufficient to support finding of transfer in contemplation of death within Inheritance Tax Law (Inheritance Tax Act, § 2, subd. 4).

In proceedings to impose inheritance tax, evidence of decedent's consultation with attorneys concerning disposition of property at time when decedent suffered stroke of paralysis, and concerning exemptions from state and federal inheritance taxes, and evidence that decedent executed transfers in trust and subsequently revoked prior will and made new will omitting trusts and died four years later from disease which had endured for five years, though tending to show absence of fear or expectation of immediate death, was sufficient to show transfer in contemplation of death, as defined in Inheritance Tax Act, § 2, subd. 4 (St. 1921, p. 1501).

4. Depositions 🔑44—Question to widow, "It is necessary * * * to determine whether * * * transfers were * * * in contemplation of death," though not in interrogatory form, held sufficient (Inheritance Tax Act).

Question asked surviving widow of deceased in deposition taken to obtain information whether transfers were taxable under Inheritance Tax Act (St. 1921, p. 1501), as made in contemplation of death, "It is necessary for us to determine whether transfers were made to you in contemplation of death," though not in interrogatory form, but treated as a question, was sufficient in form.

5. Depositions 🔑94—Answer to question whether transfer was in contemplation of death, "I think it was only as any man would feel," held sufficient (Inheritance Tax Act).

In deposition taken to obtain information whether transfers were taxable under Inheritance Tax Act (St. 1921, p. 1501), answer of witness to question whether transfers were made in contemplation of death, "I think it was only as any man would feel. He wanted to insure our safety," knowing stroke of paralysis was always dangerous, *held* sufficient in form, though beginning with words "I think," which words witness used in other parts of deposition to express degree of recollection.

6. Evidence 🔑471(9)—Testimony by widow as to husband's intention when making transfers held conclusion and inadmissible against other transferees against whom tax was levied (Inheritance Tax Act).

In deposition to obtain information whether transfers were taxable under Inheritance Tax Act (St. 1921, p. 1501), answer of widow to question whether transfer was made in contemplation of death that deceased wanted to insure safety of herself and children, and, knowing that stroke was always dangerous to any one, he wanted everything settled before anything happened to him, stated conclusion of witness with respect to what husband had in mind when making transfers, and was inadmissible against other transferees against whom tax was levied.

7. Appeal and error 🔑609—Supplemental transcript of conversation between court and jury after verdict, showing jury were uninfluenced by evidence erroneously admitted, could be filed but not considered in determining whether admission of evidence was reversible error (Code Civ. Proc. § 953a).

Supplement to reporter's transcript showing conversation between court and members of jury immediately after recording of verdict and before discharge, to effect that jury were not influenced by evidence erroneously admitted, *held* entitled to be filed in appeal under alternative method under Code Civ. Proc. § 953a, but substance of supplement cannot be taken into consideration in determining whether admission of evidence constituted reversible error.

8. Appeal and error 🔑1054(2)—Erroneous admission of evidence held not prejudicial, where different verdict would not have resulted and verdict was merely advisory.

Where evidence was erroneously admitted as conclusion of witness, but record did not show that different verdict would have been rendered, nor different judgment entered without error in admitting evidence, and verdict was advisory only, and court, though expressing doubt as to admissibility of evidence, accepted verdict and made its finding of fact in agreement with it, error in admitting evidence was no more serious than if trial was had without jury, and was not prejudicial.

9. Taxation 🔑893—Requested instruction to find transfers were not made in contemplation of death, if made in contemplation of traveling, held properly refused as unsupported by evidence.

In proceedings to impose inheritance tax on property transferred by deceased in contemplation of death, requested instruction directing jury to find that transfers were not made in contemplation of death, if they found transfers were made with certain enumerated objects in view, including desire of deceased to travel and guard against business reverses, was properly refused, where there was no showing that trusts were made in contemplation of travel.

10. Taxation 🔑893—Court need not enumerate all conditions under which transfers would not be taxable, where it stated transfers for any other reason than in contemplation of death would not be taxable (Inheritance Tax Act).

Where court, in proceedings to tax property, transferred in contemplation of death under Inheritance Tax Act (St. 1921, p. 1501), stated in effect that transfers made for any other reason than in contemplation of death would not be taxable, court was not required to enumerate all conditions under which transfers would not be taxable, especially where court did instruct on conditions under which transfers were not taxable to extent authorized by evidence.

11. Taxation 🔑893—Instruction that transfer is taxable, if made to avoid probate proceedings or tax, substantially following statute, held proper (Inheritance Tax Act).

In proceedings to impose inheritance tax on property transferred in contemplation of death, instruction that transfers would be taxable if decedent's motive was to avoid probate proceedings and deprive state of opportunity to collect tax, which instructions substantially followed language of Inheritance Tax Act (St. 1921, p. 1501) referring to transfers made in lieu of or to avoid passage of property transferred by testate or by intestate laws, was proper, where evidence was sufficient to support finding that transfers were so made, and motive must be inferred from acts of decedent and surrounding circumstances.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Proceedings by Ray L. Riley, as Controller of the State of California, to assess inheritance tax on the estate of Fred W. Boole, deceased, opposed by Fred W. Boole, Jr., as executor and on behalf of Dee Beck Boole and others as beneficiaries. From a judgment and order confirming a report of inheritance tax appraiser and denying motion for new trial, the executor and beneficiaries appeal. Affirmed.

A. P. Black, of San Francisco, for appellant.

A. W. Brouillet and Leo C. Lennon, Asst. Inheritance Tax Attorneys, both of San Francisco (W. H. H. Gentry, Inheritance Tax Attorney, of San Francisco, of Counsel), for respondent.

KOFORD, P. J. The beneficiaries of certain trusts created by the decedent during his lifetime appeal from the judgment and order confirming the report of the inheritance tax appraiser and fixing the inheritance tax in said estate, and also appeal from the order denying appellants' motion for a new trial.

The appraiser after investigation returned his report to the probate court stating that the decedent in his lifetime, on January 10, 1920, had transferred and assigned by three deeds a large amount of property in trust for members of his family without valuable and adequate consideration and in contemplation of death. The report set forth the value of the property so transferred and the amount of inheritance tax due on account of each of such transfers. Fred W. Boole, Jr., as executor of the last will of said decedent, on behalf of himself individually and also on behalf of his mother, Dee Beck Boole, and his sister, Ruth Barbara Boole, filed written objections to said report, stating in the objections that his mother and sister were abroad and were for that reason unable personally to present their objections to the report.

A trial upon the report and objections was had before a jury, resulting in a special verdict. The jury answered "yes" to the question submitted to them, to wit: Were the trusts made in contemplation of death?

[1, 2] Respondent claims that the appeal should be dismissed because appellants' motion for a new trial was prematurely made. The verdict was given February 8, 1928, and on the same day appellants filed a notice of intention to move for a new trial, and a written motion that the court set aside the verdict and grant a new trial. On April 4, 1928, the court by minute order denied the motion for a new trial, and on April 5, 1928, signed and filed its written findings and order confirming the report of the inheritance tax appraiser and fixing the inheritance tax in accordance with the recommendation of said report. The said notice of appeal was filed on April 10, 1928. An argument is made by respondent that the verdict was advisory only, that other issues remained for decision by the court which were not determined until the court made the order of April 5, 1928, and for these reasons the motion for a new trial was prematurely made. Appellants reply that in this particular case no other issue remained for decision because the sole objection to the report was the statement that said transfers were made in contemplation of death. Whatever should be done about the appeal from the order denying a new trial, the appeal from the order fixing the tax was in time and was permissible under Code of Civil Procedure, § 963, subd. 3. The latter order was a judgment and under Code of Civil Procedure, § 956, the appellate court upon an appeal from a judgment may review the verdict or decision and any intermediate ruling, proceeding, order, or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. Respondent has not indicated how the appellate power of this court to review all the points on appeal would in any way be restricted if the appeal from the order denying a new trial was not properly taken, nor if the motion for a new trial was not properly made so long as the appeal from the final order fixing the tax is valid.

Appellants urge that the evidence is insufficient to support the finding that the transfer was made in contemplation of death. The entire evidence upon the issue is not set out in the briefs, although the record is perfected under the alternative method of appeal. Appellants show certain evidence of declarations of the deceased which is said to manifest a state of mind at the time of the transfers which looked forward to future years of life, freed from business worries, guarded at once against the possible mistakes into which old age might lead him, and also against the assumed extravagance of his own family. Authorities are also cited to the effect that old age or failing health are not determinative of the question. The respondent indicates other testimony not denied in appellants' reply brief which is sufficient to support the decision. The words "contemplation of death" are defined in section 2, subd. 4, of the Inheritance Tax Act (St. 1921, p. 1501) as "that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person making a gift causa mortis; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of property transferred by testate or intestate laws."

These facts include the following: In November, 1904, the decedent Fred W. Boole executed a will disposing of his property and setting up testamentary trusts for these appellants. He was then and subsequently interested in the subject of trusts and gave them study. On April 7, 1919, he consulted his attorney concerning testamentary disposition of stock and on April 29, concerning a proposed disposition of his estate. In July, 1919, he suffered a stroke of paralysis and he did not return to his office until October of that year. He commenced again to consult his attorney: November 21, 1919, concerning a proposed trust in favor of his wife and children; December 3, 1919, for advice about collateral inheritance taxes and other points in connection with the proposed trusts; December 18, 1919, further concerning exemptions from state and federal inheritance taxes. He continued to consult his attorney from time to time, and on January 20, 1920, he executed the transfers in trust which were taxed by the order appealed from. Then 18 days later he revoked his will of 1904 and made a new one, omitting therefrom the trusts contained in the old one, but which had now been established by the document of January 20, 1920. He died at the age of 63 years on August 10, 1924, of arteriosclerosis and myocarditis which the death certificate stated were of a duration of 5 years.

[3] While the evidence quoted by appellants tends to show absence of fear or expectation of immediate death, it does not negative the existence of that contemplation of death which is defined in the statute and explained in Chambers v. Larronde, 196 Cal. 100, 235 P. 1024, 41 A. L. R. 980. The points explained in that case rule the present one in many particulars. The verdict is sustained by substantial evidence.

At the trial appellant Dee Beck Boole, surviving widow of the deceased, was absent from the state. Her deposition had been taken by the inheritance tax attorney at the state controller's office. The deposition, of course, was taken to obtain information showing whether the said transfers were taxable under the Inheritance Tax Act. At the trial parts of her deposition were read into evidence before the jury. The following part was read over the objection of appellants:

"Q. (After describing the transfers.) It is necessary for us to determine whether those transfers were made to you in contemplation of death. A. I think it was only as any man would feel. He wanted to insure our safety and knowing that a stroke is always dangerous to anyone, he wanted to have everything settled before anything happened to him."

[4-6] The question, though not in the interrogatory form, was treated as a question and sufficient in form. The answer begins with the words, "I think." The witness used this expression in other parts of her deposition to express a degree of recollection. It was also sufficient in form. 10 Cal. Jur. 953. The substance of the answer, however, was a conclusion of the witness with respect to what her husband had in mind when he made the transfers. If she were the sole transferee, her statement would be admissible as a declaration or admission, but here there are two other transferees against each of whom a tax is levied. Estate of Ricks, 160 Cal. 467, 484, 485, 117 P. 539, and cases cited. Against the other appellants this statement of the witness was a conclusion and should not have been received in evidence. This point evidently gave the trial court some concern.

[7, 8] Respondent has presented and asked leave to file a supplement to the reporter's transcript which shows a conversation between the court and members of the jury immediately after recording their verdict and before their discharge. The statements of the jury in response to the court's questions are to the effect that they were not in fact influenced by this part of the testimony. The appellants' objection to the filing of this supplement must be overruled. An appeal under the alternative method entitles each party to a full phonographic report of the proceeding at the trial, omitting only such matters as may be excluded by stipulation. Code Civ. Proc. § 953a. We have, therefore, ordered the supplement filed. Nevertheless, the substance of the supplement is not such that we can take it into consideration in determining whether the statement of Mrs. Boole thus admitted in evidence constitutes reversible error. Jurors' affidavits are not competent to show that their misconduct in reading improper newspaper articles about the cause did not influence their verdict. Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 379, 397, 104 P. 986; People v. Stokes, 103 Cal. 193, 196, 197, 37 P. 207, 42 Am. St. Rep. 102. Logically the same rule should apply to evidence erroneously submitted to them by the court. While the ruling of the cases last cited is based in part upon the old rule that from error injury was presumed, it was not entirely based upon that rule. Whether the error in admitting the statement resulted in a miscarriage of justice under the present rules governing appellate courts we determine without regard to the matter in the supplement. Our examination of the record does not show us that a different verdict would

have been rendered nor a different judgment entered without this error in admitting evidence. The verdict was advisory and stipulated by counsel to be advisory. The court, while expressing doubt as to the admissibility of the statement, nevertheless accepted the verdict and made its finding of fact in agreement with it. For this reason the error should be considered no more serious than if the trial was had without a jury. It has been held that errors in the proceedings before the jury rendering an advisory verdict are not so readily held to be prejudicial, as where the verdict is binding upon the court. In re Moore, 72 Cal. 335, 13 P. 880.

[9] Requested instructions numbers IV and V were refused. They directed the jury to answer "no" to the interrogatory submitted to them in case they found that the transfers were made with certain enumerated objects in view, but not in contemplation of death. The enumerated objects included the intention of the deceased to travel and guard against business reverses while on his travels, but there was no showing in the evidence that the trusts were made in contemplation of traveling. Refused instruction number VI could properly have been given. It was apparently taken from the language of Estate of Snyder, 71 Cal. App. 324, at page 329, 235 P. 54, 56. However, the failure to give it has not resulted in injury in view of other instructions given. The court charged the jury that the state must prove the transfers to have been made in contemplation of death, defined that expression in the terms requested by appellants, and then instructed: "If, of course, the state has failed to establish the fact that, at the time these trusts were executed, Mr. Boole had in contemplation his death, then the verdict must be for the beneficiary."

[10] The court was not required to enumerate all the conditions under which the transfers would not be taxable, where it stated in effect that transfers made for any other reason than in contemplation of death would not be taxable. To the extent authorized by the evidence, the court did instruct upon conditions under which transfers are not taxable. It stated: "If Mr. Boole's sole purpose in creating these trusts was to protect himself against himself, as it were, in the sense of making it impossible for him to later, in the latter days of his life, make any bad business ventures, and if, further, it was his purpose to teach practical economy, as it were, to the members of his family, those thoughts were strong in his mind, why of course it is a valid transfer and free of tax."

[11] The court instructed that the transfers would be taxable if the decedent was actuated at once by two kinds of motives, to wit: First, the motives last mentioned; and, second, the motive to avoid probate proceedings and deprive the state of its opportunity to collect the tax. In so doing the court referred to these two kinds of motives as "both of them strong and in a sense impelling motives, one, as already stated, his own protection against future adversity, assisting his family, and the like, and the other the desire to defeat this Inheritance Tax Act, or to protect himself and his family against the expense of probate proceedings and the like." The appellants' objection to this instruction is based upon the claim that there was no evidence tending to prove the motives secondly described. The language used in the instruction substantially follows the meaning of the language of the act, i. e., transfers "made in lieu of or to avoid the passing of property transferred by testate or intestate laws." As already pointed out, the evidence was sufficient to support the finding that the transfers were so made. The state's burden of proof is to show the motive or motives of the decedent which actuated the transfers. From the very nature of this burden, a case capable of direct proof of the issue will seldom arise. The motive will usually have to be inferred from other facts such as the acts of the decedent, the surrounding circumstances, and the nature of the transfer. For these reasons the question is one which is peculiarly within the province of the trial court.

The judgment and order fixing the tax are affirmed.

We concur: **STURTEVANT, J.**; **NOURSE, J.**

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OTHMER v. CITY COUNCIL OF CITY OF LONG BEACH et al. (L. A. 11397.)

Supreme Court of California. May 16, 1929.

1. Municipal corporations 🔑124(5)—Charter provision for recall of officers held not void for failure to provide method for ascertaining whether petitions were signed by requisite number of qualified electors (Long Beach City Charter, § 308; Code Civ. Proc. § 1963).

Long Beach City Charter, § 308 (St. 1921, p. 2145), authorizing recall petition, *held* not void because of failure to provide method of procedure to be followed by clerk in determining whether originating petition or petition as later signed contained signatures of requisite number of qualified electors, regardless of fact that it does not state how fact shall be ascertained as to each signer, in that it will be presumed in accordance with Code Civ. Proc. § 1963 that clerk in ascertaining fact will regularly perform his official duties.

2. Pleading 🔑121(4)—Denials on information or belief of matters of public record are insufficient to raise issue, and must be deemed admissions.

Denials on information or belief of matters of public record and the form thereof are insufficient to raise an issue, and must be deemed to be admissions of allegations to which denials assume to be responsive.

3. Municipal corporations 🔑159(1)—That city clerk furnished separate documents containing copy of original recall petition for signatures of electors did not destroy effectiveness (Long Beach City Charter, § 308).

Fact that city clerk, after filing recall petition in accordance with Long Beach City Charter, § 308 (St. 1921, p. 2145), provided separate documents with copy of notice containing a copy of originating recall petition with blank sheets of papers containing places for signatures to which signatures were appended and subsequently attached to original petition kept in vault in office of city clerk, did not destroy the effectiveness of petition.

4. Municipal corporations 🔑159(1)—Clerk's certificate as to signatures of qualified electors to recall petition, regular on its face, was not open to attack in collateral proceeding (Long Beach City Charter, § 308).

Certificate of city clerk as to signatures to petition for recall of municipal officers in accordance with Long Beach City Charter, § 308 (St. 1921, p. 2145), being sufficiently responsive to requirements of charter and regular on its face without showing of bad faith, fraud, or mistake, was final and conclusive and not open to attack in collateral proceeding.

5. Municipal corporations ⚷159(1)—City clerk in order to certify signatures to recall petition need not personally see every name signed thereto (Long Beach City Charter, § 308).

City clerk in order to furnish certificate as to signatures on recall petition in accordance with Long Beach City Charter, § 308 (St. 1921, p. 2145), need not personally see every name signed to petition; it being sufficient if names are signed under his direction in such manner that he or one of his deputies may certify to the fact that petitions remained in office.

6. Municipal corporations ⚷159(1)—Certificate of city clerk to recall petition in absence of bad faith, fraud, mistake, or forgery is conclusive.

In the absence of allegations of bad faith, fraud, mistake, or forgery, certificate of city clerk made within scope of his charter duties relative to signatures of qualified electors to recall petition is conclusive on city council and on the court.

7. Municipal corporations ⚷159(1)—City clerk in performing charter duty requiring him to verify signatures to recall petition could avail himself of assistance of competent persons.

City clerk in performance of charter duty requiring him to verify signatures of qualified electors to petition for recall of officers had right to avail himself of assistance of competent persons specially employed for the purpose of checking signatures on petition, and results of their work was sufficient to enable clerk to rely thereon in making certificate.

8. Municipal corporations ⚷124(5)—City charter provision relating to recall must be given liberal interpretation (Long Beach City Charter, § 308).

Long Beach City Charter, § 308 (St. 1921, p. 2145), providing for recall of municipal officers, must be given a liberal interpretation with the view of promoting the purposes for which it was enacted.

In Bank.

Original mandamus by Henry Othmer against the City Council of the City of Long Beach and others. Writ granted.

Denio, Hart, Taubman & Simpson, of Long Beach, for petitioner.

Linnell & Linnell, of Long Beach, for respondents Hicks, Jones, Lo Rentz, Alexander, Taylor, and Evans (Members of City Council, City of Long Beach).

SHENK, J. Mandamus to compel the city council of the city of Long Beach to call a special recall election.

Section 308 of the city charter (Stats. 1921, p. 2145), so far as pertinent to this controversy, provides: "The holder of any elective office, or the city manager, in the city of Long Beach, may be recalled by the qualified electors of the city of Long Beach at any time after he has held office for six months. Not less than ten nor more than twenty-five qualified electors of the city of Long Beach may originate a petition of recall in the following manner: The said qualified electors shall file with the city clerk a petition containing a general statement of the ground or grounds for which the recall of the official is sought. This petition shall be signed by each of the petitioners originating the recall, each signer adding to his signature his place of residence, giving street and number, and the date of signing. The city clerk shall file the petition, and shall cause the said petition with the signatures attached thereto to be published for three successive days in the official newspaper of the city, with notice therein that said petition is in the city clerk's office open for signatures. The city clerk shall, during office hours for thirty days from the last day of publication aforesaid, keep the petition open for signatures by the qualified electors of the city, each signer to add to his signature his place of residence, giving street and number, and date of signature. No petition other than the originating petition shall be signed or presented for signature at any place other than the city clerk's office, and must be verified by the city clerk or one of his deputies. At the expiration of said thirty days, the city clerk shall declare the petition closed for the purpose of examination, and within five days thereafter shall ascertain whether said petition is signed by qualified electors of the city of Long Beach equal to not less than ten per cent of the entire votes cast at the last general municipal election; and the city clerk shall attach to the petition his certificate showing the result of such examination, stating the number of qualified voters found upon said petition, and the number of persons not qualified to vote, and in checking said petition the city clerk shall designate the names of persons found thereon not qualified to vote, with the letters 'D. V.' in red ink opposite such name or names. * * * If the petition shall be found to be sufficient, the city clerk shall submit the petition of recall, together with his certificate, to the city council without delay, whereupon the city council shall forthwith cause a special municipal election to be held not less than thirty nor more than forty days after the date of the order calling such election, to determine whether the voters shall recall such officer. If the same ground or grounds are alleged, one petition shall be sufficient to propose the recall of one or more officials. * * *"

The petition herein alleges the official status of the respondents as the nine members of the city council of said city; also that on January 28, 1929, 20 qualified electors of said city, including the petitioner, filed with the city clerk of said city a petition for the recall of the respondents, N. H. Alexander, E.

L. Taylor, W. L. Evans, and R. M. Hicks, members of said council, which petition was signed by said 20 qualified electors, each adding to his signature his place of residence, giving his street number and the date of signing, and that said petition contained a general statement of the grounds for which the recall of said four named respondents was sought. A copy of the recall petition is attached to the petition, and the same discloses that the same grounds of recall are specified as to each of said four respondents. It is further alleged that the city clerk filed the recall petition and caused the same to be published, as required by the charter provision, in the official newspaper of said city; that during office hours for 30 days after the last day of publication the city clerk kept said petition open for signature by the qualified electors of said city; that no other petition was signed or presented for signature at any place than the office of the city clerk; that within office hours during said 30-day period 3,776 persons signed said petition at the office of the city clerk, each of said signers adding to his signature his place of residence, giving street and number, and date of signing; that at the expiration of said 30-day period the city clerk declared the petition closed for the purpose of examination, and within 5 days thereafter ascertained whether said petition was signed by qualified electors of said city equal to not less than 10 per cent. of the entire vote cast at the last preceding municipal election; that the city clerk checked said petition and designated the names of persons found thereon not qualified to vote with the letters "D. V." in red ink, opposite such names; that 3,559 of said persons were and are and were found by said city clerk to be qualified electors of said city of Long Beach; that the city clerk attached to said petition his certificate showing the result of such examination, stating the number of qualified electors whose signatures were attached to said petition to be 3,559, and the number not qualified to vote to be 217; and that the total vote cast at the last general election was 27,739; that said petition was found to be sufficient, and that the city clerk did, on the 8th day of March, 1929, submit said petition, together with his said certificate, to the respondent city council; that thereupon and at the time of submission of said petition and certificate to the city council the same were ordered filed, whereupon Councilman Barton moved that an election be called to be held on April 16, 1929, to determine whether the voters should recall the four councilmen named in the recall petition; that said motion was seconded, and, upon the same being put to a vote, Councilmen Hauge, Barton, and Stakemiller voted in favor thereof, and Councilmen Alexander, Taylor, Hicks, Jones, and Lo Rentz voted against the same, Councilman Evans being absent.

[1] As a return to the alternative writ the respondents filed a demurrer and an answer at the same time. The grounds of the demurrer have been considered and found to be without merit and, except as to one, need not be discussed. As to this one ground it is contended that said section 308 of the charter is uncertain, defective, and void, in that no provision is made therein for the method of procedure to be followed by the clerk in ascertaining whether the originating petition of not more than 25 qualified electors or the petition as later signed contains the signatures of the requisite number of qualified electors. As to the originating petition the same is not entitled to be filed unless it has appended thereto the signatures of the required number of qualified electors. Each elector is required to affix his place of residence, giving street and the date of signing. This information is sufficient to enable the clerk to ascertain by the usual method in such cases, viz.: By an inspection of the records of registration, whether the petition is entitled to be filed. It is the duty of the clerk to ascertain the fact, and it must be presumed that his official duty will be regularly performed. Section 1963, Code Civ. Proc. As to the closed petition the charter imposes upon the clerk the duty to "ascertain whether the petition is signed by qualified electors of the city" in the requisite number. It is true that the charter does not require how the clerk shall ascertain the fact as to each signer, but we think this omission is not fatal to the validity of the charter provision, for it must also be assumed that the clerk would employ the means available to ascertain the fact and would resort most naturally to the records of registration for that purpose. See Wolfskill v. City Council of Los Angeles, 178 Cal. 610, 174 P. 45. The demurrer is therefore overruled.

[2] The answer purports to raise certain issues of fact which, if material, and are not satisfactorily answered by the record before us, would require a reference. In response to the allegations of the petition that the originating recall petition was filed in the office of the city clerk, and that qualified electors of said city signed said petition, the respondents, for want of information or belief on the subject, deny that such petition was so filed, and for the same reason deny that the 20 persons whose names were signed thereto were qualified electors of said city. Those denials are denials of matters of public record, and the form thereof is insufficient to raise an issue and must be deemed to be an admission of the allegations to which the denials assume to be responsive. Santa Barbara Lumber Co. v. Ross, 183 Cal. 657, 192 P. 436; 21 Cal. Jur., p. 150, and cases cited. The same condition of the answer obtains with reference to the allegation of the petition herein that 3,559 of the persons who signed the closed petition were qualified electors

of said city. It is nowhere alleged in the answer that the persons who signed the originating petition or that the 3,559 persons who signed the closed petition were not qualified electors of the city. That they were qualified electors must, therefore, stand as an admitted fact in the case.

Other allegations of the petition are denied, but such denials for the most part relate to matters affirmatively set forth in a separate defense, and must be considered in connection therewith. The allegations of the separate defense may, for the purposes of this proceeding, be deemed to be true. In substance it is therein averred that after the publication of the notice in the official paper notifying electors of the city of the filing of the petition for recall in the office of the city clerk, and during the 30-day period after the last publication of said notice, the originating petition was kept in the vault at the office of the city clerk and that no further signatures were attached to that paper; that after the publication of said notice the city clerk prepared six separate documents, consisting of a copy of said notice (which contained a copy of the originating recall petition), pasted on a blank sheet of paper and other blank sheets of papers attached and bound thereto, the blank sheets containing places for signatures; that the documents so prepared by the city clerk were placed on desks and counters in the clerk's office, and that all of the signatures of electors alleged by the petition to have been obtained were appended to the copy of the notice to voters and the sheets appended thereto; that the city clerk himself did not personally supervise the signing of each document so as to enable him to verify all of the signatures thereto, and that neither the city clerk nor any particular deputy of the city clerk was present during the signing of all of said signatures; that due to the procedure followed it was impossible for the clerk himself or for any one of his deputies to identify and verify all of said signatures; that after the expiration of the 30-day period the clerk caused the several duplicate copies or sections of the alleged petition, with the signatures appended thereto, to be attached to the original petition filed in his office on January 28, 1929, in such manner as to make it appear that they were so attached at the time all of the signatures were appended; that thereafter the city clerk went to the city of Los Angeles, the county seat of the county in which the city of Long Beach is situated, accompanied by a deputy clerk and other persons who were neither deputies nor assistants of the city clerk, nor in the regular employ of the city clerk, and that the clerk, his deputy, and such other persons examined the great register and affidavits of registration and compared the signatures therein with the signatures attached to the copies of the recall petition; that the persons, other than the deputy city clerk, who were so employed by the city clerk to make such comparisons "were wholly unauthorized to determine any of the facts or the genuineness of signatures, and that it was upon such illegal, void determinations and hearsay that the said city clerk made his purported and alleged finding and certificate which he filed with the council" certifying to the genuineness of 3,559 of said signatures, and that the city clerk was therefore without sufficient knowledge to enable him to make such certificate. Wherefore, it is alleged, the recall petition was not legally authenticated, and no obligation rests upon the respondents to call said recall election.

[3] Admitting all of the foregoing allegations of the affirmative defense to be true, we are of the opinion that there was a substantial compliance with the law in all of the steps leading up to the presentation of the recall petition to the city council. It is conceded that each document signed by the electors had attached thereto and preceding the signatures a copy of the originating recall petition. There was nothing in the duplicate copies of the petition to mislead the electors, and there can be no doubt that each signer fully understood that he was signing a petition for the recall of the four councilmen. It is not disputed that all of the signatures attached to the duplicate petitions were appended in the office of the city clerk. Such being the fact, it would seem to be unreasonable to require that all of the electors must sign one document if by any rational construction of the charter provision the several documents as signed may, when assembled and attached, rightly be deemed to be a single petition. By necessary implication the charter contemplates that more than one document or petition may be signed. It provides that "no petition other than the originating petition shall be signed, or presented for signature, at any place other than the city clerk's office." This provision plainly means that the originating petition may be signed outside of the office of the city clerk, and that other petitions to the same effect not only may, but must, be signed in the office of the city clerk. The language of the charter is entirely inconsistent with the contention that all of the signatures must be appended to one sheet of paper or to one series of papers constituting but one document. It has been held in other states, under like statutory requirements, that it is sufficient if the names of the petitioners appear on different petitions of the same form and content. Smith v. Patton, 103 Ky. 444, 45 S. W. 459; Douglass v. County Commissioners, 23 Fla. 419, 2 So. 776. In People v. Town of Berkeley, 102 Cal. 298, 36 P. 591, 23 L. R. A. 838, it appeared that eight several petitions, identical in form, for the reorganization under general law of a town theretofore established under a special charter in accordance with the provisions of the General Municipal Corporation Act

(Stats. 1883, p. 93), had been presented to the board of trustees. After all of these petitions had been signed the signatures on seven of them had been cut off by some person having no authority so to do and had been attached to the eighth so as to make it appear that they formed a part of the eighth petition. The statute required that "a petition" for the reorganization election be signed and presented to the board of trustees. The procedure followed was held to be fatal to the reorganization proceeding, but in the course of the opinion the court stated: "Probably if the several petitions as signed had been presented they might and should be regarded and treated as 'a petition' within the meaning of the statute; and in a similar case it was so held by the Supreme Court of Florida. McKinney v. County Comrs., 26 Fla. 267 [4 So. 855]." While the above general statement of the court was obiter, we think it correctly states the rule that may safely be followed and that should govern in all similar cases. No sound reason has been advanced why duplicate copies of the petition may not be signed and used as effectually as one. If duplicates be forbidden, the right of recall, especially in populous centers, would be greatly restricted for no substantial reason. The fact that the duplicate petitions involved in this proceeding contained also the language of the notice to voters would not destroy their effectiveness. This language was in no wise confusing or misleading and may be treated as surplusage.

[4] It is contended by the respondents that the clerk's verification was defective. The verification referred to is that required by the above-quoted clause in section 308 reading as follows: "No petition other than the originating petition shall be signed or presented for signature at any place other than the city clerk's office, and must be verified by the city clerk or one of his deputies." It must be conceded that the language thus employed is ambiguous and leaves it uncertain as to what is to be verified. The subject of the verb "must be verified" is missing. Quite reasonably it may be said that the subject of the verb is not the originating "petition." The context plainly implies that the subject intended and which must be supplied by necessary implication is "such fact," that is, the fact that the petitions other than the originating petition were signed or were presented for signature at no other place than the office of the city clerk. This was the construction placed upon the charter requirement by the city clerk, for, under date of March 8, 1929, he certified under oath that "said petition was opened for signatures by the qualified electors of the city of Long Beach on the 2d day of February, 1929, and was kept open at the office of the city clerk of the city of Long Beach during office hours from the said second day of February, 1929, to and including the 2d day of March, 1929; that during said time and at said place the signatures thereto were signed * * * respectively in the presence of said city clerk, or in the presence of one of his duly appointed, qualified and acting deputies." The facts stated under oath in this certificate are sufficiently responsive to the requirements of the charter. The certificate is regular on its face; no bad faith, fraud, or mistake on the part of the city clerk are alleged, and he appears to have performed his duties regularly under the law. His certificate is therefore final and conclusive, and is not open to attack in this collateral proceeding. See Conn v. City Council, 17 Cal. App. 705, 121 P. 714, 719; Koehler v. Board of Trustees, 83 Cal. App. 648, 257 P. 187.

[5] It is suggested by respondents that the proof would show, if evidence were taken, that the number of signatures which the clerk actually saw appended to the petition in his office would be negligible. It is accordingly argued that the clerk could not properly make the verification in question. In this connection counsel have missed the purpose of the verification. It is not for the purpose of establishing that the signatures appended are the genuine signatures of the persons whose names are appended to the petition. The genuineness of the signatures is a matter for ascertainment after the names have been signed and the petition has been closed and in accordance with subsequent provisions of said section 308. The purpose of this verified certificate is to show that the names were signed only in the office of the city clerk. For the purpose of proof of this fact it should not be necessary that the clerk personally see every name signed to the petition. It is sufficient if the names are signed under his direction in such manner that he or one of his deputies may certify to the fact that the petitions remained in his office during the time they were being signed.

[6, 7] The respondents next attack the sufficiency of the action of the city clerk in certifying to the sufficiency in number and the genuineness of the signatures attached to the petition. The basis of the contention is that neither the city clerk nor his regular deputies compared all of the signatures on the petition with the records of registration. It is conceded that the city clerk took the petitions to the office of the registrar of voters of said county for the purpose of ascertaining the genuineness of said signatures, and that accompanying him were one of his deputies and several other persons specially employed by the city clerk for the purpose of checking the signatures with the affidavits of registration, and that the persons so specially employed assisted in the task of checking. From these facts it is argued that the certificate of the city clerk to the effect that he ascertained that the petition was sufficiently signed by qualified voters of the city was based, at least in part, on hearsay, and therefore unauthor-

ized. We find no merit in the contention. Here again, no fraud, bad faith, or mistake in connection with the checking of the signatures is alleged and forgery on the part of the persons signing the petition is not claimed or intimated. Furthermore, it is not contended by the respondents that genuine signatures of qualified electors of the city in the number certified by the city clerk were not attached to the petition. The answer merely denies that the city clerk, within the 5-day period, ascertained that the petition was signed by the requisite or any number of qualified electors. The execution of this certificate by the city clerk is admitted. It is regular on its face. The charter imposes upon the city clerk the duty of ascertaining the sufficiency of the petition and of certifying the fact to the city council. In the absence of allegations of bad faith, fraud, mistake, or forgery, his certificate, made within the scope of his charter duties, is conclusive on the city council and on the court. See Good v. Common Council, 5 Cal. App. 265, 90 P. 44; Laam v. McLaren, 28 Cal. App. 638, 153 P. 985; Fraser v. Cummings, 48 Cal. App. 504, 192 P. 100; Magoon v. Heath, 79 Cal. App. 632, 250 P. 583; State v. Houston, 94 Neb. 445, 143 N. W. 796, 50 L. R. A. (N. S.) 227; 21 Cal. Jur. pp. 1000, 1001. In the performance of his charter duty we perceive no valid objection to the action of the city clerk in availing himself of the assistance of competent persons specially employed for the purpose of checking the signatures on the petition. The clerk is allowed five days only to do this work. His regular force might be entirely inadequate to the performance of the task and the limitation of time might render it impracticable, if not impossible, to add regular deputies to his office force for this particular purpose. If the clerk be denied the right to employ competent persons to check the signatures, the recall proceeding might easily be thwarted for lack of proper assistance. No question is raised by the respondents as to the competency of the persons so specially employed, and it appears that their work was done under the supervision of the clerk or one of his regular deputies. The results of their work were sufficient to enable the clerk to rely thereon in making his certificate.

[8] When the Long Beach charter provision relating to the recall is given, as it must be, a liberal interpretation with the view of promoting the purposes for which it was enacted (Worth v. Downey, 74 Cal. App. 436, 241 P. 96; 21 Cal. Jur. p. 1002), we find a substantial compliance therewith in the proceedings leading up to the presentation of the recall petition to the city council. It is also apparent that no material issues of fact are presented by the record which would require a reference. The duty of the city council to call the special election as required by law is therefore manifest. See Ratto v. Board of Trustees, 75 Cal. App. 724, 727, 243 P. 466.

Let the peremptory writ issue as prayed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.

ATKINS et al. v. HUGHES et al.★
(L. A. 9964.)

Supreme Court of California. May 24, 1929.
Rehearing Granted June 20, 1929.

1. Corporations ⚷310(1)—Right of directors to exercise power given corporation by articles must be exercised for benefit of stockholders generally.

Right of directors of corporation to exercise power given to corporation by its articles of incorporation must be exercised for the benefit of stockholders generally, and not for the benefit of some favored few.

2. Waters and water courses ⚷231—Construction of reservoirs by irrigation district for certain stockholders at cost of corporation was illegal, and assessment for cost thereof invalid.

Construction by board of directors of irrigation district of reservoirs at the expense of corporation for exclusive and individual use of certain stockholders without benefit to other stockholders who were required to construct and pay for their own reservoirs constituted an illegal and unlawful use of corporate funds, and assessment levied for purpose of meeting cost thereof was invalid.

3. Waters and water courses ⚷227—Evidence sustained finding that directors of irrigation district constructing reservoirs for individual use of certain stockholders were guilty of fraud.

Evidence *held* to sustain finding that directors of irrigation district were guilty of fraud in constructing reservoirs at expense of corporation for the exclusive and individual use of certain stockholders without any benefit to other stockholders by expenditure of funds.

4. Waters and water courses ⚷227—Court of equity could remove directors of irrigation district for fraud in constructing reservoirs for individual use of stockholders.

Court of equity had power to direct removal of directors of irrigation district by reason of fraud in constructing reservoirs at expense of district for the individual and exclusive use of certain stockholders.

5. Waters and water courses ⚷227—Directors of irrigation district were liable for expenditure in acquiring reservoir site for individual use of certain stockholders.

Directors of irrigation district were properly held liable for expenditure in acquiring reservoir site, in view of evidence as to its intended use for construction of reservoir for individual and exclusive use of certain stockholders in fraud of rights of other stockholders.

★Rehearing granted on question of power of a court of equity to remove a board of directors of a corporation. 282 P. 787.

6. Judgment ⚷253(2)—Judgment against directors of irrigation district for moneys wrongfully paid out improperly included attorney's fees not mentioned in complaint.

Judgment against directors of irrigation district for moneys wrongfully and illegally paid out improperly included item for attorney's fees incurred after institution of action, and not mentioned or referred to in complaint.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Edward E. Atkins and others against George W. Hughes, L. F. Hughes, H. J. Hammond, G. C. Chase, and others. Judgment for plaintiffs, and defendants L. F. Hughes, H. J. Hammond, and G. C. Chase appeal. Modified, and, as modified, affirmed.

Haas & Dunnigan, of Los Angeles, for appellants.

Halverson & Halverson and W. T. Kendrick, all of Los Angeles, for respondents.

CURTIS, J. Action by certain of the stockholders of the Rock Creek Water Corporation against said corporation and five individual defendants. Four of said individual defendants—L. F. Hughes, H. J. Hammond, Stewart Gibson, and G. C. Chase—were directors of said corporation, and, with the plaintiff W. A. Phillips, formed the board of directors of said company. The fifth individual defendant was George W. Hughes, who died subsequent to the commencement of this action, and the same has been dismissed as to his personal representative.

The facts admitted by the pleadings or proven at the trial show that the Rock Creek Water Company is a corporation organized under the laws of the state of California; that said corporation is a mutual water company, and was organized by the owners of certain water rights for the purpose of facilitating the control of said water and the distribution of the same for domestic and irrigation purposes among its owners in proportion to the amount owned by them respectively. Some time prior to the annual meeting of said corporation in the year 1924 George W. Hughes, through the purchase of the Hammond and Boyce properties and the stock in said corporation representing water used on said properties, became the owner of a large amount of the capital stock in said corporation, and, after said purchase, the said George W. Hughes and his son, the said L. F. Hughes, owned a majority of the capital stock of said corporation. At the annual meeting of said corporation held in said year the following named persons were elected directors of said company for the ensuing year: The said L. F. Hughes, the son of said George W. Hughes; Stewart Gibson, the private secretary of George W. Hughes; H. J. Hammond, from whom he purchased the Hammond and Boyce ranches, and who acted as foreman or ranch superintendent of said George W. Hughes up to May 15, 1925; G. C. Chase, who became such foreman after May 15, 1925, and W. A. Phillips, one of the plaintiffs in this action, who represented the minority stockholders of said company upon said board of directors. The directors organized by electing L. F. Hughes president, W. A. Phillips vice president, and G. C. Chase secretary and treasurer of said company. The by-laws of said corporation provide that "Delivery (of water) to each (stockholder) shall be made at some point on the main ditch." The delivery of said water to the stockholders was made by a zanjero, and it was usually run into small equalizing or distributing reservoirs, from which the water was drawn in a more or less constant flow; these reservoirs not being intended for storage purposes, but rather for distributing purposes. These reservoirs were not owned by the corporation, but by the stockholders, or groups of stockholders, individually, nor were the pipe lines or ditches connecting the main ditch with said reservoirs owned by the company, but by the individual stockholders. There were at least four of these reservoirs, referred to in the evidence as Kendrick reservoirs Nos. 1 and 2, the Hammond reservoir, and the Boyce reservoir. The latter two reservoirs had been used by the owners of the Hammond ranch and the Boyce ranch, individually, for some years prior to the time these properties were acquired by George W. Hughes. They were situated below the lowest terminus of the company's ditch and from 10 to 15 feet lower than the lands of any of the stockholders except said lands of George W. Hughes purchased from Hammond and Boyce. About March 25, 1925, and after George W. Hughes had acquired the Hammond and Boyce ranches and while he was the owner thereof, the company began enlarging and recementing said reservoirs at the expense of the corporation. On the 7th of April following, at a meeting of the board of directors of said company on that day, deeds to sites of each of said reservoirs, executed by said George W. Hughes in favor of said corporation, were presented to said board of directors. By resolution, these were accepted by said board of directors, and it was ordered that two reservoirs be constructed upon the land thereby conveyed to be used for the storage of water for irrigation purposes, the cost of such construction to be paid by checks drawn on the funds of said corporation. A further resolution was passed by said board of directors at said meeting levying an assessment of ten cents a share on each share of the capital stock of said corporation, "for the purpose of paying expenses, conducting business and paying debts of this corporation." These resolutions were adopted by the affirmative vote of directors Hammond, Gibson, and Chase; director Phillips voting in the negative. At the time of the adoption of the said resolutions, there was in the treasury the sum of $1,915.62, which was ample for conducting the ordinary business and paying the debts of said corporation. The purpose of levying said assessment was to furnish money "to construct, improve, enlarge and cement reservoirs upon the property known as the 'Hammond Ranch' and the 'Boyce Ranch.'" Thereupon, plaintiffs commenced this action to restrain the collection of said assessment; to declare void the proceedings of the board of directors accepting the deed to said reservoir sites and ordering the construction of the reservoirs thereon; for an accounting of the money expended by the directors for the construction, enlargement, and cementing of said reservoirs, and for the removal of the defendant directors. An answer to said complaint was filed on May 29, 1925. On June 12th following the board of directors of said company met and rescinded the resolutions adopted by them on April 7, 1925, accepting said deeds, ordering the construction of said reservoirs, and levying the assessment of ten cents per share to pay the cost thereof. Immediately thereafter and at the same meeting the said board of directors adopted similar resolutions to those previously adopted by them on April 7, 1925, whereby they sought to accept said deeds from George W. Hughes, authorize the construction of said reservoirs upon the property therein described at the cost and expense of the corporation, and levy an assessment of ten cents per share, and for the same purpose as that designated in the former resolution levying the assessment of April 7, 1925. The action taken by said board of directors at the meeting of said board on June 12, 1925, rescinding the prior resolutions adopted by them on April 7, 1925, and adopting new resolutions in their stead, so the court subsequently found, was to "avoid and defeat the restraining order heretofore issued" in this action whereby said defendants were enjoined and restrained from carrying into effect the resolutions of April 7, 1925. After the adoption of said resolutions by the board of directors at their meeting of June 12, 1925, and on July 13, 1925, the plaintiffs filed an amended and supplemental complaint, in which they set forth in full the proceedings taken at the meeting of said board of directors on June 12, 1925, including the action of said board in rescinding its former resolutions and in adopting the subsequent resolutions already referred to. The relief prayed for in said amended and supplemental complaint was that the new assessment be declared void and the defendants restrained from collecting the same, for an accounting of the money expended by them upon the Hammond and Boyce reservoirs, the repayment thereof to the corporation, for the removal from office of said directors, and for general relief. To this pleading the defendants filed their answer. To a large extent the allegations of the complaint and those of the amended and supplemental complaint were admitted by the defendants' answers. Those that were not so admitted were, in the main, found to be true by the court. Upon these findings the court rendered judgment in plaintiffs' favor in accordance with the prayer of their amended and supplemental complaint. From this judgment the defendants L. F. Hughes, H. J. Hammond, and G. C. Chase have appealed.

The first point raised by appellants in their attack upon the judgment is that there is no evidence to support the finding of the trial court that George W. Hughes and L. F. Hughes conspired to elect directors of said corporation who were under their domination with the intent and purpose that said directors would adopt and pass said resolutions, the effect of which was to bring about the construction of said reservoirs for the use and benefit of the Hughes, but at the cost and expense of the corporation. It appears to us that whether or not such a conspiracy was formed is not a matter of material importance in this action. If the acts of the directors in passing said resolutions were legal, then it is a matter of no consequence that the Hughes conspired to cause the same to be adopted by the board of directors of said company. On the other hand, if said directors acted illegally in the enactment of said resolutions, then they are invalid for any purpose, and this would be their effect whether the Hughes conspired to secure their adoption or not. In our opinion, therefore, the question of first importance in considering the validity of said judgment is to determine whether the board of directors of said company in the adoption of said resolutions acted within the scope of their lawful authority.

[1, 2] Appellants contend that there was nothing illegal in the acts of the directors in accepting deeds to the reservoir sites from George W. Hughes and in ordering the construction of reservoirs thereon at the expense of the corporation, and that, if such acts were legal, the assessment levied for the purpose of paying the cost of constructing said reservoirs was free from any taint or fraud or illegality. In support of this last-mentioned contention the appellants assert in their brief that "The board of directors, in taking such action, were exercising the authority with which they were clothed to conduct the business of the company to the best of their judgment in conformity with the charter and by-laws of the company, as well as its needs. If it accepted deeds to real property from G. W.

Hughes, the corporation was not injured. On the other hand, having accepted deeds to land from said G. W. Hughes, and it being within the discretion of the board of directors under its charter, to conduct and develop the affairs of the corporation, and it being their best judgment that the reservoirs in question be constructed upon the lands so conveyed to the corporation, these acts could not be complained of nor would they be considered by the ordinary prudent business man as being unlawful." There can be no question that under the purposes for which said corporation was formed, as set forth in its articles of incorporation, it has the right to acquire water, water rights, dams, ditches, and canals for the development, storage, and carriage of water "in connection with the principal object and purpose of this corporation, which is generally specified to be the conduct of a mutual water company."

While the construction of reservoirs is not expressly mentioned in the purposes for which said corporation was formed, yet, from the broad general terms used in defining said purposes, we have no doubt, if the construction of a reservoir, or a number of reservoirs for that matter, would result in increasing the water supply of the company, or be of any substantial advantage to the company in its business of furnishing water to its stockholders, that the right to exercise such power was given to said corporation by its articles of incorporation. But this right must be exercised for the benefit of the stockholders generally, and not for the benefit of some favored few of said number. As we have stated above, the by-laws of the corporation provide that water shall be delivered to each stockholder at some point in the main ditch. The evidence shows that this has been the universal practice of the company since its organization. The water was then conducted in most instances through pipe lines or ditches to private reservoirs, built and paid for by individual stockholders who were served by the water stored therein. Upon each of the Hammond and Boyce ranches at the time the same were purchased by G. W. Hughes there was located a reservoir used by the owner thereof for the purpose of facilitating the distribution of water upon his land. The board of directors by the proceedings complained of attempted, at the expense of the company, to either rebuild these two reservoirs or to construct new ones upon the sites occupied by the original ones. These reservoirs were for the exclusive and individual use of G. W. and L. F. Hughes. The other stockholders of the company were not benefited in any manner by this expenditure of the company's funds. Their lands were located above these reservoir sites, and could not be irrigated with water drawn therefrom even had said stockholders desired so to do, or had the Hughes permitted such use. Then, also, the other stockholders had been compelled to build and pay for their own reservoirs, and there is no evidence that said board of directors intended to reimburse them for money so expended, or to maintain or keep in repair the reservoirs of the minority stockholders already constructed. The construction by said board of directors of the reservoirs on Hughes' property at the expense of the corporation was the use of the funds of said corporation to improve and benefit the private property of Hughes. It was an illegal and an unlawful use of the corporate funds, and it resulted in a detriment to every other stockholder of the corporation. While the board of directors are clothed with broad powers, and are given wide discretion in the management of the affairs of the corporation, and the expenditures of its funds, it was an abuse of that discretion for said board to use the corporate funds to improve the property or to advance the individual interests of any one or group of stockholders to the detriment of the balance of the stockholders. This proposition of law seems so simple and just that no citation of authority is necessary to support it. As we view the facts of this case, there is no question but that the board of directors acted illegally in constructing said reservoirs with the funds of said company. It follows, therefore, also that the assessment levied by the directors for the purpose of meeting the cost of constructing said reservoirs was invalid, and the action of the board of directors in levying the same was illegal and cannot be upheld.

[3] The further point is made by appellants that the judgment is erroneous in holding that the directors of the corporation were guilty of fraud in building the reservoirs, and that there was no testimony to support the findings of the court that the corporation exceeded its power in building said reservoirs. We think that there is ample evidence to support the conclusion and finding of the trial court that the directors, other than director Phillips, were guilty of fraud in constructing said reservoirs for the exclusive use of the Hughes and paying for such construction out of the funds of said corporation. The fraud is so apparent and manifest that it is unnecessary to go into any lengthy details or give any extended reasons for so holding. We might state at this time that the capital stock of said corporation was divided into 48,000 shares of the par value of $1 per share, of which the members of the Hughes family were the owners of slightly over one-half. Being the owners of a majority of the capital stock, they were able to control the election of the board of directors. The board of directors after their election attempted to foist upon the stockholders the entire cost of improvements constructed for the exclusive use of George W. Hughes and family. The court found that the directors had paid in the con-

struction of said reservoirs almost $6,000 from the treasury of said corporation and had otherwise misappropriated the funds of said company in an amount, including that paid in the construction of said reservoir, aggregating the sum of $9,767.10. To hold that this could be innocently done, under the claim that the directors were honestly endeavoring to carry on the business and affairs of the company, would be to challenge the credulity of human nature. A mere recital of the bare facts will, we believe, convince any person of ordinary intelligence of the bad faith of the majority of the directors, and that they designedly attempted to despoil the minority stockholders for the benefit of George W. Hughes and L. F. Hughes.

[4] The judgment of the court in this action further provided "that the said directors, L. F. Hughes and G. C. Chase and each of them, be removed from their offices of director of said corporation." Appellants contend that the court had no power to direct the removal of said defendants from office. They rely upon the cases of Neall v. Hill et al., 16 Cal. 146, 76 Am. Dec. 508, and Sidway v. Missouri Land & Livestock Co. (C. C.) 101 F. 481. The last-named case has no application to the matter before us. In the case of Neall v. Hill, the court rendered judgment removing Hill and Smith, who were president and secretary of the corporation, from their respective offices on the ground that they had been guilty of fraud and mismanagement in the conduct of the business of the corporation. On appeal, the judgment was reversed. The opinion appears to be based upon the principle that the president and secretary of a corporation are mere private and ministerial officers of the corporation, and, as such, they are subject to removal by the corporation alone, and the courts of equity are without jurisdiction over them. A distinction seems to have been made in that case between officers and agents of the corporation, such as Hill and Smith were, and those officers who are intrusted by law with the management of the affairs of the corporation, such as directors or trustees. We base this conclusion upon the following language found in the opinion (page 149 of 16 Cal.): "The power of amotion is incident to every corporation, and the removal of the mere private or ministerial officers of a corporation is a right which belongs to the corporation alone. The assistance of the courts can only be invoked against such officers as are intrusted by law with the management of the affairs of the corporation." Relying on this case of Neall v. Hill, Thompson on Corporations states the rule as follows: "The rule is that the right of removal of mere private or ministerial officers of a corporation belongs to the corporation alone; and that the assistance of the courts can only be invoked against such officers as are intrusted by law with the management of the corporate affairs." 2 Thompson on Corporations (3d Ed.) § 1201.

The case of Wickersham v. Crittenden, 93 Cal. 17, 32, 28 P. 788, was instituted by a stockholder of a corporation against directors of the corporation for the purpose of protecting his interest in the corporate property against the alleged unauthorized acts of the defendants. In discussing the relief to which a plaintiff under such a state of facts might be entitled, the court said: "It is often necessary, in order that the plaintiff may obtain full justice, that the relief granted him be as varied and diversified as the means that have been employed by the defendant to produce the grievance complained of. If a trustee is shown to have been unfaithful, the court may not only compel restitution, but may also restrain him by injunction from similar acts, or, if deemed necessary, may remove him from his trust." In the case of California, etc., Ass'n v. Superior Court, 8 Cal. App. 711, 97 P. 769, the court held that a court of equity had power to remove the directors of a corporation who had proven unfaithful to the interest of the corporation. In that action the court said: "That a court of equity may remove directors of a corporation if deemed necessary when they have proven unfaithful is determined in Wickersham v. Crittenden, 93 Cal. 32 [28 P. 788]." We think these decisions settle the question in this state, and that they plainly hold that a court of equity has the power to remove a director who has been proven unfaithful to his trust. In view of their holding, the judgment in the present action, in so far as it directs the removal of the two directors named, must be upheld.

[5, 6] The final objection made by appellants to the judgment herein is that the trial court, in rendering judgment in favor of the corporation and against said defendants for moneys wrongfully and illegally paid out by the defendants, included in said amount the following items: $750 for the Boyd reservoir site and $450 to the attorneys representing the defendants in this action for services rendered in defending this action. We are of the opinion that the first of these items was properly included in the judgment. The testimony regarding the Boyd reservoir site is not as full as we might wish. The price paid therefor was $750, and there was evidence that it was worth not to exceed $100. It is not clear as to just what use was to be made of the land purchased. The company had no use for it as a reservoir site. It was above the ditch of the company, was arid in character, and was underlaid with bedrock 3 or 4 feet from the surface. It evidently could not be put to agricultural purposes. In this connection we might refer to a statement which the respondent Phillips testified to as having been made by the defendant L. F.

Hughes, in which the latter was reported to have said, "I am going to build about ten reservoirs before I get through. Going to put on an assessment every month. I hope the other stockholders won't suffer too much. I am going to break Kendrick." The trial court may well have concluded that the Boyd reservoir site was purchased with the view of constructing thereon a reservoir for the same purpose as the reservoirs constructed on the Hammond and Boyce sites were intended to be used. If so, this expenditure would be in the same class as those incurred in the construction of the Hammond and Boyce reservoirs, and the judgment that the money expended therefor be repaid to the corporation was a proper one. The item of $450 was not mentioned or referred to in the complaint. It could not have been, for the reason that it was not paid out until after the commencement of this action. Neither was it mentioned or referred to in the amended and supplemental complaint. It could not, therefore, be recovered in this action. The judgment, therefore, should be modified by deducting this sum from the amount of the judgment.

It is therefore ordered that the judgment in this action be modified by deducting from the amount of $9,767.10, the amount found due said corporation from the individual defendants herein, the sum of $450, and, as thus modified, that said judgment be, and it is hereby, affirmed. Respondents will recover their costs on appeal.

We concur: LANGDON, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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98 Cal. App. 738

WARDEN v. LAMB. (Civ. 3761.)

District Court of Appeal, Third District, California. May 13, 1929.

1. Judgment ⟹126(1)—On defendant's failure to appear for trial, in action to quiet title, plaintiff's only remedy is to proceed and establish title.

Where defendant, in action to quiet title, fails to appear for trial, plaintiff's sole remedy is to move court to proceed with trial and introduce whatever testimony necessary to establish his title.

2. Judgment ⟹103—Law providing for default judgment on defendant's failure to answer does not apply where answer is on file, regardless of whether defendant appears (Code Civ. Proc. § 585).

Code Civ. Proc. § 585, providing in what cases judgment may be had upon failure of defendant to answer does not authorize entry of default judgment in cases where answer is on file, whether defendant does or does not appear at time action is called for hearing.

3. Attorney and client ⟹62—Allowing association of attorneys with defendant who originally appeared in propria persona, with full knowledge of plaintiff, was not error (Code Civ. Proc. §§ 284, 285).

Where defendant originally appeared in propria persona and later secured attorney to appear for her and caused his name to be entered of record in cause and cause proceeded to trial, all parties having knowledge of attorney's appearance, and where there was no showing of prejudice, it was not error to allow the association of counsel, in view of Code Civ. Proc. §§ 284, 285, permitting party in action to change attorney at any time and requiring notice of such change.

4. Appeal and error ⟹1170(1)—Judgment will not be set aside for irregularity or informality in employing attorneys not resulting in miscarriage of justice (Const. art. 6, § 4½).

Where defendant originally appeared in propria persona, but later associated attorneys whose names were entered of record with plaintiff's knowledge, and where there was no showing of prejudice, error, if any, resulting from irregularity of procedure in entry of attorneys of record or informality in writing employing attorneys was not sufficient to reverse judgment, in view of Const. art. 6, § 4½, providing that no judgment shall be set aside in any case for any error as to any matter of procedure unless resulting in miscarriage of justice.

5. Attorney and client ⟹62—Client may employ attorney to appear for him as may suit his convenience or desires.

Client has right to employ attorney to appear for him as may suit his own convenience or desires.

6. Municipal corporations ⟹575—Provision in law requiring statement in notice of sale of amount due on improvement bond is mandatory, and noncompliance renders sale void (Bonding Act of 1913, § 35).

Where specific lot assessed for improvement taxes under Bonding Act of 1913 was sold on failure to pay interest and installments due on improvement bond issued, but notice of sale did not state amount due, sale was void, since provisions of Bonding Act 1913, § 35 (St. 1913, p. 975), providing that publication of notice of sale must contain statement of amount due, is mandatory and noncompliance renders sale void.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action to quiet title by Grace P. Warden against Lydia L. Lamb. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

George Halverson and H. C. Hopkins, both of Los Angeles, for respondent.

PLUMMER, J. Plaintiff began this action to quiet title to a certain lot situate in the city of Los Angeles, county of Los Angeles, The defendant, Lydia L. Lamb, appeared and answered plaintiff's complaint, denied the plaintiff's title, and alleged title in herself. On the trial of the issues so joined, judgment was entered in favor of the defendant, from which the plaintiff appeals. Upon this appeal the chief cause urged by the appellant as ground for reversal herein is "that the court erred in admitting, over plaintiff's objection, the association of an attorney with the defendant, who appeared in propria persona." Other objections are raised, but only in a minor way, as to whether the defendant had shown title in herself. The appellant sets forth her objections under eight different headings, or rather numbers, but they all relate to the two specifications which we have mentioned.

The record shows that the respondent, in filing her answer to the plaintiff's complaint, appeared in propria persona, and subsequently filed with the court the following: "H. C. Hopkins is hereby associated as attorney of record in the above entitled cause. Dated, Los Angeles, September 24, 1926. Signed: Lydia L. Lamb. The above association is hereby accepted. Signed: H. C. Hopkins." Upon this writing being filed, it appears that a motion was made in court, at a time when counsel for the plaintiff was present, for the association of the said H. C. Hopkins as an attorney for the defendant, and upon such motion, the court, preceding the trial of this action, made the following order, as appears from the minutes of the court in the clerk's transcript, to wit: "Grace P. Warden, et al., plaintiff, vs. Lydia L. Lamb, defendant. Cause called. J. Everett Brown appearing for plaintiffs and H. C. Hopkins for defendants. Substitution of attorneys allowed and trial continued to October 14, 1926, over plaintiffs' objection that no showing for continuance is made." Later on an attorney by the name of George Halverson was associated as an attorney in the same cause. On the 19th day of October, 1926, the cause having been transferred to department No. 24, was called for trial, and the following appears in the clerk's transcript: "Cause transferred from department 24, called for trial, J. Everett Brown appearing for plaintiffs. On motion of H. C. Hopkins, it is ordered that H. C. Hopkins and George Halverson be substituted as attorneys for defendants. Attorney for plaintiffs objects to substitution of attorneys and asks the court to enter the default of defendant Lamb, which motion is by the court denied. Cause is dismissed as to all fictitious defendants." Thereupon, the trial of this action took place, the plaintiff introducing in evidence a tax deed to the plaintiff from the treasurer of the city of Los Angeles. The tax deed was the result of an alleged failure to pay the interest and certain installments due on an improvement bond issued as a lien against the lot involved under the Bonding Act of 1913 (St. 1913, p. 954) as amended by subsequent acts of the Legislature. Upon oral argument of this cause, counsel for appellant pressed upon our consideration only the objection urged that the court erred in permitting the association of counsel and refusing to grant appellant's motion for the entry of a default against the defendant.

[1, 2] As to the refusal of the court to grant appellant's motion for the entry of a default, it need only be stated that the appellant has not called to our attention any case or provision of the Codes which would authorize a trial court to enter default against the party defendant whose answer is on file, and this whether the defendant does or does not appear at the trial. In case the defendant fails to appear, the plaintiff's sole remedy is to move the court to proceed with the trial and introduce whatever testimony there may be to sustain the plaintiff's cause of action. This being an action to quiet title, the only course open to the plaintiff, had the defendant failed to appear at the time of the trial, would have been to introduce evidence tending to establish the plaintiff's title. Section 585 of the Code of Civil Procedure does not authorize the entry of any default in cases where an answer is on file, whether the defendant does or does not appear at the time the action is called for hearing.

[3-5] The appellant, in behalf of her objection to the order of the court in permitting the association of counsel and in permitting counsel to appear and introduce testimony in behalf of the defendant, cites a number of cases where attorneys have not been entered of record, where attempts have been made by such attorneys to serve papers, prepare bills of exceptions, and to take appeals. It seems unnecessary to review these cases, for the simple reason that no such questions are here presented. Section 284 of the Code of Civil Procedure reads, in part, as follows: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1. Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes." If it be assumed that the defendant, appearing in her own person, was thereby clothed with the right to manage her own cause, she certainly had the right, under subdivision 1 of the section which we have quoted, to consent or to employ an attorney to appear for her. Whether the paper presented to the court, signed by the defendant, authorizing the appearance of H. C. Hopkins as an attorney, or of George Halverson as one of her attorneys, did or did not amount to a substitution in the strict sense of the word, is wholly immaterial in this case. The transcript shows that they appeared for the defendant at the trial of the action, were entered of record as attorneys for the defendant, and that absolutely no proceeding has

been taken in this cause by the attorneys for the defendant which in any manner whatsoever has jeopardized or impaired the rights of the appellant, unless it be that they presented to the court admissible evidence justifying the court in entering judgment for the defendant rather than for the plaintiff. In all the cases cited by the appellant relative to the change and substitution of attorneys or the appearing of attorneys, the circumstances show some initiative taken by such attorneys which could only properly be taken by an attorney of record; that is, where notices of appeal are given or statements to be used on appeal are to be prepared, the person giving the notice as attorney must show that he has a legal right so to do. No case has been called to our attention nor have we been able to find any case where a judgment has been reversed on account of any informality in the authorization for the appearance of an attorney by his client where the attorney has been entered of record in the cause and the cause proceeded to trial with the presence of all parties in court having knowledge of the appearance of the different attorneys and where there is absolutely no showing that any prejudice has resulted to the party complaining of such informality. Nor can we conceive of any valid reason why, if it be assumed that the defendant in the first instance appeared as her own attorney, she did not have the right to employ as many attorneys to appear with her to conduct her cause, and have them entered of record as attorneys in the cause, as she thought wise or considered best for her own interests. In other words, it is wholly immaterial to the appellant in this cause whether the attorneys for the defendant, when ordered entered of record by the trial court, were substituted or associated; so long as they were entered upon the record by order of the court, they were persons upon whom notices might be served if necessary. So far as sections 284 and 285 of the Code of Civil Procedure are involved in this action, they are pertinent only in that they required the defendant to give the appellant due notice of attorneys which she was authorized or her attorneys were authorized to recognize. When that was done, as appears by the record of the court was done in this case, the appellant was left no cause for complaint. In so far as any irregularity of procedure may have occurred in the entry of the attorneys of record by the order of the court, or as to any informality in the writing signed by the defendant, employing her attorneys, we think that section 4½ of article 6 of the Constitution is applicable. Even the principal case cited by appellant, to wit, Prescott v. Salthouse, 53 Cal. 221, shows that, while the Code does not provide for associating attorneys in words, yet, if there had been an association in the case then being considered, and the notice of intention to move for a new trial had been given under the names of all of the attorneys, including the associating attorney, it would have been sufficient. We do not need to cite authorities to the effect that a client has a right to employ an attorney to appear for him as may suit his own convenience or desires. However, such is the holding in the case of Gage v. Atwater, 136 Cal. 170, 68 P. 581. That the trial court had no authority to grant the appellant's motion for the entry of a default while the defendant's answer was on file, whether the appearance by the attorneys for her was regular or irregular, formal or informal, is shown by the case of Cuddahy v. Gragg, 46 Cal. App. 578, 189 P. 721. The court there said: "That a court has no authority to enter the default of a defendant if, when it was entered, he has a pleading on file, even though it was filed out of time, is a proposition supported by an almost unbroken line of decisions. The pleading, though filed out of time, is not a nullity; and until it has been disposed of by motion, or in some appropriate manner, no judgment by default can be entered"—citing a number of cases. In the case at bar there is no pretense that the answer of the defendant was not filed within the time allowed by law.

[6] The court found that the defendant at the time of the beginning of the action, was the owner in fee and entitled to the possession of the property involved. The court further found that the plaintiff had acquired no title to the premises. It was also further found by the court that the defendant had tendered to the plaintiff payment of the amount due on the bond, and that such tender was refused. So far as defendant's title is concerned, the record shows that the defendant acquired title thereto in the year 1900, and that for many years preceding the trial, and during the time of the proceeding leading up to the execution of the deed under which the plaintiff claims title, the defendant had been in possession of the property involved in this action. While there is no finding of the fact of such occupancy of the premises and possession by the plaintiff, the testimony in the record is such that such a finding would be warranted which testimony appears to be uncontradicted. While the appellant, upon oral argument, made no answer to the respondent's contention that the deed under which the appellant claimed was void, nor is there any contention made in appellant's briefs that the deed under which the appellant claims is valid, further than the statement that the introduction of the deed established a prima facie case, we will point out one or two of the errors which constitute sufficient reason for the entry of judgment in favor of the defendant in this action. Section 35 (St. 1913, p. 975) of the act of 1913, as amended, provides for a sale of the property to obtain payment of any amount

that may be due upon any bond, where there has been a delinquency in the payment of interest or installments, and requires that in the publication of the notice of sale there must be a statement of the amount due. The application made to the treasurer for the sale of the property involved in this action does not state the amount due. The notice of publication does not correctly state the amount due in an amount greater than has been held substantial error in other cases. Under somewhat similar circumstances in the case of Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962, it was held that the requirement of section 5 of the Bond Act of 1893 (St. 1893, p. 37) as amended by St. 1899, p. 43, that notice of sale, under bonds for street assessments, shall state the amount due, is mandatory; that, if there is a failure to correctly state the amount due, the sale is rendered void. To the same effect is Simmons v. McCarthy, 118 Cal. 622, 50 P. 761. Other objections are made to the validity of the sale under which the appellant claims, such as there had been no notice as the law requires of the time when the appellant would apply for a deed; likewise that no notice had been given to the persons occupying the premises, as required by the act, in pursuance of which the bond was issued. To these different contentions on the part of the respondent, as we have stated, the appellant makes no reply, and, as they appear to be all well taken, the judgment of the trial court in favor of the defendant followed as a matter of course.

Finding no substantial error in the record, the judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

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99 Cal. App. 147

PEOPLE v. HAKAM. (Cr. 1071.)

District Court of Appeal, Third District, California. May 24, 1929.

1. Assault and battery 🔑92—Evidence held sufficient to sustain conviction for assault with deadly weapon.

Evidence in prosecution for assault with deadly weapon, based on defendant's conduct in firing shots at prosecuting witness on defendant's return following preliminary altercation, *held* sufficient to sustain conviction.

2. Criminal law 🔑1186(4)—In prosecution for assault with deadly weapon, admission of evidence that defendant had no license to carry revolver, though erroneous as involving separate offense, held not prejudicial (Deering's Gen. Laws 1923, Act 1970; Const. art. 6, § 4½).

In prosecution for assault with deadly weapon, admission of testimony that defendant never procured license to carry concealed revolver, though erroneous, as tending to prove another offense under the Deadly Weapon Act (Deering's Gen. Laws 1923, Act 1970), *held* not prejudicial under Const. art. 6, § 4½, where separate offense was not referred to in evidence, instructions, or counsel's argument, except in objection made by defendant.

3. Criminal law 🔑730(14)—In prosecution of native of Afghanistan for assault with deadly weapon, argument relative to hot-blooded characteristics of defendant's nationality, followed by court's cautionary instruction, held not prejudicial.

In prosecution of native of Afghanistan for assault with deadly weapon, argument of district attorney that "it was that hot seething blood, which was incubated in some other country which has not cooled by association with the calmer peoples of the Western World, that was in his mind," *held* not prejudicial error as constituting misconduct, where made in response to plea of defendant's counsel for justice towards his client, and followed by court's instruction to disregard counsel's statement.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Ali Hakam was convicted of assault with a deadly weapon, and he appeals. Affirmed.

H. W. McGowan, of Willows, and S. Luke Howe, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

THOMPSON, J. The defendant was convicted of an assault with a deadly weapon. It is contended that the verdict is not supported by the evidence, and that the defendant was prejudiced by the admission of incompetent evidence which tended to prove another offense against him.

[1] We are of the opinion that the evidence amply supports the verdict. The defendant Ali Hakam is a native of Afghanistan. Together with a fellow countryman, he was engaged in harvesting a crop of rice on the Spaulding ranch in Glenn county, Cal. For this purpose they had employed the prosecuting witness, Ben L. Blackburn, and his two cousins. September 14, 1928, they were engaged in cutting and binding the grain. About four o'clock in the afternoon, while Blackburn was driving a Fordson tractor, the defendant visited the vicinity in his automobile, and taking a shovel on his shoulder crossed the field and intercepted the tractor, where he accosted the prosecuting witness, severely criticising the character of his work and inquiring in sarcasm if that was the best work he could do. A controversy followed, during which time Blackburn remained seated on the tractor while the defendant stood near by with his shovel in hand. Both individuals became angry. The prosecuting witness finally said: "If you don't like the way we're cutting the rice, go to the house and come back down here and pay us off."

He also asked the defendant why he did not get Mr. Boyd, who was the general manager of the Spaulding ranch, to come down and talk to him. To the latter remark the defendant replied that Boyd was not the boss and he did not have to get him. After a somewhat heated dispute over the character of the work the defendant wrathfully told Blackburn to go on and finish his work and that he would get no pay until he had completed it. The defendant testified that Blackburn said: "You go to h——l. * * * Go and tell Mr. Boyd (to) come and talk to us—not your black face." In anger the defendant then raised his shovel and struck at Blackburn, missing him and striking the tractor. The prosecuting witness immediately sprang from his seat to the side of the tractor opposite from which the defendant stood, and, seizing an iron pinchbar about 2 feet in length, he followed the defendant, who slowly retreated for a distance of 10 or 15 feet. No further blow was struck, however, in this feature of the encounter. After a few moments of such threatening demonstrations, the defendant said: "That's all right, you stay here, I go to the house—I come back." He then crossed the field in the direction of "Camp 7," where he lived. Blackburn resumed his place on the tractor and continued cutting the rice. After an absence of half or three-quarters of an hour, with barely time to complete the journey, he again drove down the Norman road to a point opposite that part of the rice field where Blackburn and his cousins were engaged in working, and this time, without the protection of his shovel, again crossed over and intercepted the prosecuting witness, who was still seated on his tractor. As the defendant approached his hand was concealed beneath the bib of his overalls. The prosecuting witness said: "I told him I knew he had a gun; if he would lay it on the Fordson we would settle our affair with our fists. * * * He said, 'You want to settle with me, do you?' And he pulled out the gun and started shooting. Q. Where did he pull the gun from? A. Under the bib of his overalls." The defendant then stood only 5 or 10 feet from the tractor. The prosecuting witness was unarmed. He sprang from the tractor and rushed upon the defendant, who fired at him but missed his mark. Mr. Blackburn testified in this regard: "He pulled the gun like that (indicating) and shot, see. And he missed. Then I grabbed the gun—he had it stuck in my stomach like that (indicating), see; and I threw it up. The next shot hit me in the shoulder; and threw it (me) down, and shot me in the stomach, and I do not know when I got this one in the arm here (indicating). * * *

"Q. He missed you, but the next shot you say struck you in the shoulder? A. Yes.

"Q. What was the effect of that shot? A. It knocked me down. * * *

"Q. * * * When do you say that you received the wound in your stomach? A. When I was lying on the ground."

At the time this affray occurred both cousins of Blackburn witnessed the encounter from a distance of about 100 to 150 yards and corroborate the material parts of his testimony. The defendant used a 32-caliber revolver which was concealed beneath the bib of his overalls, and he fired four or five shots, three of which took effect in the body of the prosecuting witness, one penetrating the shoulder, another entering the abdomen below the ribs, and a third passing through the fleshy portion of his arm. In spite of the serious wounds which were inflicted upon him the prosecuting witness managed to get upon his feet and run towards his cousins for aid. The defendant then returned to his automobile and reloaded his revolver with cartridges, a supply of which he kept in the machine. Blackburn was taken to a hospital seriously injured, but finally recovered.

The defendant claims that he returned to "Camp 7" after the first conflict to get Mr. Boyd, but failing to find him that he again returned to the rice field to inspect the character of the cutting of the grain. In spite of the fact that he saw the son of Mr. Boyd at the house, he failed to inquire as to the whereabouts of his father. He does not pretend that he went after money with which to pay the employees with the object of discharging them. Indeed, he told Mr. Blackburn he would not pay him until his contract was completed. He returned to the field as quickly as one could reasonably make the trip to and from the house, which was a distance of more than a mile. The jury had a right to assume that if he had gone to get Mr. Boyd he would have at least inquired for him from his son, and that, if he were returning with the object of again inspecting the cutting of the rice, he could have done so in any other portion of the field than the particular place where Blackburn was working with his tractor. It seems unreasonable to believe that he would immediately return to the presence of the individual with whom he had just had so serious a conflict, for the mere purpose of inspecting the cutting of the rice. In spite of the fact that the defendant testified that he had the revolver with him upon the occasion of the first controversy, the jury may have reasonably believed, from the surrounding circumstances, that he went to his home for the purpose of arming himself, and that he deliberately returned, intercepting Blackburn, and renewed the affray. It is true that the defendant contradicts the material parts of the foregoing story, claiming that he acted solely in self-defense. Three witnesses, however, corroborate Blackburn's version of the affray, which appears to be supported by the weight of evidence.

[2] It is true that the prosecution called three witnesses by each of whom they proved, over the objection of the defense, that the de-

fendant never procured a license to carry a concealed revolver. No valid excuse was offered for the introduction of this testimony, except a statement by the district attorney that "we submit we are in our legal rights in making the proof." The defendant objected to this testimony on the ground that it was incompetent, and that it tended to prove another offense against the defendant. This objection should have been sustained. The evidence was incompetent and had no application to the offense with which the defendant was charged. The California Deadly Weapon Act (I Deering's Gen. Laws, 1923, p. 663, No. 1970) makes it a misdemeanor for any person, native citizen or foreign born, to carry a concealed revolver upon the person without having procured a license so to do. The same act also makes it a misdemeanor for an unnaturalized alien to have in his possession a revolver or other firearm capable of being concealed on his person, regardless of whether he has procured a permit or not. People v. Quarez, 196 Cal. 404, 238 P. 363. In proof of the particular crime with which the defendant was charged, it became essential to show that he carried a revolver upon his person. It is true that the concealing of a revolver upon the person, whether naturalized citizen or foreign born, without having procured a license so to do, is a misdemeanor distinct from the crime with which the defendant was charged. The gist of this statutory offense is to have a revolver on one's person without a license for its possession. This offense is merely malum prohibitum and not malum in se. The only objectionable element of this offense which was not necessary to prove the crime with which the defendant was charged was the lack of a license. Nowhere in the evidence adduced, the instructions given, or the argument of counsel was the separate offense referred to, except in the objection to the introduction of the evidence which was made by the defendant. Under the circumstances we are of the opinion that the admission of this testimony, considered in the light of article 6, § 4½, of the Constitution of California, was not prejudicial error.

[3] The appellant charges the district attorney with prejudicial misconduct in the use of the following language in the course of his argument to the jury: "You will not give to him (the defendant) the right to settle his civil differences by a force of arms, any more than you would arrogate to yourselves the right to settle your civil matters by giving and making a murderous assault upon a man with whom you had some business differences. It was that hot seething blood, which was incubated in some other country, which has not cooled by association with the calmer peoples of the Western World, that was in his mind at the time that he went out and he had this talk with this boy." This argument, however, had no reference to the charge of the commission of another offense, but was made in response to the argument on the part of defendant's counsel in his plea for justice toward his client to whom he referred as a foreign-born native of Afghanistan. The language of the district attorney may have been extravagant and unwarranted, although it had a reasonable reference to the temperament which one might presume that a man possessed who acted as the defendant did under the circumstances of this case. Moreover, at the request of the defendant, the court promptly charged the jury to disregard this language, saying: "The jury of course understands a man of any other race would be entitled to the same trial an American would be, and so far as the remarks made on the matter, you will disregard the remarks of counsel."

We are of the opinion that the foregoing remarks of the district attorney were not prejudicial, and that they did not constitute misconduct on his part.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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99 Cal. App. 53

CHRISTIE v. CHRISTIE. (Civ. 6716.)

District Court of Appeal, First District, Division 1, California. May 20, 1929.

Divorce ⚷156—Final judgment of divorce, entered more than year after interlocutory judgment, held not premature, notwithstanding intervening amended judgment.

Final judgment of divorce, entered more than a year after entry of original interlocutory judgment of divorce, merely adjudging plaintiff entitled to divorce, was not premature, at least so far as establishing the status of the parties, and so not subject to vacation on that account; the remedy for any erroneous awarding of custody of child being by amendment, though, shortly after entry of the interlocutory judgment, plaintiff, without notice, caused to be signed and entered an amended judgment and order, not purporting to set aside the original judgment, but reciting inadvertent omission therefrom of court order, as to custody and support of minor child, made at same time judgment was made, and again adjudging plaintiff entitled to divorce and embodying the provisions of the order, as whether the amendment was to correct a clerical error, and so effective, or to correct a judicial error, so that the order directing it was a nullity, the original interlocutory judgment stands as the judgment of the court and the basis for the final decree.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Ruth A. Christie against Richard H. Christie for divorce. From an order vacating final decree for plaintiff, plaintiff appeals. Reversed.

See, also, 276 P. 1045.

Lyle W. Rucker, of Los Angeles, for appellant.

Lucian J. Clarke and Clarke & Wilson, all of Los Angeles, for respondent.

LUCAS, Justice pro tem. Appeal is taken from an order vacating a final decree of divorce. By an interlocutory judgment of divorce made March 5, 1926, and entered March 8, 1926, it was adjudged that plaintiff was entitled to a divorce from the defaulting defendant. The judgment did not include or refer to the court's order, also made on March 5th, awarding plaintiff certain household goods and the custody of the minor child of the parties and providing for the support of plaintiff and said child and the payment of attorney's fees. Thereafter, on March 9, 1926, and without notice, plaintiff caused an amended judgment and order to be signed, reciting therein "that an interlocutory judgment was entered herein on the 8th day of March, 1926, but through inadvertence did not set forth the court's order as made on the 5th day of March, 1926," and again adjudging plaintiff to be entitled to a divorce and embodying the provisions of the March 5th order as to custody and support of the minor child, etc. This latter judgment and order did not by its terms purport to set aside or vacate the first interlocutory judgment. It was duly docketed and entered March 10, 1926.

On March 9, 1927, on motion of plaintiff, the court made and caused to be entered on the same day, its final judgment of divorce dissolving the bonds of matrimony between the parties (referring therein to the interlocutory judgment entered on March 8, 1926), and ordering and decreeing that "wherein said interlocutory decree makes any provision for alimony or the custody and support of children, said provision be and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full, and that wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto." As already pointed out, the interlocutory judgment thus referred to contained no provision as to alimony, property or custody of the child.

On March 30, 1927, the court, on motion of defendant, made its order adjudging the final judgment of divorce to have been prematurely entered and caused it, for that reason, to be vacated and set aside. The order of vacation recited that on January 17, 1927, the court made an order, pursuant to a written agreement of the parties, modifying the provisions concerning the custody of the minor child, and that the final decree did not embody the terms of such order. The order of January 17, 1927, is not set out in the transcript.

The appeal in this case is unique in this: Both appellant and respondent contend that the amended judgment and order of March 9, 1926 (entered March 10, 1926), is invalid, since no notice was given defendant and it was not procured pursuant to section 473, Code of Civil Procedure, or any other statute providing for the modification or amendment of judgments.

If this contention is correct the original interlocutory judgment of divorce, made March 5, 1926, and entered March 8, 1926, was at all times effective as the basis for a final judgment of divorce. Therefore, more than one year having expired after the entry of the interlocutory judgment, the court had jurisdiction on March 9, 1927, to make its final judgment of divorce, and the order of vacation appealed from is erroneous.

The cause of the unusual situation here presented is not apparent from the record, but from the brief of respondent, defendant below, it is made to appear that the day following the entry of the final judgment the parents of appellant, plaintiff below, procured an order adopting the minor son of appellant and respondent without notice to or consent of respondent, taking advantage, it is to be presumed, of the provisions of section 224 of the Civil Code. It also appears from said brief that appeal has been taken from an order denying a motion to set aside the order of adoption. With that we are not here concerned.

Our sole consideration concerns the validity of the order of vacation made herein. If the amended judgment and order was ineffective for any purpose, as both parties contend, the final judgment, as has already been pointed out, was not premature—at least in so far as it established the status of the parties. If the latter erroneously awarded the custody of the minor child, or was otherwise uncertain or incorrect, relief should have been sought by way of amendment or modification.

If the amended judgment and order was effective for any purpose it merely added to the original judgment that which the court had already decided, that is to say, it was an amendment to make the record speak the truth. Such amendments courts have inherent power to make at any time. DeCoe v. Johnson, 54 Cal. App. at page 604, 202 P. 362. "The power to amend is not wholly confined to the correction of an erroneous record; it extends also to cases where some provision of or omission from an order or judgment as made or rendered was due to the inadvertence or mistake of the court and may therefore properly be treated as a clerical misprision rather than a judicial error." 14 Cal. Jur. p. 995; Kowalsky v. Nicholson, 23 Cal. App. 160, 137 P. 607.

If, as so held in the case of McConville v. Superior Court, 78 Cal. App. at page 207, 248

P. 553, the amendment be regarded as having been made to correct a mere clerical error, the first judgment stands as the judgment of the court. On the other hand, if the correction was of a judicial error, the order of the court directing the amendment was a nullity. In either event the first interlocutory judgment stands as the judgment of the court and as the basis of the final decree.

It is to be remembered that the amended judgment did not purport to set aside the original judgment—in fact, it confirmed it. At the time the original judgment was made the court had jurisdiction of the parties and of the subject-matter, and its judgment was valid as far as it went. Even were it valid in part and void in part, the valid part would stand and the time for the entry of the final decree would begin to run from the date of entry of the valid portion. Claudius v. Melvin, 146 Cal. 257, 79 P. 897.

It is to be concluded, therefore, that the final judgment of divorce was not prematurely entered, and that the trial court erred in setting it aside.

The order appealed from is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

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99 Cal. App. 13

SERVICE OIL CO. v. CREEDEN.
(Civ. 5344.)

District Court of Appeal, Second District, Division 2, California. May 16, 1929.

1. Witnesses ⚷388(10)—Witness following defendant who had testified concerning written instrument was properly permitted to testify relative thereto against objection that time, place, and parties were not fixed.

Where defendant had testified relative to certain written instrument and circumstances in connection therewith, witness succeeding him on the stand was properly permitted to state what defendant had said with reference to such instrument as against objection that time, place, and parties present had not been fixed.

2. Appeal and error ⚷1058(2)—Error did not result from sustaining objection, where witness was permitted to answer immediately thereafter.

Where trial judge after sustaining objection permitted witness to answer after counsel had remarked that question was asked for purpose he disliked to disclose, error did not result, even though ruling was incorrect at moment it was made.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the Service Oil Company against L. E. Creeden. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert E. Austin and John N. Helmick, both of Los Angeles, for appellant.

R. D. McLaughlin, of Los Angeles, for respondent.

WORKS, P. J. Defendant was a member of the board of directors of plaintiff. This action was commenced for the purpose of recovering a secret profit which it was alleged he had made on his agreement to procure from plaintiff a lease running to third parties who paid him, as a consideration for his services, the sum evidencing the profit. Judgment went for plaintiff, and defendant appeals.

[1] The secretary of respondent testified at the trial that appellant produced a certain written instrument at a meeting of the directors of the corporation and that he said something at the time. The witness was then asked to state what appellant had said, and objection was made that time, place, and parties present had not been fixed, and the objection was overruled. If we concede that the foundation indicated by the objection was necessary—the particular point, however, is argued in the briefs—it is evident from the record that the objection was not good. Appellant had preceded the secretary as a witness. The date of the directors' meeting had been stated while he was on the stand, and he had testified that he was present on the occasion, although he could not remember the date. The document later referred to by the secretary, signed by directors of the corporation and produced from the minute book, had been exhibited to appellant and he had been asked if he did not bring it to the meeting. He had also been asked whether he did not, at that time and place and "in the presence of the directors signing that instrument," make the statement later, in substantial effect, attributed to him by the secretary in answer to the query to which objection was made. The meeting in question was the only one mentioned during the examination of appellant, which was short. He was immediately followed on the stand by the secretary. This witness testified that the document was "presented to us at this meeting" by appellant. Shortly after this statement the question to which objection was made was asked. The ruling of the court was proper.

[2] Appellant complains that the trial court erred in sustaining the objection to a question addressed to a witness by his counsel. However, the moment the objection was sustained the counsel remarked that the question was asked for a purpose he disliked to disclose. The judge then observed: "I will let you proceed on that statement." The question was at once again put to the witness and he answered it. There was here no error of which appellant may avail himself, even if we concede that the ruling was incorrect at the moment it was made.

Appellant makes one other point, but it is so obviously devoid of merit that it requires no particular discussion.

Judgment affirmed. Appellant is fined $50 for the prosecution of a frivolous appeal.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

99 Cal. App. 57

HARTMAN v. MOLLER. (Civ. 6661.)

District Court of Appeal, First District, Division 2, California. May 20, 1929.

Guardian and ward 🔑10—Parent is entitled to guardianship of child in preference to any other in absence of finding of unfitness or incompetency.

A parent is entitled to the guardianship of his child in preference to any other person in the absence of a finding of unfitness or incompetency.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Separate petitions by Simon Hartman and by Margaret Moller for letters of guardianship of the person of Violet Hartman, a minor. From an order appointing petitioner Moller as guardian, petitioner Hartman appeals. Reversed.

Walter E. Dorn and L. W. Lovey, both of San Francisco, for appellant.

Gottesfeld, Mann & Carmody and Harry Gottesfeld, all of San Francisco, for respondent.

KOFORD, P. J. This is an appeal from an order appointing a guardian of the person of Violet Hartman, a minor child nine years of age.

When about six months old her father, the appellant, and her mother were divorced. Her mother was awarded the decree upon the ground of extreme cruelty and she was awarded to the custody of her mother, her father being ordered by the decree to pay a monthly sum for her support. During the years that followed she was left by her mother mostly in the care of her aunt, Margaret Moller, the respondent. Her mother died in May, 1925, and since that time Violet has remained with respondent.

Respondent filed a petition for letters of guardianship in August of the same year. Appellant also filed a similar petition a few days later and the two petitions were heard together. The court made an order appointing respondent guardian without expressly denying appellant's petition for letters. Findings of fact were made in some detail to the effect that it was for the best interests of the minor that respondent be appointed her guardian. There is no finding, however, that appellant is incompetent nor an unfit and improper person to have the guardianship of his daughter. The facts found upon which the court determined the best interests of the minor fall far short of meaning that the father is not competent to discharge the duties of the guardianship. The law is well settled that a parent is entitled to the guardianship of his child in preference to any other person in the absence of a finding of unfitness or incompetency. In re Campbell's Estate, 130 Cal. 380, 62 P. 613; In re Salter, 142 Cal. 412, 76 P. 51; Matter of Forrester, 162 Cal. 493, 123 P. 283; In re Mathews' Estate, 169 Cal. 26, 145 P. 503; Estate of Akers, 184 Cal. 514, 194 P. 706; In re Green, 192 Cal. 714, 221 P. 903.

The order is therefore reversed.

We concur: NOURSE, J.; STURTEVANT, J.

99 Cal. App. 73

SCOTT v. LOS ANGELES WHOLESALERS BOARD OF TRADE. (Civ. 3773.)

District Court of Appeal, Third District, California. May 21, 1929.

Landlord and tenant 🔑80½—Plaintiff suing, as assignee from partnership of sublease, for money received from sale of partnership's order on sublessees, must prove assignment.

One claiming assignment of partnership's interest in sublease, in suit against partnership's creditor for appropriation of money received from sale of partnership's order on sublessees for payment of rentals, had burden to prove assignment of partnership's interest, and, on failure to make such proof, could not recover.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by D. M. Scott against the Los Angeles Wholesalers Board of Trade. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel Spencer Jackson, of Los Angeles, for appellant.

W. T. Craig, of Los Angeles (Merrill L. Granger, of Los Angeles, of counsel), for respondent.

FINCH, P. J. The complaint alleges that the plaintiff and J. A. Platt entered into a partnership under the name of Bankers' Stationery Company; that the partnership obtained a lease of certain premises for a period of five years at a rental stated in the complaint; that subsequently they sublet the premises to M. S. Evans and Helen Campbell at a higher rental; that thereafter the partnership was dissolved by mutual consent; "that upon said dissolution, said partnership for a valuable consideration duly assigned to plaintiff herein all of said partnership's right, title and interest in and to said sublease"; that prior to the dissolution of the partnership the defendant held for collection accounts against the partnership amounting to not more than $900; that the partnership, "in order to avoid lawsuits," gave the defendant an order on said sublessees to pay the rentals as they fell due to the defendant "and pay off the said $900"; that without the knowledge or consent of "plaintiff, and against the wish of plaintiff," the defendant "sold said order to said M. S. Evans and Helen Campbell for the sum of $1,600 and appropriated the same" to its own use. Other appropriate allegations are made. The purpose of the action is to recover the difference between the partnership indebtedness of $900 and the amount which the partnership otherwise would have received from its sublessees.

The answer denies most of the allegations of the complaint. It denies the alleged assignment from the partnership to the plaintiff. No effort was made by the plaintiff to prove the alleged assignment. It appears that this failure of proof was not a mere oversight, because the plaintiff's attention was called thereto by the defendant's motion for a nonsuit on the ground, among others, "that the evidence wholly fails to show any right in this plaintiff to maintain the action." The plaintiff made no request for permission to supply the missing proof. Since the burden was on the plaintiff to prove the assignment, the court properly found against him on that issue.

It is clear from the record that the plaintiff was not suing in behalf of the partners or the partnership, but only in his individual behalf, and that, without proof of the assignment to him, he had no stnading to maintain the action. As the judgment must be affirmed on the ground stated, it is unnecessary to consider other alleged grounds for reversal.

The judgment is affirmed.

We concur: ROLFE L. THOMPSON, J.; PLUMMER, J.

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98 Cal. App. 765

NETZEL et al. v. MELLENTHIN.
(Civ. 6220.)

District Court of Appeal, Second District, Division 1, California. May 15, 1929.

1. Contracts ⇨322(3)—Evidence held to sustain findings that defendant owed plaintiffs nothing because of their failure to perform services and furnish materials contracted for.

Evidence *held* sufficient to sustain trial court's findings that defendant owed plaintiffs nothing because of their failure, refusal, and neglect to perform services and furnish materials, for which defendant agreed to pay amount sued for.

2. Contracts ⇨305(1)—Contract time for installing draperies and furnishings held not waived by extension of time after long delay.

Agreed time limit for plaintiffs' installation of draperies and furnishings in defendant's home *held* not waived by defendant's extension of time after weeks of delay beyond time stipulated, notwithstanding defendant's constant insistence on compliance with contract, especially where plaintiffs finally failed to fulfill it with respect to both materials and workmanship, furnishings installed were returned to and accepted by them, and no offer of performance was subsequently made.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by C. L. Netzel and another, doing business under the firm name of the Standard Furniture Company, against Gurli Mellenthin. Judgment for defendant, and plaintiffs appeal. Affirmed.

Stephen Monteleone, of Los Angeles, for appellants.

Ray E. Nimmo and Edward B. Howell, both of Los Angeles, for respondent.

HOUSER, J. [1] In the instant matter it appears that by virtue of a memorandum contract entered into between the parties hereto it was agreed that, for a consideration of the sum of $3,250, plaintiffs would supply the necessary labor and materials for installing in the home of defendant certain draperies and furnishings. Prior to, at, as well as immediately after, the time when the memorandum of contract was signed by the parties, it was understood between them that the entire work was to be completed not later than three weeks from the date of the contract, and that for seemingly important reasons, time was made the essence of such agreement. As a matter of fact, the draperies and furnishings were never completely installed by plaintiffs in the home of defendant. In that connection the evidence showed that, frequently from time to time before the three weeks' period from the date of the contract had expired, defendant requested of plaintiffs that the draperies and furnishings be installed within the time limit which had been agreed upon, but that, instead of complying with the condition of the contract in that regard, plaintiffs delayed the matter for a period of about two months before the actual work of installation of the principal portion of the draperies and furnishings was commenced by them, at which time, notwithstanding a prior notice to them by defendant to the effect that the contract was canceled, ostensibly they proceeded to install in the home of defendant "only a small portion" of the draperies and furnishings which they had agreed to install therein. However, it was found by the court: "That none of the said draperies or furnishings were in conformity with the terms of said contract, in that said draperies and furnishings were not handmade, and some of them were made of materials different from those provided in said contract, and some of them were not lined or interlined as provided in said contract; that a reasonable time for the plaintiffs to complete the terms of said written contract between the parties would have been one month; but that said contract was not completed within two months from the date of said contract." It appears that theretofore plaintiffs had installed some flimsy, damaged, and makeshift materials in one or two of the rooms covered by the contract, to all of which defendant had immediately and strenuously objected to plaintiffs, with the result that plaintiffs had repeatedly promised defendant that substitutions would be made so as to conform to the spirit and the letter of the contract between them. Such promises, however, were not kept or performed.

As further shown by the evidence, although a limit of three weeks was originally agreed upon by the parties for the completion of the contract, almost continuously from the time the contract was executed until approximately two weeks before plaintiffs finally attempted to install the draperies and furnishings, defendant urged plaintiffs to install the draperies and furnishings in her home in accordance with the memorandum of agreement that had been entered into between the parties—at which latter time the attorney for defendant, acting in her behalf, notified the plaintiffs in writing that, although the order for the manufacture and hanging of the draperies was given with the understanding that it was to be executed within three weeks, more than seven weeks had elapsed and the order was "no nearer completion than at any time." In said communication attention of plaintiffs was directed to "certain draperies placed upon windows of one bedroom * * * being the only one completed, * * * damaged throughout by what apparently was done in removing threads and the silk material has been torn in many places. Therefore the draperies are not acceptable." Also: "That unless this order is executed by the evening of April 25, you need proceed no further and nothing will be paid by Mrs. Mellenthin." Notwithstanding the limit fixed by such communication, defendant again orally extended the time for performing the contract, but only upon the expressed condition that plaintiffs would give defendant a written agreement that the draperies would be ready by May 5th, which proposition was neither accepted nor performed by plaintiffs in any way. However, on May 5th a second letter was addressed to plaintiffs by the attorney for defendant, in which, after directing attention to the particular provisions of the contract between the parties and the breach thereof by plaintiffs, the following statements occur:

"* * * In view of this, Mrs. Mellenthin cannot proceed and will place an order with another house for the completion of this work, unless you desire to see me immediately or reduce to writing what you will do, and keep your agreement.

"The agreement has been completely breached by your failures in all of its details, but Mrs. Mellenthin is willing to let you have one more opportunity. I will take this up with you personally if you so desire. If not, we will treat the transaction at an end. I shall expect to hear from you not later than 4 o'clock Wednesday, May 6th."

The ultimatum thus delivered to plaintiffs was utterly ignored by them. Not until May 9th, which was three days beyond the utmost limit of any implied extension contained in the last communication addressed by defendant to plaintiffs, was any attempt made by plaintiffs to conform in any way with the requirements of their agreement. At that time, without specific objection of defendant, but in the absence of either any request or authorization by her so to do, plaintiffs proceeded with the installation of a portion of the draperies and furnishings in the home of defendant in attempted compliance with the terms of the contract. Both in workmanship and materials furnished, the job was most unsatisfactory; so much so that, after permitting the work to proceed for one day, during which time defendant continually complained thereof, not only to the employees of plaintiffs, but as well to one of the plaintiffs personally, defendant finally declined and refused to permit anything further to be done in the matter of performing the contract, and thereupon returned to plaintiffs all the draperies and effects which theretofore had been placed by plaintiffs in the home of defendant. It will thus be noted that the evidence was ample to sustain the findings of fact by the trial court that "defendant does not owe said amount ($3,250), or any amount to plaintiffs, for the reason that plaintiffs failed, refused and neglected to perform services and furnish materials for which defendant had agreed to pay said amount."

[2] Appellants urge the point that in the circumstances as shown by the evidence the time limit fixed in the agreement between the parties was waived; but such contention is completely answered by the fact that at no place in the evidence does it appear but that, far from acquiescing in the delinquencies and failures of plaintiffs, defendant was constantly and vehemently insisting upon a compliance by them with the terms of the contract. The fact that after weeks of delay beyond the time stipulated for the completion of the contract defendant graciously extended to plaintiffs an opportunity to at last "make good" should not militate against the

apparent rights of defendant in the premises, especially in view of the fact that finally plaintiffs failed both with respect to the materials and the workmanship which went into the draperies and furnishings which were installed by them in the home of defendant and which, after being rejected by the latter, were returned to and accepted by plaintiffs. Nor does the evidence show that thereafter any offer of performance of the contract in accordance with its terms, or otherwise, was ever made by plaintiffs to defendant.

Notwithstanding the legal aspects connected with the original time limit of three weeks within which it was agreed that the contract would be completed, and notwithstanding the disappointment and inconvenience suffered by defendant on account of the failure of plaintiffs in that regard, no inclination is discernible on the part of defendant to insist upon the "pound of flesh" to which by the strict letter of the contract she was entitled. To the contrary, every reasonable opportunity to fulfill the requirements of the agreement was extended to plaintiffs. That the contract was rescinded and canceled is due not to any fault in defendant, but solely because of the delinquencies and shortcomings of plaintiffs.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

99 Cal. App. 71

TURLEY et al. v. ROBERTS. (Civ. 5256.)★

District Court of Appeal, Second District, Division 2, California. May 21, 1929.

Hearing Denied by Supreme Court July 18, 1929.

Courts ⚷122—Jurisdiction of superior court is fixed by allegation of complaint, though evidence may disclose amount involved was less than limit of jurisdiction.

Where complaint, in action for money loaned, alleged loan of $325 and evidence disclosed amount loaned was only $250 which was below limit of jurisdiction of superior court, superior court had jurisdiction, since allegation in complaint fixes jurisdiction.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Anna Le Van Turley and husband against Charles P. Roberts. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hearing denied by Supreme Court; PRESTON, J., voting for a hearing.

M. F. Stiles and Dan M. Critchley, both of Los Angeles, for appellant.

G. R. Dexter and Howard B. Henshey, both of Los Angeles, for respondents.

WORKS, P. J. In this action for the recovery of money loaned, judgment went for plaintiffs, and defendant appeals.

It is contended that the superior court was without jurisdiction of the cause upon the theory that the evidence disclosed that the amount loaned was but $250, and that this sum was less than $300, the latter amount representing the limit of the jurisdiction of the superior court. The complaint alleged, however that one of the plaintiffs had loaned to defendant the sum of $325. That allegation fixed the jurisdiction in the superior court. Dashiell v. Slingerland, 60 Cal. 653.

Appellant pleaded the bar of the statute of limitations. The court found against him on the question. He now insists upon the point, but it is plain that the finding is amply supported by the evidence.

Judgment affirmed. Appellant is fined the sum of $25 for the prosecution of a frivolous appeal.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

99 Cal. App. 81

YORE v. PACIFIC GAS & ELECTRIC CO.† (Civ. 3681.)

District Court of Appeal, Third District, California. May 21, 1929.

Rehearing Denied June 20, 1929. Hearing Denied by Supreme Court July 18, 1929.

1. Master and servant ⚷330(3)—Mere presumption that workmen smoke while employed will not warrant finding that employer was negligent in not prohibiting employees' carelessly using cigarettes or matches while working near dry grass.

Mere presumption that workmen are accustomed to smoke while engaged in their employment will not warrant finding that employer was negligent in not prohibiting careless use of cigarettes or matches by employees while they were reconstructing line of electric power poles on right of way covered with dry grass and weeds, where it was not shown that employer or his agent had knowledge that employees were addicted to habit of smoking under such conditions.

2. Master and servant ⚷302(2)—Tossing cigarette stumps or burning matches into inflammable material are not acts within scope of employment of men setting electric power poles.

Neither habit of smoking on part of employees nor careless tossing of cigarette stumps or burning matches into dry grass or inflammable material near by are acts within scope of employment of men engaged in digging holes or setting electric power poles.

3. Master and servant ⚷302(6)—Generally, employer is not liable for damages from fires started by employee for his own purpose.

As general rule, employer is not liable for damages resulting from fire started by employee merely to serve his own pleasure or purpose, where acts have no connection with duties of his employment and have not been authorized or ratified.

★Hearing denied by Supreme Court. †Rehearing denied. Hearing denied by Supreme Court.

4. Negligence 🔑50—Employer held not negligent in not removing grass from right of way before permitting workmen starting fire by smoking to replace poles thereon.

Employer *held* not negligent in not removing dry grass from right of way more than three miles in length before permitting workmen to replace power poles thereon, where fire resulted from act of employee throwing cigarette stump or match in grass.

5. Evidence 🔑14—Court will not take judicial notice that men ordinarily smoke while replacing power poles on right of way covered with dry grass.

Court will not take judicial notice of fact that laboring men ordinarily smoke while engaged in replacing power poles on right of way covered with dry grass.

6. Negligence 🔑119(1)—Charge of negligence must be supported by evidence before damages may be imposed.

Charge of negligence must be supported by evidence before resulting damages may be imposed.

7. Master and servant 🔑300—Where evidence did not support findings that employer knew it was employees' habit to smoke or that they were smoking, employer was not liable for fire caused by employees (Civ. Code, §§ 2338, 2339).

Where there was no evidence to support findings to effect that defendant employer knew it was habit of employees to smoke while replacing power poles in right of way covered by dry grass or knew that they were smoking when fire occurred, employer was not liable for fire caused by employees while smoking, under Civ. Code, §§ 2338, 2339.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by John Yore against the Pacific Gas & Electric Company. From a judgment for plaintiff, defendant appeals. Reversed.

Hearing denied by Supreme Court; SEAWELL and PRESTON, JJ., voting for a hearing.

Orrick, Palmer & Dahlquist, of San Francisco, for appellant.

W. P. Rich and Frances Carlin, both of Marysville, for respondent.

THOMPSON, J. This is an appeal from a judgment for damages for negligence which is alleged to have caused the destruction of pasturage and cordwood by means of a grass fire.

The defendant owned a right of way along which it was engaged with a gang of workmen in reconstructing a line of electric power poles. Fifteen or twenty men under the direct supervision of Mr. Mahan, a subforeman, were employed setting poles in the vicinity of Colgate. The right of way was covered with a stand of dry grass and weeds. A strong wind was blowing. Some of the workmen were occasionally smoking. A grass fire was started from the stump of a live cigarette or from a burning match carelessly thrown away by a workman. In spite of strenuous efforts to control the fire, it spread rapidly to the adjoining fields owned by the plaintiff, destroying the pasturage on some 1,400 acres of land, together with a large quantity of cordwood and fence posts. Upon the trial the court adopted findings holding that the appellant negligently permitted dry grass and weeds to accumulate and remain upon the right of way, that it was aware of the habits of its employees to engage in smoking during their employment, and that it failed to prohibit its employees from smoking under such circumstances. Based upon these findings, judgment was rendered in behalf of the plaintiff. No question is raised as to the amount of damages.

The appellant contends that the findings are not supported by the evidence, for the reason that it appears without conflict that the conduct of the workmen in smoking or carelessly throwing away burning cigarette stumps or matches was not within the scope of their employment, and that the result of such negligence was therefore not binding upon it, and that there is no evidence of the appellant's knowledge that its employees were accustomed to smoke under such circumstances. The entire record with relation to the actual smoking or use of matches upon this occasion or the habit of the workmen to engage in smoking during their employment consists of the following. Mr. Henshaw, an employee, testified:

"Q. Did you notice whether they were smoking? A. One was smoking once. I called his attention to it. * * * He was smoking a cigarette and throwed it down—If you want to know just the words I said, I says, 'Watch, you might start a fire.' * * * He says 'There is nothing there to burn, it is so damned dry and hot the ground will burn.' And he put his foot on it and went back to work. * * * It didn't burn from that cigarette, for he put his foot on it. * * * It didn't start very far away, about six or eight feet from where he throwed it. * * *

"Q. Was the other man smoking who was working in that post-hole? A. He was smoking a pipe. I don't think he was smoking right then but one was smoking a cigarette and the other smoking a pipe, and I was smoking. * * * When they hollered 'Fire' I was stooped over lighting my pipe. * * *

"Q. Were the men generally smoking around there? A. I didn't see anybody barred from smoking.

"Q. You smoked, did you? A. I smoked and the two digging the hole were smoking.

"Q. And you saw them smoking around the camp? A. Yes."

Mr. Lind, an employee, also testified:

"When I went to get a drink of water I saw Mr. Henshaw standing alongside of his slughole and I knew he had his pipe. I seen him start the match and throw the match down and he took another one. * * * The head flew off of it and that is all there was to it. He went down into the hole and in about a second after that the fire came up. * * * It started about three or four feet from his hole. * * *

"Q. You were smoking, weren't you? A. Why, no, I wasn't smoking at the time.

"Q. You did smoke? A. Yes.

"Q. You smoke cigarettes? A. I do smoke cigarettes, but over there I didn't have any cigarettes.

"Q. What did your partner smoke? A. My partner smoked— He smoked Prince Albert, rolled a cigarette out of Prince Albert tobacco."

The record contains no evidence that the foreman was in the vicinity at the time the fire commenced to burn. There is no evidence as to the habit of the workmen to smoke during their employment upon this or previous occasions.

The sole question involved upon this appeal is whether the agent of the Pacific Gas & Electric Company omitted to do anything which a reasonably prudent person should have done under the circumstances to prevent the fire which destroyed plaintiff's property. Section 2338 of the Civil Code provides in part: "A principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent *in and as a part of the transaction of such business*, and for his wilful omission to fulfill the obligations of the principal."

Section 2339 of the Civil Code provides: "A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service."

[1] Knowing the inflammable and dangerous condition of the dry grass, it would be the duty of the agent in charge of the restoration of the pole line to prohibit careless use of cigarettes or matches by the employees. If the master had knowledge of the negligent use of cigarettes or matches by its employees under such dangerous circumstances, it might be liable for damages for retaining in its employ one who persisted in such careless habits. The failure to do so might constitute an authorization or ratification of the negligent act of the employee which resulted in the fire. The record, however, is devoid of evidence indicating that the agent of the appellant had any such knowledge, or that the employees were addicted to the habit of smoking under such dangerous circumstances. A mere presumption that workmen are accustomed to smoke while engaged in their employment will not warrant a finding of negligence on the part of the employer.

[2] Neither the habit of smoking on the part of the employees, nor the careless tossing of a cigarette stump or burning match into dry grass or inflammable material near by, are acts within the scope of the employment of men engaged in digging holes or setting electric power poles. Feeney v. Standard Oil Co., 58 Cal. App. 587, 209 P. 85; Williams v. Jones, 3 Hurl. & C. 256, 159 Eng. Rep. 528, affirmed 159 Eng. Rep. 668. With reference to the application of the sections of the Civil Code above cited to a similar affair, it is said in Feeney v. Standard Oil Co., supra: "Under the rule thus declared it seems clear that the defendant is not responsible for McDonald's negligent act in dropping the lighted match into the gasoline. The lighting of the cigaret was no part of the transaction of the defendant's business. It was an independent act for McDonald's personal enjoyment. It occurred during the time of his transaction of the defendant's business, but was no part thereof and was not in the course of his employment. The fact that defendant had instructed McDonald not to smoke while delivering gasoline does not enter into the problem."

[3] As a general rule, an employer is not liable for damages resulting from fires started by an employee merely to serve his own pleasure or purpose, which acts have no connection with the duties of his employment, and which have not been directly or indirectly authorized or ratified. 39 C. J. 1300, § 1498; 18 R. C. L. 806, § 262; Adams v. Southern Bell Telephone & Telegraph Co. (C. C. A.) 295 F. 586; Morier v. St. Paul, M. & M. Ry. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; Excelsior Prod. Mfg. Co. v. Kansas City So. R. Co., 263 Mo. 142, 172 S. W. 359, Ann. Cas. 1917B, 1047; Ireton v. Atchison, etc., R. Co., 96 Kan. 480, 152 P. 625, L. R. A. 1917F, 1120.

[4-6] Unless the acts or omissions of the appellant in the present case amounted to an authorization or ratification of the employees' habit of smoking while they were engaged in work under such circumstances as existed at the time of the fire, it will not be liable for the damage resulting from the negligence of its laborers occurring in the performance of acts or conduct outside of the scope of their employment. If the appellant was guilty of negligence which imposed liability upon it for the damage resulting from the fire, it is because it either failed to remove the dry grass from the right of way before permitting its employees to work thereon, or because with knowledge of their custom to smoke while engaged in working, it failed to prohibit them from doing so under the dangerous circumstances which existed at the time of the fire. It is unreasonable to hold that the law would require the employer to remove dry grass from a right of way which was more than three miles in length, before permitting workmen to proceed to replace power poles thereon. The evidence is undisputed that the foreman,

MaLean, who had charge of these workmen, was "about a mile down the line" at the time the fire began. There is no evidence that the foreman, or any authorized agent of appellant having charge of the employees, knew that it was their habit to smoke while engaged in working, or that they were actually smoking on the occasion of this fire. It may not be said that the court, as a matter of law, will take judicial notice of the fact that laboring men do ordinarily smoke while engaged in working under such circumstances as existed in the present case. It is an invariable rule that a charge of negligence must be supported by evidence before resulting damages may be imposed.

In support of the judgment, the respondent relies chiefly upon the case of Palmer v. Keene Forestry Ass'n, 80 N. H. 68, 112 A. 798, 13 A. L. R. 995, where a judgment for damages resulting from a fire occurring under similar circumstances was upheld. That action, however, is readily distinguishable from the present case. In that case there was evidence that the foreman himself and the employees were accustomed to smoke while engaged in working. The facts are recited as follows: "The evidence tended to show that the men, or some of them, including the foreman, smoked while doing their work; that they smoked at their boarding house and at the railroad station; that they were not forbidden to smoke while at work."

[7] Since there is no substantial evidence in the present case to support the findings to the effect that the appellant knew it was the habit of the employees to smoke while engaged in work, or knew they were smoking at the time the fire occurred, a reversal of the judgment becomes imperative.

The judgment is therefore reversed.

We concur: FINCH, P. J.; PLUMMER, J.

99 Cal. App. 15

In re TURK'S ESTATE.

KELSEY et al. v. STRONG.

(Civ. 6460.)

District Court of Appeal, Second District, Division 2, California. May 16, 1929.

1. Wills 🔑285—Court properly denied leave to amend will contest to allege contestant was legatee under former will, where proponents tendered such legacy.

Court properly denied contestant's application for leave to amend will contest by alleging that she was legatee under former will, where proponents, at time application came on for hearing, tendered her amount of $10 bequeathed her under former will.

2. Wills 🔑285—Other legatees under former will not before court, could not be injected into will contest via contestant's application for leave to amend.

Where rights of other legatees besides contestant under former will were not before court, they could not be injected into contest via contestant's application for leave to amend contest.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Petition by J. H. Kelsey and others for the probate of the will of Laura L. Turk, deceased. From an order dismissing the contest, Elizabeth Strong, contestant, appeals. Order affirmed.

R. S. Harrington, of Sawtelle, and Fogel & Beman, of Los Angeles, for appellant.

Fredericks, Hanna & Morton, of Los Angeles, for respondents.

WORKS, P. J. Contestant filed her written contest of the will of deceased. As showing her right to inaugurate the contest, she alleged that she was a sister of the deceased. In the answer to the contest, this allegation was not denied. More than a year after the contest was filed, however, an amended answer was filed, and a denial was then interposed. Up to this time the counsel for contestant had believed that she was a sister of the decedent, but he now made an inquiry and ascertained she was but a sister-in-law. He immediately made written application to the court for leave to amend the contest by alleging that contestant had been a legatee of decedent under a former will. The application showed that the amount of the legacy was $10. It was shown, too, that the counsel of contestant were also attorneys for other legatees under the former will, and that the contest had been filed by contestant "as representative of said other legatees." The proponents of the last will opposed the request for leave to amend the contest and tendered to contestant the sum of $10, the amount of her legacy under the former will. Leave to amend was denied by the court. When the contest came on for hearing, it failed because of the inability of contestant to show that she was a sister of the deceased, and the contest was dismissed. Contestant appeals from the order of dismissal.

[1] There was no abuse of discretion in the order of the trial court denying the application for leave to amend the contest. The amount to be secured to appellant as the result of a successful contest—the sum of $10—was so small as to render the contest a matter of negligible moment, especially as the amount was tendered to her at the time the application came on for hearing.

[2] The rights of the other legatees under the former will were not before the court and

could not be injected into the proceeding via the application for leave to amend.

Order affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

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99 Cal. App. 127

DALY v. WIGHT et al. (Civ. 6713.)

District Court of Appeal, First District, Division 1, California. May 24, 1929.

1. Appeal and error 🔑1011(1)—Court's findings on conflicting evidence cannot be disturbed on appeal.

Court's findings, on conflicting evidence, that plumbers did not leave unprotected hole in basement into which plaintiff fell and that plaintiff knew of existence of hole, cannot be disturbed on appeal.

2. Master and servant 🔑281(1)—Evidence held sufficient to support finding that housemaid's injuries, sustained when she fell in hole dug by plumbers in basement floor, was caused by her negligence.

In action by housemaid for injuries sustained when she fell in hole in basement dug by plumbers, finding that plaintiff's injuries were sustained because of her own negligence *held* supported by evidence.

3. Master and servant 🔑278(8)—Evidence supported findings that employer was not negligent, where housemaid fell into hole dug by plumbers in basement.

Evidence *held* sufficient to support finding that employer was not negligent, where housemaid fell in hole dug by plumbers in basement.

Appeal from Superior Court, Los Angeles County; Paul B. Dougherty, Judge.

Action for damages for personal injuries by Mary E. Daly against Mary A. Wight and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for respondents.

LUCAS, Justice pro tem. By this action appellant, Mary E. Daly, housemaid and servant of respondent Mary A. Wight, seeks to recover damages from said respondent and from respondents Anderson Bros., plumbers, who were engaged in repairing the plumbing in the basement of the Wight home. It is alleged that appellant sustained personal injuries in the course of her employment by reason of the negligence of the several respondents.

The evidence shows that on the day the injuries are alleged to have been sustained, Anderson Bros. had made an excavation in the floor of the Wight basement approximately 3 feet long and variously estimated to be from 8 inches to 1½ feet wide and of a depth equal to its width. After Anderson Bros. had quit their work for the day, appellant went down to the basement for the purpose of turning off the electric lights, found the basement floor partially flooded with water, and while walking through the water for the purpose of turning off the lights stepped into the excavation, stumbled, and fell against a sledge hammer, thereby bruising her body and fracturing two ribs.

The respondents Wight and Anderson Bros. filed separate answers, in substance denying the material allegations of appellant's complaint and averring that negligence on the part of appellant was the proximate cause of her injury. In addition respondent Wight in her answer pleaded that, Anderson Bros. were independent contractors and that they alone were responsible for the injuries complained of, if any.

The case was tried without a jury, and the court rendered judgment for respondents. From this judgment appeal is taken on the ground that the evidence is insufficient to justify certain findings.

[1] The findings that Anderson Bros. did not negligently or at all leave the hole in the basement unprotected or uncovered, and that appellant had knowledge of the existence of said hole, are both said to be erroneous. Yet, in this regard, John R. Anderson, one of the respondents, and the witness John Lightfoot, both testified that when they quit work the afternoon in question, as a protection against accident, they left the electric lights burning in the basement and barricaded the excavation with an ironing board and so-called zig-zag clothes bars. They also testified that appellant was told by Anderson about the hole in the basement floor and was advised to leave the lights burning.

Appellant testified in effect that at the time of the accident the excavation was filled with water, the basement floor was covered with water, and that she saw nothing on the surface of the water at all. Appellant's son-in-law, C. H. Stoddard, gave similar testimony. Appellant denied that she knew anything about the existence of the hole or was told to keep the lights burning. There being a substantial conflict in the foregoing testimony, and the court hearing the evidence being in a far better position to say who told the truth than is this court, its findings in reference thereto should not be disturbed. "It is a cardinal doctrine often enunciated, that where, upon a question of fact, the testimony in the court below involves a substantial conflict, the action of the court below will not be disturbed." 10 Cal. Jur., p. 1172, and cases cited.

[2] The finding of the trial court that ap-

pellant's injuries were sustained by reason of her own carelessness and negligence is, in the opinion of this court, sufficiently supported by the evidence. For, in spite of an oral warning of a hidden danger, a barricade indicating such danger, the presence of water obstructing the view of the course she was about to pursue, and the request not to do the very thing she was doing when injured, appellant nevertheless willfully persisted in a course of conduct which resulted in her injury.

In view of the supported findings that appellant herself was negligent and that the respondents Anderson were free from negligence, the question as to whether other findings are unsupported by the evidence becomes of no importance.

[3] As to the liability of respondent Wight, the most that can be said is that her negligence is to be measured by that of the Andersons, and since they have been properly found free from negligence, so must she. Neither being negligent, it is not necessary to consider the remaining issue as to whether or not the Andersons were independent contractors.

The judgment appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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99 Cal. App. 174

MOAKLEY v. LOS ANGELES PAC. RY. CO. et al. (Civ. 3769.)★

District Court of Appeal, Third District, California. May 21, 1929.

Rehearing Denied June 20, 1929. Hearing Denied by Supreme Court July 18, 1929.

1. Records ⇨9(13)—Filing of title registration petition, not naming reversioners under deed to petitioners' grantor, held constructive fraud, because of which they were not notified and hence were not bound by decree (Land Title Law 1914 and § 12).

Filing of petition, under Land Title Law 1914 (St. 1915, p. 1932), for registration of titles to land, claimed by petitioners under quitclaim deeds from railway company, which abandoned use thereof as right of way, without naming parties who conveyed way to railway company, subject to reversion to them or their assigns if grantee failed to maintain and operate line for six months, constituted at least constructive fraud, by reason of which neither grantors nor their successor were notified of proceeding under section 12, so that court never acquired jurisdiction to bind them by decree; such notice serving purpose of summons in ordinary civil action.

2. Quieting title ⇨34(5)—Plaintiff in suit to quiet title need not state nature of defendant's claim.

In a suit to quiet title, plaintiff is not required to set forth the nature of defendant's claim.

3. Quieting title ⇨43—Plaintiff in suit to quiet title could prove want of notice and fraud invalidating title registration decree not pleaded by defendants (Land Title Law 1914, § 12).

While defendants in suit to quiet title were not required to set up nature of title claimed by them, nor to plead title registration decree on which they relied, plaintiff could prove invalidity thereof as against her for want of notice, required by Land Title Law 1914 (St. 1915, p. 1932) § 12, and extrinsic fraud in procuring it, under implied replication, without thereby collaterally attacking decree.

4. Records ⇨9(13)—Plaintiff in suit to quiet title held not bound by findings in title registration proceeding, of which she had no notice, that defendants had title by adverse possession (Land Title Law 1914 and § 12).

Plaintiff in suit to quiet title *held* not bound by findings in title registration proceeding, under Land Title Law (St. 1915, p. 1932), that defendants had acquired title by adverse possession, where neither she nor her grantors had notice thereof, as required by section 12.

5. Judgment ⇨243—Court cannot determine rights of defendant's grantee, not party to action to quiet title.

Where one, to whom one of defendants in action to quiet title conveyed all his interest in property, was not a party to action, court was without jurisdiction to determine whether such grantee's title was less vulnerable than that of her grantor as against plaintiff.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Emily Moakley against the Los Angeles Pacific Railway Company, Alphonso Swaboda, and others. From a judgment for defendants Swaboda and others, plaintiff appeals. Reversed.

See, also, 265 P. 548.

John F. Poole, of Los Angeles, for appellant.

James W. Bell, of Los Angeles, for respondents.

FINCH, P. J. This is an action to quiet title to a strip of land formerly occupied by the defendant railway company as a right of way. The complaint is in the usual short form. The answer of the defendants Young and Alphonso and Margaret Swaboda deny the allegations of the complaint. Their denial of the allegation that their claims are unfounded is in the following language: "Defendants deny that the claims of said defendants and each of them or of said defendants or each of them are without any right whatever and deny that said defendants or either of them have no estate, right, title or interest in or to said real property above described or any part thereof."

At the trial, the foregoing denial was treated as a sufficient statement of the defendants' claims to admit proof thereof, and no

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★Rehearing denied. Hearing denied by Supreme Court.

question in relation thereto is raised by the parties to this appeal.

Judgment was entered quieting plaintiff's title to a part of the strip of land and adjudging that Alphonso and Margaret Swaboda and "the successors in interest" of Young are the owners of the remainder of the strip and that the plaintiff "has no right, title, or interest," in such remainder. The plaintiff has appealed from the part of the judgment in favor of such defendants.

[1] February 28, 1900, Robert M. Turner and wife conveyed to the Los Angeles & Pacific Railway Company "a right of way for a state railway over" the strip of land described in the complaint. The deed contained the following:

"Should grantee fail to maintain and operate a line over said right of way for regular passenger traffic for a period of six months, said right of way and all rights under this instrument shall immediately revert to grantors or to their assigns."

"The railway company tore up its tracks and abandoned the use of the property * * * on or about September 1, 1915."

The defendants' claims of title are all based on quitclaim deeds executed by the defendant railway company October 11, 1921.

January 11, 1923, Young and others filed their petition in the superior court for the registration of their titles under the provisions of the Land Title Law of 1914 (Stats. 1915, p. 1932). Included in the lands described in the petition were the lands in controversy on this appeal. The petition was accompanied by an abstract of title showing all the conveyances mentioned. Notwithstanding the fact that the interest of the Turners clearly appeared from a mere reading of the abstract, they were not named in the petition, and one of the allegations thereof reads as follows: "That as applicants are informed and believe, and therefore allege, there is no person who has any estate, or claims any interest in the, or any part of the land hereinafter described, other than as stated in each application, in law or equity, in possession, remainder, reversion or expectancy."

The court ordered that "notice of filing said petition be given, as provided in the land registration act, directed to all persons known and unknown who have, or claim to have an interest in, or lien upon, said land, and to all whom it may concern," and that said notice be published in the Los Angeles Review for four successive weeks. Notice, directed to a long list of persons, but not containing the names of the plaintiff or the Turners, was duly published as ordered, and on May 7, 1923, a decree was entered confirming the titles of the petitioners and ordering the issuance of certificates of title to them. Certificates of title were so issued pursuant to the order.

It is clear from the record that the acts of the petitioners constituted at least constructive fraud, extrinsic in character, and that, by reason thereof, neither the Turners nor the plaintiff herein were given any notice of the registration proceeding, and that therefore the court never acquired jurisdiction to bind them by the decree. Section 12 of the act provides: "When the court shall order notice given, a notice must be issued, under the seal of the court, * * * which notice shall be directed to all parties appearing by the petition or the petition and abstract or by the report of the examiner of titles, if any, to have any interest in the land or any part thereof."

The notice in question is the process by the service of which the court acquires jurisdiction of the parties to whom it is directed. It serves the same purpose as a summons in an ordinary civil action. No one would contend that jurisdiction of the person of a known defendant can be acquired by publication of a summons in which his name does not appear. Respondents rely on American Land Co. v. Zeiss, 219 U. S. 47, 31 S. Ct. 200, 55 L. Ed. 82. In that case, however, the court was not considering the question of notice to known owners. The court said: "As no complaint is made concerning the provisions of the statute relating to the designation of and notice to known claimants, we put that subject out of view and address ourselves to the provisions relating to unknown claimants or claims." The precise question presented on this appeal was decided in Riley v. Pearson, 120 Minn. 210, 139 N. W. 361, L. R. A. 1916D, 7, in which case, quoting from the syllabus, it was held: "Where, in proceedings under the Torrens act to register title, the applicant fails to disclose to the court the names of persons known to him to have an interest in or lien upon the property, and such persons are not named as parties to the proceeding or served with summons, and do not have actual notice of the proceeding, a judgment rendered therein is not binding upon such persons."

In Follette v. Pacific L. & P. Corp., 189 Cal. 193, 203, 208 P. 295, 299 (23 A. L. R. 965) in considering the provision of section 12, requiring personal service on occupants of the land, it is said: "To adopt a construction of said law which would permit a petitioner thereunder to imperil or destroy the vested rights and interests of the occupants of the property by the simple process of omitting their names as parties to such proceedings and by so doing obtain jurisdiction by a mere publication of notice and without that personal service of process which the law designates as to those whose names are required to be set forth in said petition would be a manifest injustice and would work a departure from those constitutional principles which are as old as Magna Charta and which guarantee to the owners of vested interests in property that they shall not be deprived of these without due process of law."

The foregoing argument applies with equal force to the omission from the petition and the notice of the names of persons shown by the abstract of title to have an interest in the land to which the petitioner claims title. The omission was a failure to comply with one of the express provisions of the statute relative to the contents of the required notice, and such provision is mandatory. 21 Cal. Jur. 485. It appears from the record that the Turners were residents of the state of Kansas, and that therefore service of the notice might have been made on them by publication, but publication of a notice in which their names do not appear was not notice to them in any sense.

[2, 3] Respondent contends that appellant's attack on the decree is collateral. In the Follette Case the plaintiff relied solely on a similar decree. The defendant therein alleged facts, in effect the same as those relied on by the plaintiff in this case, showing fraud and lack of jurisdiction. The court held that "the assault which the defendant makes upon this decree is not a collateral but a direct attack." In a suit to quiet title "the plaintiff is not required to set forth the nature of the claim of defendant." Hyatt v. Colkins, 174 Cal. 580, 581, 163 P. 1007. If the defendants had alleged in their answer the entry of the decree in the registration proceeding, then all affirmative matter by way of replication would have been deemed to have been pleaded by the plaintiff. 21 Cal. Jur. 165; Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 616, 130 P. 15; Kipp v. Reed 183 Cal. 49, 50, 190 P. 363. In that event the plaintiff would have been permitted to prove that the decree is void as against her for want of notice to her and the Turners and that the decree was procured by extrinsic fraud. The defendants were not required to set up the nature of the title claimed by them or to plead the decree upon which they rely. 22 Cal. Jur. 157. It would be a strange rule, however, which would permit them to prove the decree as the foundation of their claim without pleading it and at the same time prevent the plaintiff from making the proof she would have had the right to make if the decree had been alleged in the answer as the foundation of the defendants' claims. The rule applicable to such a situation is the same as that applied in Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P. 1029. In that case the plaintiff alleged in general terms its ownership of the personal property involved in the suit. The defendant merely denied the allegations of the complaint. At the trial, the defendant introduced proof that the property had been sold to it. It was held that the plaintiff had the right to meet such claim of ownership "by proof that such sale was void because of fraud, without having made any allegation of fraud in the complaint." After citing cases to the effect that a plaintiff is entitled to introduce evidence of fraud, without alleging it, to overcome proof of affirmative matter alleged by the defendant in his answer, it is said: "The same is, of course, true as to the matters disclosed by evidence in behalf of a defendant properly given under denials contained in the answer." The plaintiff in this case had the right to show fraud and lack of jurisdiction under the implied replication which the law raises under the circumstances stated. The Follette Case therefore is controlling, and, on the authority of that case, it must be held that the plaintiff's assault upon the decree in question is a direct attack. The decree being void as to the plaintiff, her rights, of course, are not affected by it.

[4] In the registration proceeding, the court found facts showing that the petitioners had acquired title by adverse possession, but no such finding was made in this case, and the plaintiff herein is not bound by the findings in the proceeding of which neither she nor her grantors had notice.

[5] The court also found that on September 15, 1923, Young conveyed all his interest in the property "to Ella J. Robinson, who is not a party to this action and has had no notice thereof." Since Ella J. Robinson is not a party to the action, the court was without jurisdiction to determine whether, as against the plaintiff, her title is less vulnerable than that of her grantor. Even if that question could be decided in this action, there is no finding that she is an innocent purchaser for value as defined in section 34 of the act. Besides, under the provisions of section 34, subd. 5, and section 45, the title of a registered owner is subject to a right of action such as this, commenced within "one year following the first registration." It is not intended to express any opinion as to whether, in such a case, an action may be commenced after the expiration of one year following the first registration, as that question is not involved in this case.

The part of the judgment appealed from is reversed.

We concur: PLUMMER, J.; THOMPSON, J.

98 Cal. App. 763

In re INCE'S ESTATE.

MOORE v. INCE et al.

(Civ. 6411.)

District Court of Appeal, Second District, Division 1, California. May 15, 1929.

1. Executors and administrators 🔑509(3)—Real estate agent employed to sell estate property was "party" with right to move to vacate order allowing commissions (Code Civ. Proc. §§ 473, 1559).

Real estate agent employed to effect sale of estate property by virtue of authority of Code Civ. Proc. § 1559, was a "party" within the meaning of Code Civ. Proc. § 473, so as to authorize motion to vacate order allowing commissions because of mistake, inadvertence, surprise, and excusable neglect.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Party.]

2. Executors and administrators 🔑509(9)—That order vacating previous order allowing broker's commission for sale of estate property was made after confirmation of sale did not affect validity (Code Civ. Proc. § 473).

The fact that order under Code Civ. Proc. § 473, vacating a previous order allowing broker's commission for sale of estate property, was made at a time subsequent to the time of confirmation of the sale did not affect validity of order.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

In the matter of the estate of Thomas H. Ince, deceased. From an order vacating a previous order allowing a broker's commission to Harley Moore for sale of estate property and fixing anew the amount of commission, Ellen Priscilla Ince, executrix, and another appeal. Affirmed.

Chas. W. Fourl and Edward W. Tuttle, both of Los Angeles, for appellants.

Walter R. Leeds and Dockweiler, Dockweiler & Finch, all of Los Angeles, for respondent.

YORK, J. This is an appeal from an order vacating a previous order allowing a broker's commission for sale of estate property, and fixing anew the amount of commission due to respondent. Such motion to vacate was made under section 473, Civil Code of Procedure, and was based upon the ground that the first order was made and taken against respondent through his mistake, inadvertence, surprise, and excusable neglect.

Appellants contend that the superior court had no jurisdiction to entertain respondent's motion to vacate or to vacate its previous order for the reasons:

1. Respondent is not a party within the meaning of section 473 of the Code of Civil Procedure.

2. The order confirming sale of the realty is not severable as to that part thereof allowing the commission to respondent.

[1] As to appellants' first contention that respondent is not a party within the meaning of section 473 of the Code of Civil Procedure, the case of Eastwood v. Stewart, 64 Cal. App. 614, 222 P. 369, is decisive, holding that a real estate agent employed under the authorization given under section 1559, Code of Civil Procedure, is a person interested in the estate.

[2] The superior court had general jurisdiction to vacate its own order and make another increasing the amount to be paid, upon a motion made by respondent under section 473, Code of Civil Procedure, on the ground that the first order was taken against him through his inadvertence, surprise, and excusable neglect. Levy v. Superior Court, 139 Cal. 590, 73 P. 417. The fact that the later order was made at a time subsequent to the time of confirmation of the sale could not, on any admissible theory, affect the validity of said order.

The order appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

99 Cal. App. 58

CROWHURST v. GREEN et al. (Civ. 6913.)★

District Court of Appeal, First District, Division 2, California. May 20, 1929.

Rehearing Denied June 19, 1929. Hearing Denied by Supreme Court July 18, 1929.

1. Abatement and revival 🔑7—Plea in abatement for pendency of another action is not available after judgment therein becomes final.

Plea in abatement on ground that another action of same character is pending is no longer available after judgment in prior suit becomes final.

2. Mandamus 🔑154(7)—Petition for mandate, requiring city councilmen to act on annexation petition, need not allege specific demand to perform acts sought.

Petition for mandate requiring city councilmen to act on annexation petition need not allege specific demand on them to perform acts sought, since they act under statute for benefit of general public, without any private or personal interest in subject-matter.

Proceeding in mandamus by Frank G. Crowhurst against Lisle C. Green and others. Writ granted.

Clark, Nichols & Eltse, of Berkeley, for petitioner.

Lovett K. Fraser, of San Francisco, for respondents.

★Rehearing denied. Hearing denied by Supreme Court.

NOURSE, J. This is a proceeding in mandamus to require respondents to act upon an annexation petition with a view to determining whether a special election should be called to vote upon the proposition of annexation.

The respondents, by demurrer and answer, have presented but two excuses for their failure to act which require consideration.

[1] First. It is pleaded that another action of the same character is pending. In October, 1928, a similar petition was filed with these respondents, asking them to call a special election for the same purpose. Having refused to act upon the petition, a proceeding in mandamus was instituted in the First Division of the District Court of Appeal. This was decided adversely to petitioners on March 15, 1929, and the judgment therein is now final. Carter v. Green (Cal. App.) 276 P. 120. Assuming that the two actions are of the same character, so that the pendency of the first action would support a plea in abatement to the second, such plea is no longer available when the former action is no longer pending.

[2] Second. It is argued that the petition for mandate herein does not sufficiently allege demand made upon the respondents to perform the acts sought by this proceeding. Without engaging in a technical discussion of the pleadings, it is sufficient to say that no specific demand was necessary, because the respondents are here acting under a statute for the benefit of the public in general and without any private or personal interest in the subject-matter. In such cases the law itself stands in lieu of a specific demand. Wilson v. Board, etc., 138 Cal. 67, 69, 70 P. 1059; Thoits v. Byxbee, 34 Cal. App. 226, 236, 167 P. 166; Jensen v. McCullough (Cal. App.) 271 P. 568, 571.

Let a writ issue as prayed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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98 Cal. App. 769

ARMSTRONG CO. v. SHELL CO. OF CALIFORNIA. (Civ. 6214.)★

District Court of Appeal, Second District, Division 1, California. May 15, 1929.

Rehearing Denied May 31, 1929. Hearing Denied by Supreme Court July 11, 1929.

1. Patents 🔑218(3)—Contract to pay percentage of proceeds of gasoline extracted at plant held not to require payment of royalties after ceasing operation.

Under a patent license agreement requiring licensee to pay royalty of 5 per cent. of net proceeds of gasoline produced at extraction plant for term of 10 years, provided that payment of royalties should cease on payment in aggregate of $100,000, licensee ceasing operation of such plant was under no further obligation to pay royalties, notwithstanding only fraction of $100,000 had been paid.

2. Patents 🔑218(4)—Assignee of licensee, by notice refusing to pay further royalties, held not estopped from denying obligation to pay further royalties.

Notice to owner of patent by assignee of licensee, refusing to make further payment of royalties under license, *held* not tantamount to admission of obligation to pay such royalties, and not to estop assignee from relying on defense that contract did not impose obligation to pay further royalties.

Houser, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Erwin T. Owen, Judge.

Action by the Armstrong Company, a California corporation, against the Shell Company of California. From an adverse judgment, plaintiff appeals. Affirmed.

Bauer, Wright & Macdonald, Alexander Macdonald, Lyon & Lyon, and Frederick S. Lyon, all of Los Angeles, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent.

McLUCAS, Justice pro tem. Plaintiff entered into a contract with Western Union Oil Company on September 19, 1919, wherein plaintiff, as owner of a certain patented process known as the Armstrong process, for the extraction and manufacture of high-grade gasoline from natural and casing-head gas, licensed Western Union Oil Company to use said Armstrong process on certain premises leased by Western Union Oil Company in a plant or plants to be constructed and equipped on said leased premises, and to treat therein natural gas or casing-head gas produced from the lands covered by said lease, or from lands adjoining thereto. Western Union Oil Company agreed to pay the entire cost of all labor and materials required in the construction and equipment of said plant, which was to be constructed under the supervision of the plaintiff in accordance with plans and specifications theretofore approved by Western Union Oil Company. The contract further provided as follows:

"The party of the second part further agrees to pay to the party of the first part, at the offices of said first party in the city of Los Angeles, California, on the 10th day of each and every month from and after the commencement of the production of gasoline at said plant, and thereafter during the life of this agreement, for the right to use said Armstrong process, a royalty of five per cent. (5%) of the net amount of money received by the party of the second part during the preceding month from the sale of gasoline produced at said plant, which net amount shall be ascertained after deducting the cost of

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★Rehearing denied. Hearing denied by Supreme Court.

production, including the amount of any royalties due to the lessors of said Western Union lease. It is mutually understood and agreed that the term for which said royalties shall be paid shall be ten (10) years from and after the date of the actual commencement of the production of gasoline at said plant: Provided, however, that should the aggregate amount of royalties paid to the party of the first part prior to the expiration of said term equal the sum of one hundred thousand ($100,000) dollars, then the obligation to pay royalties shall cease and terminate; and provided, further, that the party of the second part may at any time terminate its obligation to pay any further royalties by giving written notice to the party of the first part of its intention so to do and by paying to said party of the first part the difference between the aggregate amount of royalties already paid and the sum of one hundred thousand ($100,000) dollars. It being understood and agreed that when royalties as herein provided shall have been paid for ten (10) years from and after the date of the actual commencement of the production of gasoline at said plant, or if prior to the expiration of said ten (10) years, the party of the second part shall have paid to the party of the first part the sum of one hundred thousand ($100,000) dollars, as herein provided, it shall have the right to continue to use said Armstrong process in the manner herein provided, without the payment of any further royalties or sums whatsoever."

Plaintiff further guaranteed that it had the sole and exclusive right to license for use in the state of California the said Armstrong process, and plaintiff agreed to defend at its own cost and expense any suit, claim, or demand of any person based on the use of said process, and to indemnify Western Union Oil Company for any judgment rendered against it on account thereof. The contract further provided:

"It is further mutually understood and agreed that the license hereby granted to the party of the second part to use said Armstrong process is unlimited as to time, but that the same confers no rights upon said second party to authorize or license other persons, firms or corporations to use the same without the written permission of the party of the first part. This agreement shall extend to and be binding upon the successors, assigns, heirs, and representatives of the parties hereto during the full time this agreement may remain in force."

The gasoline plant was completed and operated by Western Union Oil Company until on or about January 1, 1922, when defendant succeeded to all the right, title, and interest of Western Union Oil Company under said agreement, and defendant took over said plant and operated the same up to about April 19, 1923. On said day defendant notified plaintiff in writing that it renounced and terminated said agreement and repudiated the license purported to be given thereby, in words as follows:

"As you know, we have succeeded to all right, title, or interest of Western Union Oil Company under said agreement. Please be advised that we hereby renounce and terminate said agreement; that we hereby repudiate the license purported to be given by said agreement to said Western Union Oil Company; that we hereby abandon any position as licensee under said agreement; that we hereby renounce any protection of said license; that we hereby refuse to make any further payments as royalty or otherwise for said license or under said agreement. We do this for the reason that the letters patent upon which you relied for your authority to grant said license are invalid and void. Please be further advised that we have completed and entirely abandoned the operation of the gasoline extraction plant erected pursuant to said agreement on the lands covered by the lease referred to in the said agreement; that from the date hereof we will not operate said plant, or any gasoline extraction plant, on the lands covered by the said lease pursuant to or in accordance with the terms of said agreement; that we declare that we are freed and discharged from any liability or obligation of making further payments as royalty or otherwise for said license or under said agreement."

The plant has not been operated since April 19, 1923. It was stipulated that the total payments made to plaintiff by defendant and defendant's assignor pursuant to said contract amounted to $20.840.88. Action was brought by plaintiff to recover the sum of $80,671.49, together with interest thereon from April 19, 1923, on an alleged difference between the sum of $100.000 mentioned in the contract and the amount of money paid to plaintiff as royalty under said contract. Judgment was rendered for the defendant, and plaintiff appeals from the judgment.

[1] Appellant's first contention is that, by refusing to pay further royalties to the plaintiff, defendant became liable under the contract to pay plaintiff the difference between the aggregate of sums already paid and $100,000, and that the trial court erred in finding to the contrary. It is argued that the cause of action arose out of a contract between the parties; that the contract imposed a direct and unqualified obligation to pay royalties for ten years and then provides an exclusive method by which the licensee may terminate its obligation in this behalf. Analyzing the contract, we find that the instrument contains no mention of the aggregate amount of royalties payable to plaintiff, except in paragraph 2. In the first sentence of this paragraph Western Union Oil Company is required to pay to plaintiff on the 10th day of each month after the commencement of production of gas-

oline, and "thereafter during the life of this agreement, for the right to use said Armstrong process, a royalty of 5 per cent. of the net amount of money received by the party of the second part during the preceding month from the sale of gasoline produced at said plant." The only obligation to pay royalties imposed upon the licensee in the foregoing sentence is to pay royalties "from the sale of gasoline produced at said plant" by the use of said Armstrong process. If no gasoline were produced by the use of said process, then no royalties were payable. The obligation to pay royalties has been fully performed by the payment of royalties during all of the time when the process was used and the plant remained in operation. While it may be inferred from the terms of the contract that it undoubtedly was the intention of the parties that Western Union Oil Company should produce gasoline by the use of said process in a plant to be erected on its lands, yet we have searched the contract in vain for any direct provision requiring Western Union Oil Company to produce any gasoline whatsoever by the use of said process. The contract merely requires Western Union Oil Company, under the supervision of the plaintiff, to erect and equip at its own cost and expense a gasoline extraction plant, and further licenses Western Union Oil Company "to use said Armstrong process in a plant or plants to be constructed and equipped on said Western Union lease, and to treat therein any natural gas or casing-head gas it may now or hereafter own or become entitled to," produced from certain lands.

Under the contract the licensee had the right, but was not under the obligation, of paying a total amount of $100,000 at any time during the life of the contract. Had defendant done so, there would have been no further obligation to pay royalties, even though it continued to use the process. Appellant assumes that the contract imposes an obligation on the licensee to pay royalties for ten years, and then points out that the contract provides the method by which the licensee may terminate its obligation in this behalf, namely, either by the payment of an aggregate amount of royalties in the sum of $100,000 prior to the expiration of said ten-year term, or during said term, by the licensee giving written notice of its intention to terminate its obligation to pay further royalties and paying to the licensor the difference between the aggregate amount of royalties already paid and the sum of $100,000. But, as we have already seen, there is no obligation to pay further royalties to be found in the contract. Appellant is mistaken in its premise. The premise being false, the conclusion must be false. There being no such obligation, it follows that there is none to be terminated, and there is no difference to be paid by the defendant.

[2] Appellant argues that, since defendant gave notice to plaintiff refusing "to make any further payment as royalty or otherwise for said license or under said agreement," and declaring that it is "freed and discharged from any liability or obligation to make further payments as royalty or otherwise," it is tantamount to an admission that if it had not been for the alleged invalidity of the patent it would not have been freed and discharged from such liability. We do not find in this notice any admission of an obligation to pay further royalties; nor do we find that the fact that defendant stated that it was refusing "further payments as royalty or otherwise, * * * for the reason that the letters patent upon which you relied for your authority to grant such license are invalid and void," prevented the defendant from availing itself of the contract and assignment defenses after litigation had begun. The doctrine that when a party gives a reason for his conduct and decision touching anything involved in a controversy he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration, is inapplicable in the instant case.

This doctrine is not applicable for two reasons: In the notice of renunciation the defendant refused payment on two grounds; first, the invalidity of the patent, and, second, the abandonment of the operation of the plant or any gasoline extraction plant on account of which the defendant declared that "we are freed and discharged from any liability or obligation to make further payments as royalty or otherwise for said license or under said agreement." In our opinion, the second of these grounds permits the defendant to rely on a defense that the contract imposed no obligation to pay further royalties. It follows that if the contract imposes no obligation to pay further royalties, then defendant is not estopped to rely on a defense that the defendant never assumed any liability under said contract. But even though the contract did impose a liability to pay further royalties, we do not think the defendant is estopped by the renunciation to set up the defense that defendant never assumed any liability under said contract.

If the contract imposes no obligation to pay further royalties, then a discussion of the further defenses becomes superfluous. But as plaintiff insists that the contract does impose such obligation to pay further royalties, for the purpose of a complete consideration of the case we proceed to a discussion of the further defenses. Plaintiff contends that, defendant having taken over operations under the contract, and having held itself out to plaintiff as assuming the liabilities thereunder, it is liable to plaintiff and that the trial court erred in finding to the contrary. In reply thereto, defendant states that, if the contract be construed as creating any obligation, defendant is not liable because it never assumed any of the obligations of the contract. The contract is by its terms made binding upon the assigns of the licensee. The mere assignment by the purchaser of its rights under an executory contract does not cast upon the assignee any of the personal liabilities imposed by the contract upon the assignor, even though the contract provides that its stipulations are to apply and bind the assigns of the respective parties, unless the assignee expressly obligates himself to perform the covenants binding upon the assignor or recognizes his personal obligation to the vendor or claims or accepts the benefits of a full performance of the contract. 25 Cal. Jur. 701; Lisenby v. Newton, 120 Cal. 571, 52 P. 813, 65 Am. St. Rep. 203; Tarpey v. Curran, 67 Cal. App. 575, 587, 228 P. 62; Barberich v. Pooshichian, 59 Cal. App. 507, 211 P. 236; Robinson v. Rispin, 33 Cal. App. 536, 165 P. 979; Jones v. Allert, 161 Cal. 234, 118 P. 794; Drips v. Moore, 179 Cal. 249, 176 P. 159; Wilson v. Beazley, 186 Cal. 437, 199 P. 772.

In the instant case the assignee did not expressly obligate itself to perform the covenants binding upon the assignor. In order that an assignee may be held liable under a contract, there must be an express assumption. The indenture of January 2, 1922, between Western Union Oil Company and defendant, attached to the amendment to the answer as Exhibit A, contains an agreement of assumption reading as follows: "The grantee hereby assumes, from and after the day of the delivery of this indenture, and hereby covenants and agrees to and with the grantor and Union Company, and each of them, promptly to pay and perform, when and as payment and performance may be due, subject as hereinafter provided, the following indebtedness, liabilities and obligations of the grantor, namely: (a) All the covenants, agreements and obligations, contingent or otherwise, existing under or pursuant to any of the leases or other instruments in writing respecting oil and gas properties, included in the property and assets hereby assigned, transferred and conveyed; provided that this assumption shall not become effective as to the covenants, agreements and obligations under or pursuant to any particular lease or other instrument in writing until the delivery and acceptance, pursuant to the second sentence of article III of this indenture, of an instrument specifically assigning the same. * * *"

In article III of said indenture the grantor agrees to execute not later than July 1, 1922, and deliver to the grantee an instrument in form satisfactory to counsel for the grantee assigning all contracts respecting oil and gas properties. No such instrument has been introduced into the record. Defendant has in the amended answer specifically denied assuming any liability under said contract, and it would appear that such liability has never been consummated, since the terms of the proviso as hereinbefore stated are not shown to have been complied with. Furthermore, if this assumption of the agreement had become effective by the delivery of the specific agreement of assignment of the contract in suit, plaintiff could not rely upon such admission for the reason that the indenture between Western Union Oil Company and defendant was expressly not for the benefit of plaintiff. It is provided in said indenture as follows: "Nothing in this indenture, express or implied, is intended or shall be construed to confer upon, or give to, any person, firm or corporation other than the parties hereto, any right, remedy or claim, under or by reason of this indenture, or of any term, covenant or condition thereof; and all of the terms, covenants, conditions, promises and agreements in this indenture contained shall be for the sole and exclusive benefit of the parties hereto and their successors and assigns."

The rule is well established that only an express beneficiary can recover on a contract between other parties. Civ. Code, § 1559; Chung Kee v. Davidson, 73 Cal. 522, 15 P. 100; Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88; Wilson v. Shea, 29 Cal. App. 788, 157 P. 543; Ericksen v. Rhee, 181 Cal. 562, 185 P. 847. Nor has the defendant recognized a personal obligation to the vendor to pay further royalties. The only obligation recognized by the defendant was the obligation to pay accruing royalties so long as the process was used by the defendant, which obligation has been fully met. Nor has defendant claimed or accepted the benefits of a full performance of the contract; in fact, the defendant by its notice of renunciation has waived full performance and released plaintiff therefrom. Plaintiff contends that defendant held itself out to plaintiff as assuming the liabilities under the contract in question by taking over operations and making payments of accruing royalties in accordance with the terms of the agreement. We are not able to perceive in what manner defendant by such conduct held itself out to plaintiff as assuming the liability to pay anything further than royalties accruing for the use of the process. We do not believe the defendant by such conduct assumed a liability to pay further royalties for a period of ten years, or until $100,000 in royalties should have been paid, especially since its assignor was not so bound by the terms of the original contract.

In support of its contention plaintiff relies upon section 1589 of the Civil Code, which provides, "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting," and upon section 3521 of the Civil Code, which provides that "he who takes the benefit must bear the burden." In this case the defendant was not a party to the original transaction. The rule is well settled that section 1589 of the Civil Code applies only to a person who was a party to the original transaction. Stone v. Owens, 105 Cal. 292, 38 P. 726; Canale v. Copello, 137 Cal. 22, 69 P. 698; Beazley v. Embree, 41 Cal. App. 706, 183 P. 298; Bryant v. Smith, 57 Cal. App. 214, 206 P. 1025; Tarpey v. Curran, 67 Cal. App. 575, 228 P. 62. In Stone v. Owens, supra, the court said, page 296 of 105 Cal. (38 P. 727): "But we think this section applies only to 'a transaction' to which the person accepting the benefit is, or purports to be, or is claimed to be, a party, but who would not have been bound by the transaction if he had not accepted the benefit thereof."

Appellant next contends that the trial court erred in overruling plaintiff's motion to strike out all testimony, exhibits, and proofs offered for the purpose of showing that plaintiff's patent was invalid. It is a well-recognized rule of law that a licensee under a patent right cannot dispute the validity of his licensor's patent. But an apparent exception to the rule of estoppel exists where the licensee repudiates the license. In Robinson on Patents, § 820, vol. 2, it is said: "A licensee, having accepted a license, and while exercising under its protection the rights therein conferred, is estopped from denying the validity of the patent in any suit in which such exercise of his license privileges is the basis of the controversy. In the absence of express provisions in the license to the contrary, however, he may repudiate the license, cease to claim its protection, and as to his future exercise of the privileges described therein defend himself upon the ground that the patent is invalid."

In Universal Rim Co. v. Scott (D. C.) 21 F.(2d) 346, the court said: "A licensee under a patent, who has manufactured an article pursuant to a license agreement and has regularly paid royalties during a number of years, is thereafter estopped to set up as a defense to a demand for payment of royalties that the article as made was not within the claims of the patents. Sproull v. Pratt & Whitney (C. C.) 97 F. 807; Andrews v. Landers (C. C.) 72 F. 666. A licensee is estopped to show invalidity of licensed patents as a defense to an action for royalties only so long as the relation of licensor and licensee continues and the licensee uses and enjoys the benefit and protection of the patents covered by the agreement. A licensee, if evicted from the use of the patents by a judgment of a court of competent jurisdiction declaring the patents invalid, may, after giving notice to the licensor, defend against the payment of royalties subsequently accruing. A licensee, if the patents are in fact invalid, may, without waiting to be evicted, renounce and abandon the license, and after giving notice thereof to the licensor, may defend against an action to enforce the license or to recover royalties subsequently accruing, with the same freedom as may a stranger to the patent, and the licensor is remitted to his infringement suit. These principles of law, notwithstanding some respectable dicta to the contrary, will be found fully supported and established by the following authorities: Holmes v. McGill (2 C. C. A.) 108 F. 238, 244; Mudgett v. Thomas (C. C.) 55 F. 645, 647; White v. Lee (C. C.) 14 F. 789; Brown v. Lapham (C. C.) 27 F. 77; Macon Knitting Co. v. Leicester, 65 N. J. Eq. 138, 55 A. 401; Harlow v. Putnam, 124 Mass. 553; Ross v. Dowden, 147 Iowa, 180, 123 N. W. 182; Edison Elec. Co. v. Thackara Mfg. Co., 167 Pa. 530, 31 A. 856; Skinner v. Wood Mowing Mach. Co., 140 N. Y. 217, 35 N. E. 491, 37 Am. St. Rep. 540; K.-W. Ignition Co. v. Unit Coil Co., 93 Ohio St. 128, 137, 112 N. E. 199.

"The contention is made, and some support therefor may be found in the books, that a licensee cannot, in the absence of a provision permitting the license to be terminated, contest the validity of patents covered by the agreement, even after renunciation and notice. This contention originates in the common-law doctrine of estoppel by covenant. It requires to support it, first, a special admission of fact, namely, that the patent is valid, or, that the licensor is the first and true inventor of the invention covered by the patent; and, second, a deed or covenant under seal which, at common law, barred a party thereto from disputing the truth of an admitted fact. It is doubtful if this rule ever had any application in equity, which, from early days, gave relief against deeds or agreements under seal in certain situations; but, be that as it may, the true rule, in my opinion, now is that the licensee, whenever he ascertains that the patents covered by the license agreement are invalid, may refuse to be further bound thereby, and, upon repudiation and notice, may thereafter defend against an action for royalties or an infringement suit as freely as may a stranger. This is particularly true in a case like the present, where the license agreement contains no recital or clause admitting the validity of the patents and no stipulation not to dispute or contest the validity thereof. If the patents are in fact invalid, then there is no continuing consideration for the agreement, and, as was said by Mr. Justice Brown in Pope Mfg. Co. v. Gormully, 144 U. S. 234, 12 S. Ct. 636, 36 L. Ed. 414: 'It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly.' So long, however, as the invalidity of a patent has not been judicially declared and the licensee continues to operate thereunder without repudiation or notice such as will place him in the attitude of an infringer, there is no such want or complete failure of consideration as will permit the licensee to refuse to pay royalties which have been previously earned."

It should be noted that the contract in suit does not contain any recital or clause admitting the validity of the patent, nor any stipulation not to contest the validity thereof, but, on the contrary, contains a guaranty of the validity by the plaintiff. That a licensee who has renounced the license may defend on the ground of invalidity of the patent is recognized in the following cases: Brown v. Lapham (C. C.) 27 F. 77; Mudgett v. Thomas (C. C.) 55 F. 645, 647; Martin v. New Trinidad Lake Asphalt Co. (D. C.) 255 F. 93, 94; Schutte & Koerting Co. v. Wheeler Condenser & E. Co. (D. C.) 295 F. 158, 162. In Martin v. New Trinidad Lake Asphalt Co., supra, the court said: "A licensee under a license agreement, such as that upon which this suit is based, when sued for royalties payable under the agreement, where the patent which is the subject-matter of the license, is apparently valid and in force (where it has not been declared invalid by a court of competent jurisdiction or revoked by the Patent Office before the royalties have accrued), may not set up the supposed invalidity of the patent and the consequent failure of consideration of the agreement, unless, prior to the period for which the royalties are sought to be recovered, he has given to the licensor a distinct, definite, and unequivocal notice to the effect that he no longer recognizes the binding force of the agreement, and that he will thereafter manufacture or use the article covered by the patent under a claim of right, founded upon the alleged invalidity of the patent, and in hostility to and defiance of the authority of the patent and the license, so that the licensor can thereafter proceed against him for an infringement of the patent, if he choose so to do. Lawes v. Purser, 6 Ellis & Blackburn, 930; Martin v. New Trinidad Lake Asphalt Co., Ltd., 182 App. Div. 719, 170 N. Y. S. 234 (App. Div., 1st Dept. N. Y. Sup. Ct.); Skinner v. Walter A. Wood Mowing & Reaping Mach. Co., 140 N. Y. 217, 35 N. E. 491, 37 Am. St. Rep. 540; Hyatt v. Dale Tile Mfg. Co., 106 N. Y. 651, 12 N. E. 705 (quoted in full in 125 U. S. at 49, 8 S. Ct. 756, 31 L. Ed. 683); Marston v. Swett, 82 N. Y. 526; Skidmore v. Fahys Watch-Case Co., 28 App. Div. 94, 50 N. Y. S. 1016 (App. Div. N. Y. Sup. Ct., 1st Dept.); White v. Lee (C. C. Mass.) 3 F. 222; Brown v. Lapham (C. C. S. D., N. Y.) 27 F. 79; Mudgett v. Thomas (C. C. S. D., Ohio) 55 F. 645, 648; Holmes, etc., v. McGill, 108 F. 238, 244, 47 C. C. A. 296 (C. C. A. 2d Cir.); Macon Knitting Co. v. Leicester Mills Co., 65 N. J. Eq. 139, 152, 55 A. 401."

We see no merit in plaintiff's contention that defendant cannot avail itself of the renunciation exception to the general rule of estoppel because defendant has not notified plaintiff that it would manufacture in hostility to or in defiance of the authority of the patent and license so that the licensor could thereafter proceed against it for infringement of the patent. It is true that many cases apply the renunciation exception in favor of the licensee who abandons the license and thereafter infringes the patent. Nevertheless, it is inconceivable that defendant would be liable under the contract despite the alleged invalidity of the patent solely because it discontinued the use of the process, whereas if it had continued the use of such process in defiance of the patent it could now successfully defend itself against any liability by showing the invalidity of such patent. The authorities do not permit the invalidity of a patent to be asserted as a defense to any liability which accrued before renunciation. The alleged obligation in the present case did not accrue before the renunciation notice was given on April 19, 1923, and defendant thereby brings itself within the exception to the rule of estoppel. In United States v. Harvey Steel Co., 196 U. S. 310, 25 S. Ct. 240, 49 L. Ed. 492, cited by appellant, the liability accrued before renunciation, and recovery was had for accrued, but not for unaccrued, royalties.

Appellant urges that a mere licensee cannot raise the defense of invalidity, and cites authorities holding that, where the grant of an exclusive right is made, if the exclusive right fails, the consideration fails, but that where a mere license is given there is no failure of consideration until the licensee is actually prevented from using the invention. An apparent conflict of authority exists for the reason that many of the cases do not discuss the question of renunciation. In the following cases the right of a mere licensee to rely upon the defense of invalidity of the patent was recognized: Universal Rim Co. v. Scott (D. C.) 21 F.(2d) 346 (license expressly described in the court's opinion as "nonexclusive"); White v. Lee (C. C.) 3 F. 222; Brown v. Lapham (C. C.) 27 F. 77; Crossley v. Dixon, 10 H. L. C. 293; 11 Eng. Rep. 1039; Lawes v. Purser, 6 El. & Bl. 930; 119 Eng. Rep. 1110; Ross v. Dowden Mfg. Co., 147 Iowa, 180, 123 N. W. 182; K.-W. Ignition Co. v. Unit Coil Co., 93 Ohio St. 128, 112 N. E. 199. Appellant cites authority to the effect that a licensee cannot assert invalidity of a patent unless he has been evicted. Some of the cases cited by appellant state that the licensee, in order to avoid the payment of royalties, must prove an eviction, or what is equivalent thereto, but these cases do not discuss the effect of a renunciation notice upon the payment of further royalties. In the following cases, where renunciation was held an exception to the general rule, there was neither

judicial declaration of invalidity nor eviction proved: Universal Rim Co. v. Scott (D. C.) 21 F.(2d) 346; Brown v. Lapham (C. C.) 27 F. 77; Mudgett v. Thomas (C. C.) 55 F. 645; Martin v. New Trinidad Lake Asphalt Co. (D. C.) 255 F. 93; Harlow v. Putnam, 124 Mass. 553; K.-W. Ignition Co. v. Unit Coil Co., 93 Ohio St. 128, 112 N. E. 199; Macon Knitting Co. v. Leicester Mills Co., 65 N. J. Eq. 138, 55 A. 401.

Appellant further claims that defendant cannot "escape its covenanted liability to pay the stipulated royalties for the use it has had of the plant and process as well as for the engineering services of plaintiff in designing and superintending the erection and construction of the plant, the production of the plans and specifications for such plant, and the performed covenant of plaintiff to protect the licensee from eviction from the use of the plant and process, or liability to any other patent owner on account of such use." In reply thereto it should be noted that under the contract Western Union Oil Company furnished the land on which the plant was built, did the necessary grading and excavating work, furnished all materials and labor, paid all the costs of labor and materials, paid the compensation of the engineer designated by plaintiff to superintend construction and became the owner of the completed plant. All that plaintiff did was to designate the engineer and furnish plans and specifications, matters which were purely and solely incidental and prerequisite to the license of the patent. If Western Union Oil Company did not receive any valid patented process, it does not matter how many plans and specifications for worthless and invalid patents it received or how many plants embodying worthless and invalid patents were designed or superintended by plaintiff. If it did not get such a valid patented process, it simply did not receive the only substantial thing for which it bargained, and there was a total failure of the only material consideration for its agreements. Furthermore, it is to be remembered that defendant never covenanted with plaintiff and never assumed the liabilities under the contract in suit. Whether there is any liability to pay further royalties by reason of the use the defendant had of the plant and process and of the performed covenant of plaintiff to protect the licensee from eviction from the use of the plant and process, or from liability to another patent owner on account of such use, is to be determined from the validity of the patent itself.

Finally, appellant contends that the evidence is insufficient to show that plaintiff's patent was invalid. No good purpose would be served by reviewing the evidence submitted on the question of the validity of the patent. Suffice it to say that, in our opinion, the evidence submitted is sufficient to support the findings of the trial court.

For the reasons stated the judgment is affirmed.

YORK, J. I concur in the conclusion reached by reason of the first part of said opinion wherein it states that there was no further liability under the terms of the written contract.

HOUSER, Acting P. J. I dissent from the judgment.

99 Cal. App. 8

STRATTON et ux. v. CORNELIUS et ux.
(Civ. 6228.)

District Court of Appeal, Second District, Division 1, California. May 16, 1929.

1. Covenants 🔑92—Sale to negroes was not violation of agreement that property should not be leased to those other than of White or Caucasian Race.

Sale of property to negroes does not constitute a violation of terms of alleged agreement, whereby property was subject to restriction that it should not be leased or rented to any person or persons other than the White or Caucasian Race.

2. Appeal and error 🔑931(1)—All intendments favor judgment.

All intendments favor judgment by the lower court.

Appeal from Superior Court, Los Angeles County; Joseph F. Chambers, Judge.

Action by S. M. Stratton and wife against V. Cornelius and wife. Judgment of nonsuit, and plaintiffs appeal. Affirmed.

G. C. Watson, of Los Angeles, for appellants.

Willedd Andrews, of Los Angeles, for respondents.

HOUSER, J. [1] This appeal is from a judgment made pursuant to an order of nonsuit in an action in which plaintiffs sought to have it judicially declared that by virtue of a subsisting agreement between the parties certain property owned by defendants was held by them subject to restrictions thereon that it should not be "leased or rented to any person or persons other than of the white or Caucasian race, * * * or be used or occupied, or permitted to be used or occupied, by any person other than of the white or Caucasian race." The only allegation contained in the complaint which in any way dealt with the violation of the agreement between the parties was: "That plaintiffs are informed and believe and therefore allege that the defendants are about to convey said property to Lucy Frost, a single woman, and Hannah F. Mayo, a widow, and that the said Lucy Frost and Hannah F. Mayo have knowledge of the existence of the covenant and know its terms."

By the answer to the complaint it was admitted that the grantees in the deed of conveyance referred to in the complaint were negroes. Without consideration of possible infirmities of the alleged agreement between the parties, it will be noted that by the allegations of the complaint a *sale* of the property was contemplated by defendants, rather than a lease or a rental to, or a use or an occupation of the property by, persons "other than of the white or Caucasian race." It is obvious that a *sale* of the property in question would not constitute a violation of the terms of the alleged agreement. The distinction between the two situations is considered in the case of Los Angeles Inv. Co. v. Gary, 181 Cal. 681, 186 P. 596, 9 A. L. R. 115, and authorities there cited.

[2] All intendments favor the judgment by the lower court; and it is apparent that, without taking into consideration objections which might be suggested other than the defect to which attention has been directed, no error was committed by such court in ordering a nonsuit of plaintiffs' case.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

98 Cal. App. 759

MARSHALL v. AMERICAN METER CO. et al. (Civ. 6657.)★

District Court of Appeal, First District, Division 2, California. May 15, 1929.

Rehearing Denied June 14, 1929. Hearing Denied by Supreme Court July 8, 1929.

1. Appeal and error 🔑1002—Verdict for plaintiff on issue of contributory negligence will not be disturbed, where evidence is conflicting.

Where the evidence of contributory negligence is conflicting, jury verdict for plaintiff will not be disturbed on that issue.

2. Appeal and error 🔑930(4)—Appellate court must assume in support of judgment for plaintiff that jury found plaintiff not guilty of contributory negligence.

In support of judgment for plaintiff in personal injury action, appellate court must assume that jury found that plaintiff was not guilty of contributory negligence.

3. Trial 🔑191(7), 253(4)—Instruction to find against only negligent defendants held not erroneous, as assuming one defendant negligent or as omitting mention of contributory negligence.

Instruction that, in case only certain of defendants were guilty of negligence proximately causing plaintiff's injuries, "you are to find against such negligent defendant only," *held* not erroneous as assuming that at least one defendant was negligent or as omitting mention of contributory negligence; such instruction not purporting to be all-inclusive.

4. Trial 🔑296(4, 5)—Instruction as to conduct in time of imminent danger held not erroneous, as omitting consideration of plaintiff's conduct before such danger, adequately covered by other instructions.

Instruction that person in time of imminent danger is not necessarily negligent because he fails to take every precaution that subsequent calculation shows might have avoided injury *held* not erroneous, as failing to consider conduct of plaintiff before imminent danger arose, which was adequately considered in other instructions.

5. Trial 🔑260(1)—Refusal of requested charges adequately covered by others is not error.

Refusal of numerous instructions adequately and correctly covered by court's charge is not error.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Mrs. Mae Glass Marshall against the American Meter Company, a corporation, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellants.

Derby, Sharp, Quinby & Tweedt, Joseph C. Sharp, and Lloyd M. Tweedt, all of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover damages for injuries sustained in an automobile collision. The defendants answered, and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and from a judgment entered thereon the defendants have appealed.

The accident happened at about 10 o'clock at night on the 21st of June, 1926, in the intersection of Van Ness avenue and Eddy street, in the city of San Francisco. Neither machine saw the other machine until both were inside of the intersection. The plaintiff introduced evidence to the effect that her car was traveling on its side of the street at a speed of 7 or 8 miles an hour and in all respects was exercising due care. She also introduced evidence to the effect that the defendants' car was traveling in excess of 15 miles per hour, to wit, 25 miles or more. The defendants introduced evidence that their car entered the intersection at not more than 15 miles per hour and then slowed down to a lower speed; that they were traveling on their side of the street and in all respects exercising due care. They also introduced evidence that the plaintiff's automobile came

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★Rehearing denied. Hearing denied by Supreme Court.

down Eddy street at a speed of 25 or 30 miles an hour and having entered Van Ness avenue attempted to swing in front of the defendants' car and proceed north on Van Ness avenue. On all of these matters the evidence was directly conflicting.

[1, 2] The defendants quote some of the testimony and then assert that the plaintiff's driver was guilty of contributory negligence and that such contributory negligence is imputable to the plaintiff. That contention assumes that her driver was guilty of contributory negligence. The briefs do not proceed to show what act or acts constituted contributory negligence. As we have shown above, there was evidence of contributory negligence and there was evidence contradicting it. Under fundamental rules this court may not interfere under such circumstances. However, in support of the judgment, we must assume that the jury found that the plaintiff was not guilty of contributory negligence.

[3] Acting on the request of the plaintiff, the court instructed the jury as follows: "In case you find that only certain of the defendants are guilty of negligence which proximately caused any injuries to plaintiff, you are to find against such negligent defendant only." The defendants assert that the instruction assumed that at least one of the defendants was negligent and that the instruction omitted any mention of contributory negligence. It was not addressed to the subject of contributory negligence. It did not assume anything whatever. The defendants cite and rely on Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066. In that case the instruction under consideration was one of those instructions which on its face purports to be inclusive and exclusive and to direct the verdict. The case is not applicable to the facts before us.

[4] Acting upon the request of the plaintiff, the court instructed the jury as follows: "In time of imminent danger a person is not necessarily negligent because he fails to take every precaution or adopt every means of safety that a careful calculation subsequently shows he might have taken or adopted." The defendants assert that the instruction fails to consider the conduct of the plaintiff before the imminent danger arose. That is true; but it neither includes such conduct nor excludes such conduct. That was considered in other instructions specially addressed thereto. The instructions under consideration in Vedder v. Bireley (Cal. App.) 267 P. 724, were not so drawn. They expressly excluded and ignored plaintiff's prior conduct.

[5] Defendants requested and the trial court refused to give 17 instructions. The defendants have printed them en bloc. Thereupon they assert that they were entitled to have the jury instructed upon their theory of the case. That is quite true, and in fairness the defendants might have continued and might have said that the trial court gave to the jury 49 instructions in which it instructed with meticulous care on every element of the theory of each party to the litigation. They might have added that every instruction which was refused was fully covered by an instruction which was given and which was clear, sound, and complete in every respect.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

98 Cal. App. 731

In re BRAHM. (Cr. 1781.)

District Court of Appeal, Second District, Division 1, California. May 13, 1929.

1. Criminal law ⚷1084—Independent of statutory authority, appellate court has inherent power in all cases to stay execution of sentence pending determination of appeal (Pen. Code, § 1243).

Appellate court has inherent and plenary power in all cases to stay execution of sentence pending determination of appeal, whether such appeal be from judgment itself or from some other order made after judgment, but which would be directly affected by execution of judgment, notwithstanding Pen. Code, § 1243, providing that, where sentence less than death has been imposed, stay of execution is within sole discretion of trial court.

2. Criminal law ⚷1073, 1084—Certificate of probable cause or writ staying execution should be granted where issues presented by appeal constitute debatable questions.

Certificate of probable cause or writ staying execution should be granted where issues presented by appeal constitute debatable questions, and should be refused only where it unmistakably appears that appeal is clearly frivolous.

3. Criminal law ⚷1084—Appeal from orders denying motion to withdraw plea of guilty and to vacate judgment held to present debatable questions warranting stay of execution.

Appeal from order denying motion to withdraw plea of guilty and substitute in lieu thereof plea of not guilty and order denying motion to vacate judgment *held* to present debatable questions warranting issuance of writ staying execution.

4. Criminal law ⚷1073, 1084—Trial court has primary duty of staying execution or issuing certificate of probable cause.

Duty of issuing order staying execution or certificate of probable cause rests primarily with trial court in proper case.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Application by Alice Brahm for a stay of execution after judgment on plea of guilty of arson. Granted.

See, also, 277 P. 896.

Arthur Brigham Rose, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

HOUSER, J. This is an application for stay of execution of judgment by which the defendant in the action in the lower court was sentenced to the term of imprisonment prescribed by law for the commission by her of the crime of arson. It appears that the judgment was rendered several weeks after a plea of guilty had been interposed by defendant, and followed a denial by the court of defendant's application for probation.

After sentence had been pronounced, defendant presented a motion by which she asked leave to withdraw her said plea of guilty and substitute in lieu thereof a plea of not guilty. At the same time defendant moved the court to vacate the judgment which theretofore had been rendered in the action. The trial court denied each of such motions, and an appeal was taken from such order.

[1] Although the intimation contained in the language found in section 1243 of the Penal Code is to the effect that on appeal *from a judgment of conviction* on a charge where sentence less than death has been imposed, "in the sole discretion of the trial court" execution of the sentence may be stayed, the point has been directly ruled that, independent of statutory provision, the power of this court is inherent and plenary in all cases to issue writs or orders by which execution of the judgment will be stayed pending the determination of an appeal, whether such appeal be from the judgment itself, or from some other order made after judgment but which would be directly affected by the execution of the judgment (In re Albori [Cal. App.] 272 P. 321, and cases there cited; In re Mayen, 49 Cal. App. 531, 193 P. 813); and such has been the long-established practice of the Supreme Court of this state (People v. Durrant, 119 Cal. 54, 50 P. 1070; People v. Ross, 135 Cal. 59, 67 P. 13; People v. McNulty, 95 Cal. 594, 30 P. 963. See, also, 8 Cal. Jur. 548 et seq., and cases cited).

[2] As has been repeatedly pointed out by judicial decision, such a writ or order should be granted where the issues presented by the appeal constitute "debatable questions," and should be refused only where it unmistakably appears that the appeal is "clearly frivolous." In re Adams, 81 Cal. 163, 22 P. 547; In re Albori (Cal. App.) 272 P. 321.

[3, 4] In the instant case, on consideration of the appeal from the order to which reference has been had, it is manifest that the appeal is not "frivolous"; but, to the contrary, that "debatable questions" are presented for determination by this court. It follows that an order staying execution of the judgment should be and it is granted. However, in so doing, this court again directs attention to the fact that in a proper case the duty of issuing such orders or certificates of probable cause rests primarily with the trial court, and that the effect of a failure or a refusal by the trial court to perform its duty in that regard but adds a burden to this court in a matter in which properly it should not be called upon to act. In re Biescar (Cal. App.) 272 P. 328.

We concur: CONREY, P. J.; YORK, J.

98 Cal. App. 733

PEOPLE v. BRAHM. (Cr. 1781.)★

District Court of Appeal, Second District, Division 1. California. May 13, 1929.

Rehearing Denied May 27, 1929. Hearing Denied by Supreme Court June 10, 1929.

1. Criminal law 🔑274, 1149—Permitting withdrawal of plea of guilty is discretionary, and court's action will not be disturbed in absence of abuse.

Determination of existence of alleged causes which induced defendant to plead guilty to charges preferred and sufficiency thereof to warrant withdrawal of plea of guilty rests within discretion of trial court, whose conclusion cannot be disturbed in absence of abuse.

2. Criminal law 🔑274—Denying motion to withdraw plea of guilty induced by promise of probation was not abuse of discretion.

Where defendant charged with arson pleaded guilty on the faith of promise made by investigating officer that, if she pleaded guilty, probation would be granted her, denial of motion to withdraw plea of guilty was not abuse of discretion.

3. Criminal law 🔑736(1)—Questions raised by motions to withdraw plea of guilty and vacate judgment are not for jury.

Question of whether motions to withdraw plea of guilty and substitute therefor plea of not guilty, and to vacate judgment, should be granted, *held* for court and not for jury to pass on.

4. Criminal law 🔑261(2)—Pronouncing judgment against defendant previously arraigned without new arraignment violated no substantial right of defendant warranting reversal (Pen. Code, § 1200; Const. art. 6, § 4½).

Where defendant was arraigned for judgment in substantial compliance with requirements of Pen. Code, § 1200, and hearing was postponed to day following with acquiescence of defendant and attorney, pronouncing judgment on following day without new arraignment

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★Rehearing denied. Hearing denied by Supreme Court.

did not violate any substantial right of defendant warranting reversal, in view of Const. art. 6, § 4½.

5. Criminal law 🔑977(3)—Contention that trial court by continuances had lost jurisdiction to pronounce judgment where statutory time therefor had not elapsed was without merit (Pen. Code, § 1191).

Where time for pronouncing judgment as provided for by Pen. Code, § 1191, had not elapsed at time sentence was pronounced, contention of defendant that by reason of continuances trial court lost jurisdiction to pronounce judgment was without merit.

6. Criminal law 🔑1043(2)—Appellate court is not required to closely examine information to determine its sufficiency, where probable error is not called to its attention.

Where appellate court is not informed as to particulars in which information is claimed to be defective, no duty exists to subject information to rigid scrutiny or examination for purpose of discovering in what possible respect it may be wanting as pleading.

7. Arson 🔑18—Information charging one with willfully, unlawfully, feloniously, and maliciously burning certain building with intent to destroy same was sufficient to charge arson (Pen. Code §§ 447, 452).

Pen. Code, § 447, defining arson as the willful and malicious burning of building with intent to destroy it, information charging one B. with willfully, unlawfully, feloniously and maliciously burning building with intent to destroy same, and containing statement with reference to ownership of building, under Pen. Code, § 452, was sufficient.

8. Criminal law 🔑982, 1147—Question of probation rests within discretion of trial court, and will not be disturbed on appeal in absence of abuse.

Question of whether defendant in criminal case should be admitted to probation rests within sound discretion of trial court, and will not be disturbed on appeal in absence of abuse.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Application by Alice Brahm to withdraw plea and to vacate judgment following plea of guilty of arson. From orders denying the motions, defendant appeals. Affirmed.

See, also, 277 P. 895.

Arthur Brigham Rose, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, of Los Angeles, for the People.

HOUSER, J. Defendant pleaded guilty to a charge of arson and, at her request, was granted leave to make application for probation. After several continuances had been had of the hearing, on the matter of probation for defendant, an order was finally made by which probation was denied, and judgment was pronounced against her. Thereafter defendant moved the trial court for leave to withdraw her plea of guilty to the charge and substitute therefor a plea of not guilty thereto. At the same time, and as a part of the same motion, defendant moved the court to vacate the judgment in the action. From an order denying each of such motions, this appeal is prosecuted.

[1, 2] The first point advanced by appellant is that, because she "pleaded guilty under duress, misapprehension, fear, intimidation," she should have been permitted thereafter to withdraw such plea. In connection therewith no pertinent facts, other than her own statement to the effect that she was advised by an "investigating officer" that, if she would plead guilty, probation would be granted to her, were submitted to the trial court—which statement was denied by such officer. The determination of the existence of either or any of the alleged causes which induced defendant to plead guilty to the charge preferred against her rested with the trial court; and, in the absence of an abuse of discretion in the matter, the conclusion reached by such court cannot be disturbed by this tribunal. People v. Manriquez, 188 Cal. 602, 605, 206 P. 63, 20 A. L. R. 144; People v. Junod, 85 Cal. App. 194, 259 P. 101. But even assuming the truth of appellant's said statement, it is clear that no abuse of discretion was committed by the trial court in denying the several motions or either of them. As is said in the case of People v. Manriquez, 188 Cal. 602, 605, 206 P. 63, 64 (20 A. L. R. 144): "Another ground upon which the appellant based his motion for vacation of the judgment was that his plea of guilty was entered without due deliberation, and with the hope and expectation that the punishment to which he might be exposed would be mitigated. Even if such were the case, the fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel, or others, to hope or believe that he would receive a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by a jury, presents no ground for the exercise of the discretion necessary to permit a plea of guilty to be withdrawn. (People v. Dabner, 153 Cal. 398, 403, 95 P. 880; People v. Miller, 114 Cal. 10, 16, 45 P. 986; People v. Lennox, 67 Cal. 113, 115, 7 P. 260.)"

[3] Appellant also contends that the question of whether the motions in the premises should be granted should have been submitted to a jury for its determination. Certain authorities have been cited in support of the point; but, so far as this court can determine, none of them is applicable to the question here presented. We know of no authority which would warrant procedure such as is suggested by appellant.

[4] Appellant also complains that at the

time judgment was pronounced against her she was not arraigned therefor as provided by section 1200 of the Penal Code. The record herein discloses the fact that, on the day preceding the date on which defendant was sentenced, at which time the question of whether probation should be granted to defendant, and in case it should be denied, the matter of pronouncing judgment, were before the court for its determination, defendant was arraigned for judgment in substantial compliance with the requirements of section 1200 of the Penal Code. After considerable discussion of the various matters presented to the court for its consideration at that time, with the acquiescence of defendant and her attorney, the conclusion with reference thereto was continued until the day following, at which time, without again arraigning defendant, judgment was pronounced. It is clear that in the circumstances here present no substantial right of defendant was violated; from which it follows that the point is without avail to appellant. Section 4½, art. 6, Const.

[5] Appellant suggests that, by reason of certain continuances, the trial court lost jurisdiction to pronounce judgment. From the record it appears that all such continuances were the result of defendant's application for probation, and each of them was either at defendant's request, or at least with her acquiescence. As the statutory time in the matter, as provided by section 1191 of the Penal Code, had not elapsed at the time sentence was pronounced, it follows that (without reference to other possible considerations) appellant's point is without merit.

[6, 7] It is urged by appellant that the information herein does not charge the commission of a public offense. The brief filed by appellant contains the statement that: "The slightest inspection of the information will disclose that the information fails to allege the offense of arson as required by law." Otherwise, this court is not informed as to the particulars in which it is claimed that the information is defective. In such circumstances this court should not be required to subject the information to rigid inspection or examination for the purpose of discovering in what possible respect it may be wanting as a pleading. However it may be noted that by the information defendant is accused of the "crime of arson, a felony, committed as follows: That the said Alice Brahm, on or about the 13th day of November, 1928, at and in the county of Los Angeles, state of California, did, wilfully, unlawfully, feloniously and maliciously burn with intent to destroy the same, the building of one John Doe Meiling."

Section 447 of the Penal Code defines arson as the willful and malicious burning of a building with intent to destroy it. The "slightest inspection" of the information reveals the fact that it was in substantial accord, not only with the language of section 447 of the Penal Code, but that as well it included a statement with reference to the ownership of the building which it was alleged that defendant had burned. Section 452, Pen. Code. The case of People v. De Winton, 113 Cal. 403, 45 P. 708, 33 L. R. A. 374, 54 Am. St. Rep. 357, is ample authority to the effect that such an information is legally sufficient. See, also, People v. Russell, 81 Cal. 616, 23 P. 418, People v. Morhar, 78 Cal. App. 380, 384, 248 P. 975.

[8] Without an extended discussion of the denial of probation to defendant, it need only be said that, by practically all the authority on the subject in this state, the determination of that question rests with the sound discretion of the trial court. Since no abuse of discretion appears in the instant case, the decision reached by said court as to whether probation should be granted to defendant is necessarily conclusive.

The remaining points presented by appellant as reasons for reversal of the order made by the trial court are either included within those already considered by this court, or are of so little importance that, even if the position assumed by appellant therein be correct, a decision thereon in her favor could not affect the outcome of the appeal.

The order denying each of defendant's several motions is affirmed.

We concur: CONREY, P. J.; YORK, J.

99 Cal. App. 60

MIGALA v. DAKIN. (Civ. 3757.) ★

District Court of Appeal, Third District, California. May 20, 1929.

Rehearing Denied June 19, 1929. Hearing Denied by Supreme Court July 18, 1929.

1. Appeal and error ⚷1011(1)—Findings on conflicting evidence are conclusive.

Findings of trial court, where rendered on conflicting evidence, are conclusive on appeal.

2. Appeal and error ⚷901, 931(1)—All reasonable inferences are indulged in support of findings, and appellant attacking them has burden to show error.

All reasonable inferences should be indulged in support of trial court's findings, and burden is on appellant to show existence of error therein.

3. Appeal and error ⚷989—Power of reviewing court extends only to inquiry whether there is substantial evidence supporting findings attacked for insufficiency of evidence.

Where findings are attacked on appeal for insufficiency of evidence, power of reviewing court extends only to inquiry whether there is substantial evidence to support them.

★Rehearing denied. Hearing denied by Supreme Court.

4. Husband and wife 🔑281—Finding that property settlement for $260 between husband and wife in contemplation of divorce was fair held justified, under evidence of husband's previous payments and conduct of negotiations through attorneys.

Finding of trial court that property settlement between husband and wife for $260, entered into in contemplation of divorce, was just and was obtained without fraud or undue influence, *held* justified under evidence that negotiations were conducted through attorneys, and that husband was not present, and had not seen or communicated with his wife for over three years, and that husband had previously paid to wife considerable part of moneys accumulated by them during their marriage.

5. Husband and wife 🔑281—No presumption of confidential relations existed between husband and wife as to property settlement entered into pending divorce suits, after nearly five years' separation, where negotiations were conducted through attorneys (Civ. Code, §§ 158, 2235).

Where, at time of property settlement, husband and wife had been separated nearly five years, and each had brought actions for divorce, which were then pending, and negotiations for settlement were conducted through attorneys in absence of husband, no presumption of confidential relations existed, under Civ. Code, §§ 158, 2235, so as to place burden on husband to show that transaction was fair and just.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Keturah T. Migala, formerly Keturah Townsend Rickard, against Charlotte Rickard Dakin, administratrix of the estate of William E. Rickard, deceased, substituted for William E. Rickard. Judgment for defendant, and plaintiff appeals. Affirmed.

Smith & Breslin and Willard G. Cram, all of Los Angeles, for appellant.

Dana R. Weller and Frank R. Carrell, both of Los Angeles, for respondent.

PRESTON, Justice pro tem. Plaintiff, Keturah T. Migala, brought this action against her former husband, William E. Rickard, to rescind a property settlement made between them on or about May 22, 1922, upon the ground that she was induced to make the settlement through the fraud, deceit, misrepresentations, and undue influence of said William E. Rickard. William E. Rickard died before the case was tried, and Charlotte Rickard Dakin was appointed administratrix of his estate, and substituted as defendant in this action in the place and stead of William E. Rickard. The case was tried by the court, and judgment was entered in favor of the defendant. From this judgment, plaintiff, Keturah T. Migala, prosecutes this appeal.

[1-3] The court found that no fraud, deceit, misrepresentations, or undue influence were practiced upon appellant; in fact, the court found against the appellant upon all the material issues in the case. Appellant contends that the findings are not supported by sufficient evidence. The findings of the trial court upon conflicting evidence are conclusive, and all reasonable inferences are to be indulged in support of the findings. The burden is upon appellant, who claims error, to show its existence. The authorities supporting these well-known rules are legion, and we only need to cite the following: Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332; Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111. When the findings are attacked for insufficiency of the evidence to support them, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the findings of the trial court. Treadwell v. Nickel, supra.

[4] A careful examination of the entire record fully convinces us that all the material findings of the trial court are amply supported by the evidence. The pertinent facts are briefly these:

Appellant and William E. Rickard were married in the state of Ohio on February 10, 1897, and lived there as man and wife until 1915, when they came to California and settled in Los Angeles. Shortly after their arrival in California they purchased a house and lot in Hollywood, Cal., which is the property in question. The deed was made to William E. Rickard and appellant, whose name was then Keturah T. Rickard. This property was purchased by them upon the following terms: $300 cash, which was community property, a first mortgage given for $1,600, and a second mortgage for $1,100. In October, 1917, appellant, without any apparent reason, abandoned William E. Rickard, and never afterwards lived with him. In 1919 she saw him on several occasions in the city of Los Angeles, but from 1919 to May 22, 1922, when the settlement was made, she did not see or correspond with Rickard at all. At the time of the settlement she was residing in Reno, Nev., and had instituted an action for divorce there against Rickard on the ground of failure to provide, which action was pending at the time of the settlement. The summons and complaint in this action were served upon Rickard in the city of Los Angeles, and he employed an attorney and sent said attorney to Reno to effect a reconciliation, if possible; if not, to make a property settlement with appellant. This attorney visited Reno, and in the office of appellant's attorney in that city had an interview with appellant and her attorney.

Being unable to induce appellant to return to her husband, said attorney informed appellant and her attorney that he would recommend to Rickard that he pay to appellant the sum of $260, if appellant would relinquish all rights she might have in the property to Rickard. Said attorney further stated to appellant and her attorney that he did not know the condition or the value of the property, but stated it had probably doubled in value since its purchase by the Rickards. Thereupon appellant's attorney stated that he was in correspondence with lawyers in Los Angeles and was fully informed regarding the property in question. At this interview Rickard's attorney produced an affidavit made by Rickard, in which it was stated that Rickard had paid to appellant about $3,700 out of the $4,300 community property which they possessed when they arrived in the city of Los Angeles, and that appellant had already received more than her share of the property. Appellant was questioned by her attorney, in the presence of Rickard's attorney, as to the truth of these statements, and she admitted receiving some of the money, but not all of it, but failed to specify the amount that she had received. Rickard's attorney returned to Los Angeles, prepared a property settlement agreement and a quitclaim deed from appellant to William E. Rickard, and forwarded the same, together with $260, to appellant's attorney at Reno. The $260 was retained, and the contract and deed were executed by appellant in Reno, and returned by her attorney to Mr. Rickard's attorney in Los Angeles. At the time of the settlement there was pending in the superior court of Los Angeles county an action by William E. Rickard against appellant for divorce upon the ground of adultery, naming the man whom she afterwards married as corespondent, which fact was made known to appellant by Rickard's attorney.

[5] Appellant contends that this case comes within the general rules controlling the actions of persons occupying confidential relations, as defined by the title on trusts (sections 158, 2235, Civ. Code), and that the rule laid down in such cases as Locke Paddon v. Locke Paddon, 194 Cal. 80, 227 P. 715, is controlling in this case. We are unable to agree with this contention. At the time of the settlement appellant and Rickard had been separated nearly five years, and for three years had not seen or heard from each other. Each had brought actions for divorce, which cases were then pending. The negotiations for settlement between them were conducted through their attorneys. Rickard was not present, and had not seen or communicated with his wife for over three years, so there was no chance for personal influence to be exercised by him upon her. Under such circumstances, there was no presumption of confidential relations, such as was found to exist in the cases relied upon by appellant.

We think this case falls within the rule stated in such cases as Hensley v. Hensley, 179 Cal. 284, 183 P. 445, and Chadwick v. Chadwick (Cal. App.) 273 P. 86. In the case of Hensley v. Hensley, supra, the Supreme Court, in considering the subject of confidential relations and to the extent it affects negotiations between husband and wife, who have been living separate and apart for some time, used the following language, which is particularly appropriate in the case at bar: "The husband and wife had been living apart for years. That they were in hostility the suit for maintenance sufficiently proves. The transactions for settlement of her claim were conducted through her agents and his, so there was no chance for personal influence to be exercised by him upon her. There was no presumption of confidential relation such as was found to exist in cases like Brison v. Brison, 75 Cal. 525 [17 P. 689, 7 Am. St. Rep. 189], and Brison v. Brison, 90 Cal. 323 [27 P. 186]. The parties to the contract were dealing 'at arm's-length.'" See, also, Dimond v. Sanderson, 103 Cal. 97, 37 P. 189.

If, however, it be admitted, for the sake of argument, that a confidential relation existed between appellant and her husband at the time of the settlement, and that the burden was upon respondent to show that the transaction was fair and just, and fully understood by appellant, the evidence and finding show that respondent has fully met and sustained this burden. The court found that no fraud, concealment, or misrepresentations were resorted to in the settlement, and that no undue influence was exerted over appellant; that the value of all the property in question, at the time of the settlement, was of the reasonable value of $8,000, and was purchased in 1915 from funds acquired by them in the state of Ohio, partly from the separate funds of appellant, but the larger portion thereof having been acquired through their joint efforts; that appellant had received from William E. Rickard, prior and subsequent to her abandonment of him, $3,700 out of moneys accumulated by them during their marriage. The court also found that appellant never relied upon any statements made to her by Rickard's attorney, that Rickard himself made none, and that appellant executed both the agreement and quitclaim deed freely and voluntarily, under the advice of counsel, and after mature consideration and deliberation by her.

Appellant makes a multitude of objections to the findings, but the effect of all these objections is that the court should have found in favor of plaintiff, instead of defendant. This case, in its last analysis, presents only a question of fact, and the court has resolved all conflicts in favor of the defendant and against the plaintiff and appellant, and, as we have seen, there is sufficient evidence to support the findings; so the findings are conclusive upon this court. We see no necessity for a further discussion of the case.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

ROBERTS v. GRIFFITH CO. (Civ. 6709.)★

District Court of Appeal, First District, Division 1, California. May 18, 1929.

Rehearing Granted June 21, 1929.

1. Animals 🔑55—Defendant held not as matter of law free from negligence in permitting mules on streets without supervision, as respects injuries to deputy marshal.

Corporation engaged in doing street work, in connection with which it used some 20 mules, *held* not as matter of law free from negligence in permitting mules to run at large upon public streets of city without keeper or other supervision, in action against corporation by deputy marshal for injuries sustained in attempting to drive the mules from the streets, as against claim that there was no allegation by plaintiff that mules were vicious or of scienter on part of corporation.

2. Animals 🔑55—Alleged negligence in permitting mules at large held not as matter of law too remote as regards injuries to deputy marshal clearing streets (Pen. Code, § 370).

Alleged negligence of defendant corporation engaged in doing street work, in permitting some 20 mules to run at large on streets without supervision, could not be held as matter of law too remote to constitute proximate cause of injury to deputy marshal injured by mules while attempting to clear the streets and prevent obstruction claimed to constitute nuisance under Pen. Code, § 370.

3. Pleading 🔑225(1)—Plaintiff's failure to move to amend after sustaining demurrer, due to want of opportunity, did not prevent reversal of judgment.

Failure of plaintiff to ask leave to amend complaint *held* not to prevent reversal of judgment of dismissal entered after order sustaining demurrer, where judgment was entered without opportunity to plaintiff to move for leave to amend.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Clarence W. Roberts against the Griffith Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Brewton A. Hayne and Ernest M. Torchia, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondent.

DOOLING, Justice pro tem. From a judgment of dismissal, entered pursuant to an order sustaining defendant's demurrer to plaintiff's complaint without leave to amend, plaintiff appeals.

The complaint, in substance, alleges that Lynwood is a city of the sixth class and plaintiff was and is a deputy marshal thereof; that defendant was and is a corporation chiefly engaged in doing street work and in connection therewith owned more than 20 mules; that on October 24, 1926, at the hour of 10 o'clock p. m., defendant carelessly and negligently allowed about 20 of its mules to run at large, without a keeper or other supervision, upon the public streets of Lynwood, thereby creating a public nuisance by unlawfully obstructing the free passage and use in the customary manner of said streets in violation of section 370 of the Penal Code; that it thereupon became the duty of plaintiff, as a deputy marshal, to abate such nuisance and while engaged with two other deputy marshals in driving such mules from the streets plaintiff was thrown by such mules violently to the ground and his left leg broken, to his damage. The demurrer was both general and special.

[1] It is not contended by respondent that under the circumstances alleged in the complaint plaintiff was not acting in the performance of his duty in endeavoring to remove the mules from the city streets; but respondent does contend that no actionable negligence is pleaded, because there is no allegation that the mules were vicious or of scienter on the part of respondent, and that the negligence, if any, in permitting them at large was not the proximate cause of appellant's injuries. With these contentions we cannot agree. While there is a conflict of authority on the subject in the various jurisdictions, we are satisfied that the better rule is that it may be actionable negligence to permit horses or mules to run at large and untended on the streets of a municipality regardless of their vicious character or of scienter.

In Goodman v. Gay, 15 Pa. 188, 53 Am. Dec. 589, the court said:

"The owner has no right, either by law or custom, to turn a horse loose in the streets of a city. All men know that a horse which has been stabled and well fed will, when turned out, run and plunge, and become dangerous in the midst of people. If one man has the right to turn out his horse, every man has the same right; and, if the one-fourth of people who own horses in a city would turn them out on the streets, not only the women and children, but even the men would have to abandon them.

"There is no reported case in which it was held that a person who turned out his horse in the streets of London or New York was not answerable, if he run over a child or a woman, unless the owner knew, when he turned him out, that he was vicious and prone to kick. But, I may say, that all horses are, when turned loose, more or less dangerous in confined streets; and all men know this. The gist of the action is, that the defendant did an act, not sanctioned by law nor custom, from which he must have known that injury might result."

To the same effect are Dickson v. McCoy, 39 N. Y. 400; Hardiman v. Wholley, 172

★Rehearing granted. 280 P. 199.

Mass. 411, 52 N. E. 518, 70 Am. St. Rep. 292; Baldwin v. Ensign, 49 Conn. 113, 44 Am. Rep. 205; Doherty v. Sweetser, 82 Hun, 556, 31 N. Y. S. 649; Wasmuth v. Butler, 86 Hun, 1, 33 N. Y. S. 108; Stern v. Hoffman Brewing Co., 26 Misc. Rep. 794, 56 N. Y. S. 188; Lyons v. Merrick, 105 Mass. 71; Drew v. Gross, 112 Ohio St. 485, 147 N. E. 757.

Respondent relies on the English case of Cox v. Burbridge, 13 C. B. (N. S.) 431, 143 Eng. Rep. 171, and the English cases following it, and the Indiana case, Klenberg v. Russell, 125 Ind. 531, 25 N. E. 596. The English cases hold that it is not actionable negligence to permit domestic animals to run at large on country roads. It does not at all follow that the same rule should apply to the streets within an incorporated municipality. Klenberg v. Russell extends the same rule to city streets. We refuse to follow the rule blindly in such fashion. It may well be that, in the absence of statutory restrictions, it is not unreasonable to permit domestic animals to run on country roads. Upon that question we do not need to express an opinion. It would be intolerable to permit such animals as horses, mules, and cattle to roam untended and untethered on the public streets of incorporated cities and towns. While the precise question has not come before our appellate courts, the early case of Ficken v. Jones, 28 Cal. 618, is instructive. In that case plaintiff was injured by a steer which was being driven with other cattle through Brannan street in San Francisco. There was no evidence that the cattle were wild, untamed, or vicious, or that defendants had cause to believe they were so, but the court held that defendants were nevertheless bound to exercise care in driving them for the safety of people on the streets, and would be liable for failure to do so, which resulted in injury to person, saying: "The driving of cattle through the streets of a city is attended with danger to persons who are of right there, and who can justly demand that the care, diligence and skill essential to their safety shall be commensurate with the necessities of the case." If the driving of cattle through city streets is attended with danger to persons, the permitting of them to wander untended is of necessity fraught with greater peril.

[2] The real question in this case is whether the defendant could reasonably foresee that by allowing a band of 20 mules to be loose upon the streets an injury such as occurred to defendant might ensue. To that question there is only one reasonable answer. Any one who has had experience with animals in herds or bands, however docile they may ordinarily be, must know the danger attendant upon frightening, alarming, or startling them, and must equally know that it is impossible to foretell what trifle may throw them into a stampede.

We conclude that the complaint stated a cause of action as against the general demurrer, and it was error not to grant leave to amend.

[3] Respondent urges, however, that the judgment should not be reversed because certain grounds of special demurrer, particularly as to the failure to specify the manner in which the accident to plaintiff occurred, were well taken, and plaintiff did not ask leave to amend. The record shows that the order sustaining the demurrer without leave to amend was made on March 18, 1927, and judgment of dismissal was signed and filed on March 22, four days later. There is nothing to show that plaintiff had notice of the order sustaining demurrer or any opportunity to move for leave to amend before the judgment was entered. The case falls within the rule laid down in Metzger v. Vestal, 76 Cal. App. 409, 418, 244 P. 942, 945: "The rule that a party, against whom an order has been entered sustaining a demurrer without leave to amend, must ask leave to amend in order to have the ruling reviewed on appeal presupposes that the complaining party had an opportunity to ask such leave prior to the time of entry of judgment on the order. To hold otherwise would be to carry a technical rule to the extreme of absurdity."

Judgment reversed, with directions to the trial court to grant plaintiff leave to file an amended complaint.

We concur: TYLER, P. J.; KNIGHT, J.

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99 Cal. App. 66

RINGLAND et ux. v. HOCKENSMITH et al. (Civ. 3781.)

District Court of Appeal, Third District, California. May 20, 1929.

1. Libel and slander ⚿100(8)—Policeman's testimony that defendant said plaintiffs were handling booze or dope held not variance from allegation as to saying, if he watched their premises, he would find they were peddling whisky or dope.

In action for slander, policeman's testimony that defendant told him plaintiffs were either handling booze or dope *held* not a variance from allegation of complaint that she told him that, if he watched plaintiffs' premises, he would find they were peddling whisky or dope; such testimony sufficiently conforming with rule requiring that substance of words alleged be proved.

2. Evidence ⚿317(1)—Admission of testimony as to conversations outside defendant's presence concerning latter's accusations against plaintiffs held erroneous.

In action for slander, court erred in admitting testimony of plaintiffs' landlady and her agent as to conversations between them and with plaintiffs and a policeman out of defendant's presence concerning accusations alleged to have been made to such policeman against plaintiffs by defendant.

3. Appeal and error 🔑1170(7)—Admission of hearsay testimony as to conversations concerning defendant's disputed statements to policeman about plaintiffs held reversible error (Const. art. 6, § 4½).

Admission of hearsay testimony of plaintiffs' landlady and her agent in slander suit as to conversations between themselves and with plaintiffs and policeman concerning accusations alleged to have been made to latter by defendant *held* reversible error, in view of conflicting testimony of defendant and policeman as to what was said to him; Const. art. 6, § 4½, being inapplicable.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by David L. Ringland and wife against Elsie Hockensmith and husband. Judgment for plaintiffs, and defendants appeal. Reversed.

Sherman & Sherman, of Los Angeles, for appellants.

Loraine B. Beyer, of Los Angeles, for respondents.

PLUMMER, J. This appeal presents for our consideration an action wherein it is alleged in the complaint that the defendant Elsie Hockensmith, on or about the 26th day of May, 1925, spoke to one L. Chalfant, of and concerning the plaintiffs, the following words, to wit: "If you will watch the premises at 730 Spence street you will find that these people are peddling whisky or peddling dope." The plaintiffs in their complaint allege that, by reason of the use of said words by the said Elsie Hockensmith, of and concerning them, they were damaged in the sum of $25,000. Upon the trial of the action, judgment was awarded in favor of the plaintiffs as against the defendant Elsie Hockensmith in the sum of $1,000. From this judgment the defendants appeal.

While several grounds for reversal are alleged, the consideration of two of them will sufficiently dispose of all the issues here presented, to wit: First, as to whether the proof substantially corresponds with the allegations of the complaint; and, second, the alleged errors of the court in the admission of testimony. The record shows that the plaintiffs and defendants occupied apartments in a certain bungalow court in the city of Los Angeles; that on the 26th day of May, 1925, the defendant Elsie Hockensmith called to the apartment occupied by the defendants a police officer by the name of L. R. Chalfant, and complained to him of the use of an incinerator by the plaintiffs at No. 730 Spence street, and also complained to said Chalfant of the keeping of a barking dog by the said plaintiffs at their premises, which very much annoyed herself and her husband.

The testimony of L. R. Chalfant is in substance as follows: That he went to the residence of the defendants, pursuant to a call, to investigate the use of an incinerator by the plaintiffs; that, after a conversation about the incinerator, he stepped into one of the rooms occupied by the defendants; that the said Elsie Hockensmith invited him to sit down, and then said, if I would keep my eyes open I would be able to see something. I said, "What do you mean?" She said, "These people over there are either handling booze or dope because they get up along about two to four o'clock in the morning and leave here and I don't know what they are doing unless they are handling that." It appears that the names of the plaintiffs were not mentioned, but the following question and answer indicates to whom reference was made. "Question by the Court: Did she say in her conversation that it was the people in the house where the incinerator was? A. Yes." Upon cross-examination the witness further testified: "She said, 'If you will watch those people you will see them; I think they are peddling dope or booze.'"

[1, 2] Without setting forth further of the testimony of this witness, which is in line with what we have just quoted, it appears to us to sufficiently conform with the rule which requires the substance of the words alleged to be proved; not merely that other words which correspond in substance, but a sufficient number of words alleged, as is stated in the case of Fleet v. Tichenor, 156 Cal. 343, 104 P. 458, 34 L. R. A. (N. S.) 323, to wit: "In an action for slander, where the defendant is charged with the speaking of certain specified slanderous words, it is sufficient to prove the substance of the precise words alleged. By this is meant, not that it is sufficient to show the speaking of other words which would produce an impression similar to that which the words alleged would produce, but that the words alleged, or enough of them to amount to a charge of the particular offense alleged to have been imputed, must be substantially proved." See, also, 16 Cal. Jur. 97, § 67. Without further elaboration we hold that the objection of variance is not well taken. That the court erred in the admission of testimony as alleged by the appellants appears to be clearly and distinctly established. Over the repeated objections of the defendants, which were followed by timely motions to strike out, which were denied, the court permitted the following testimony to be introduced: A witness called for the plaintiff, by the name of Jack Gaines, who appears to have been acting for a certain Mrs. Haley, who was the owner of the premises occupied by the plaintiffs, was permitted to testify, as to matters which occurred out of the presence of the defendants, and which was entirely hearsay

testimony, as follows: "On May 26, 1925, I resided at 720 Spence street, and am acquainted with the plaintiffs and defendants in this case. I am a newspaper man, and on the 26th day of May, 1926, had a conversation with Mr. Ringland. Mr. Ringland, his wife and myself were present. Mrs. Haley phoned me at my office and said they were having a little trouble there, that there had been a police officer over there, and advised me that one of our tenants on the property was indulging in the sale of narcotics and liquor, and asked if I would leave my office and come right home and handle the matter for her. I arrived home and Mrs. Haley told me that Officer Chalfant had been called from the Boyle Heights division and that Mrs. Hockensmith had advised this officer by indicating the Ringland home, where they had been living, they had been selling narcotics and booze, and that if he would keep his eyes open he would learn that they were engaged in that business. At that time I said to Mrs. Haley. 'If you own this property you better ask the people for your property.' I said to Mr. and Mrs. Ringland when I went over there for Mrs. Haley, 'You have been accused of peddling booze and dope and if you are engaged in that kind of traffic, we do not allow that on the property and would like to have the property now.' Mr. Ringland asked the source of my information. I told him that Officer Chalfant had advised Mrs. Haley that he had been in discussion of this matter with one of our neighbors and that Mrs. Hockensmith had made the accusation."

The witness Eva P. Haley, called for the plaintiff, testified as follows: "I reside at 720 Spence street. I first met Officer Chalfant when he came to my house on May 26, 1925, in the forenoon, and had a conversation with him at that time. My daughter, Mrs. Fuller, who lives with me, was present. Officer Chalfant came to my house and asked me if I knew the business of Mr. Ringland who lived at 730. I told him that he was a driver for the Crescent Creamery. He said, 'I have been informed that he is selling booze and peddling dope.' I asked him where he got his information. He said, 'Mrs. Hockensmith, who lives in the house directly back of you.' Mrs. Fuller asked him some questions. She asked him if that was not libelous." Question by the Court: "Who asked you? A. My daughter, Mrs. Fuller, asked Officer Chalfant at the time that he was there in our house and had told me that he had been informed that these people were selling booze and peddling dope, and my daughter asked me if that was not a slanderous statement, unless they were doing—unless they were peddling booze. He said, 'If it were my family I should certainly consider it so.'" Other hearsay testimony was also introduced along somewhat similar lines.

[3] That this testimony was inadmissible we think requires no argument nor much citation of authority. In 37 C. J. p. 151, on the subject of libel and slander, the rule is stated in relation to the admission of evidence in slander cases as follows: "The general rules in regard to presumptions and burden of proof apply in prosecutions for libel or slander. The burden is upon the prosecution to show every fact essential to the commission of the crime. The general rules governing the admissibility of evidence are applicable in prosecutions for libel or slander. The evidence must be relevant, and must not come within the prohibition of the hearsay rule," —citing a number of authorities. To the same effect are the cases of People v. Thornton, 74 Cal. 482, 16 P. 244; Morris v. Lachman, 68 Cal. 109, 8 P. 799; Carpenter v. Ashley, 148 Cal. 422, 83 P. 444, 7 Ann. Cas. 601. In the Carpenter Case it was held that newspaper recitals of the alleged slanderous words were properly excluded under the rules which we are discussing that what others may have said about what the defendant in the slander case is alleged to have said is inadmissible. That there was a sharp conflict between what the officer, called as a witness for the plaintiffs, recited as the conversation he had with the defendant Elsie Hockensmith, and what said defendant claims was the conversation, appears from the following excerpt taken from her testimony:

After stating that the officer had been called on account of the burning of refuse in the incinerator referred to, this witness testified that there was this further conversation: "Yes," I said, "those dogs—this dog annoys my husband; he is a working-man and has to have his rest, and the other people in the neighborhood don't care whether they have rest or not." I said, "My husband has to have his sleep." I said, "There are some people around here that don't work, and the dogs annoy us." He said, "What do you mean, 'not work?'" I said "Well, we have to have our rest." So then he said, "Don't work for a living, hard?" I said, "I don't know; they don't act like it; they don't seem to get their rest." He said, "What do you mean, they don't work hard, they bootleg or peddle dope?" I said, "I don't know."

This witness claimed that she made no further reference to bootlegging or peddling of dope by the plaintiffs, and did not use the words testified to by the witness Chalfant. We might further add that the cross-examination of the witness Chalfant, which we have not set forth herein, indicated that he was not quite definite as to the words alleged to have been used by the defendant Elsie Hockensmith, but, assuming that the exact words or the substance of them were testified to by him, the testimony of the two witnesses referred to is in direct conflict, and, under such circumstances, section 4½ of article 6 of the Constitution cannot be held applicable. The record shows that the court participated in bringing out the objectionable testimony, overruled all of the defendants' objections thereto, and denied their motions to strike it out. Under such circumstances we cannot conclude that the hearsay testimony was not given consideration by the court in arriving at its conclusions.

As the cause must go back for a new trial, it is unnecessary to consider the question of the alleged excess of damages.

The judgment is reversed.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 1

MIRATTI v. BANCA POPOLARE FUGAZI et al. (Civ. 3774.)

District Court of Appeal, Third District, California. May 15, 1929.

1. Venue ⟹8—Complaint held to support order denying change of venue as showing payment of money because of resident defendant's fraudulent statements (Civ. Code, §§ 1570, subd. 3, 1572, subds. 1, 4, 5).

Complaint in action by bank teller and his mother against bank and officers thereof to recover amount of note, executed by plaintiffs for shortage of cash intrusted to teller and paid by his mother, *held* to support order denying motion for change of place of trial as showing on its face entire want of consideration for such payment and payment thereof because of resident defendant's untrue statements, denounced as fraudulent by Civ. Code, § 1572, subds. 1, 4, 5, and threats of injury to teller's reputation in violation of section 1570, subd. 3.

2. Appeal and error ⟹863—Sufficiency of complaint and question of limitations are immaterial on appeal from order denying change of venue, if defects are curable by amendment.

Whether complaint is good as against special demurrer, facts alleged are defectively stated, or cause of action is barred by statute of limitations, cannot be considered on appeal from order denying motion for change of place of trial, if defects can be cured by amendment.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Frank Miratti, Jr., and another against the Banca Popolare Fugazi and others. From an order denying their motion for a change of place of trial, certain defendants appeal. Affirmed.

E. W. Squier, of Santa Barbara, and R. T. Harding, of San Francisco, for appellants.

Scherrer & McCarty, of Los Angeles, and Heaney, Price & Postel, of Santa Barbara (Charles Robert McCarty, of Los Angeles, of counsel), for respondents.

PLUMMER, J. This cause is before us upon an appeal by the defendants Banca Popolare Fugazi, F. N. Belgrano, Sr., and F. N. Belgrano, Jr., from an order of the superior court in and for the county of Santa Barbara, denying their motion for a change of place of trial of said action to the city and county of San Francisco. The grounds of their motion are that no cause of action is stated in the complaint against the defendant U. Dardi, the only defendant residing in Santa Barbara county, and that the other defendants are residents of the city and county of San Francisco, etc. The motion appears to be supported by proper notices and affidavits. The argument of appellants is addressed to the point that the complaint states no cause of action against any of the defendants, and, therefore, the fact that U. Dardi is a resident of the county in which the action is brought must be disregarded. The complaint alleges the residence of U. Dardi in the county of Santa Barbara; that Pasqualina Miratti is the mother of the plaintiff Frank Miratti, Jr.; that both of the plaintiffs are residents of the county of Santa Barbara; that the defendant Banca Popolare Fugazi was and is a banking corporation duly organized under the laws of the state of California, and owned and operated the bank and branches thereof throughout the state; that the headquarters of said bank was and is in the city and county of San Francisco; and that said defendant owned and operated a branch bank thereof in the city and county of Santa Barbara.

The complaint then sets forth: "That on or about the 10th day of October, 1921, the plaintiff Frank Miratti, Jr., was an employee and assistant cashier of the defendant bank, and was employed in such capacity at the branch bank of said defendant in the City and County of Santa Barbara, and had been such for a period of approximately four years prior to the date just mentioned; that the defendant U. Dardi was an employee of the defendant-bank, and was employed by the bank in the capacity of manager of the branch bank of the defendant-bank owned and operated by it in the City and County of Santa Barbara; that on or about October 10, 1921, the plaintiff Frank Miratti, Jr., was employed by the defendant to act as teller at one of its paying and receiving windows; that one Emil Toscanini was also an employee and teller of the defendant-bank, in charge of another and adjoining paying and receiving window, and was the head teller of said bank and superior in authority to the plaintiff Frank Miratti, Jr., and was in charge of all the cash of said branch bank; that on the 10th day of October, 1921, said Emil Toscanini, pursuant to the practice and custom of said bank, turned over and delivered to the plaintiff Frank Miratti, Jr., at the paying and receiving window occupied by the said Frank Miratti, Jr., the sum of $2240.00, in lawful money of the United States, and that the said Frank Miratti, Jr., thereupon placed said money in the cash drawer in the cage at the window where said Frank Miratti, Jr., was acting as receiving and paying teller, and as provided by the defendant-bank for such purpose; that at the conclusion of the day's business, the plaintiff Frank Miratti, Jr., checked over his cash and discovered that he was short to the extent of $2240.00; that the plaintiff Frank Miratti, Jr., then and there so informed the said Emil Toscanini and delivered to said Emil Toscanini all the cash on hand in his cage, and the said Toscanini checked the same with the plaintiff Frank Miratti, Jr., but the said shortage still remained; that on the opening of said branch bank on the following morning the said Toscanini and the said plaintiff rechecked said cash, and also checked the entire cash of said branch bank, but the shortage still remained; that thereupon the plaintiff Frank Miratti, Jr., and the said Emil Toscanini informed U. Dardi, the manager of said bank, of said shortage; that the said U. Dardi then and there communicated with the head office of said bank in San Francisco, and informed them of such shortage; that thereafter, and on or about the 12th day of October, 1921, the defendants in this action informed the plaintiff Frank Miratti, Jr., that the said Frank Miratti, Jr., was under fidelity bond and had been bonded with such a bond by a Bonding Company; that they did not believe that said plaintiff Frank Miratti, Jr., had appropriated or committed any wrongful act in or about the loss or shortage of said sum of $2240.00, or any part thereof; but that for the protection of said bank it would be necessary for the plaintiff Frank Miratti, Jr., to pay the said bank the sum of $2240.00, and that unless the said plaintiff Frank Miratti, Jr., did pay the same to said bank, it would be necessary for them to, and they would turn the entire matter over to, and refer the same to the said Bonding Company for refund; that the said defendants then and there further stated to said Frank Miratti, Jr., that in the event the said matter was turned over to, or referred to the Bonding Company, that the Bonding Company would bring great disgrace upon the plaintiff Frank Miratti, Jr.; that the character and reputation of the plaintiff Frank Miratti, Jr., for honesty and integrity would be utterly ruined; that the defendant Banca Popolare Fugazi would be compelled to immediately discharge the plaintiff Frank Miratti, Jr., and that the plaintiff Frank Miratti, Jr., would thereafter be unable to hold any position of honor or trust in any place whatever; that he would be so disgraced in his own community that he would be forced to leave Santa Barbara where he was born and had been raised and where his family had resided ever since, and that the said plaintiff Frank Miratti, Jr., would, in addition thereto, have to repay to the Bonding Company the said sum of $2240.00; the said defendants at the same time and place, stated to the said plaintiff Frank Miratti, Jr., that if the plaintiff Frank Miratti, Jr., forthwith paid said sum of $2240.00 to the defendant Banca Popolare Fugazi, that the plaintiff Frank Miratti, Jr., would not suffer said misfortune or disgrace; he would not be discharged, and the matter would not be turned over to the Bonding Company, but would be kept quiet, and the said plaintiff could retain his position with the bank, and that said plaintiff was in line for promotion; that the defendants, at the same time and place, further stated to the plaintiff Frank Miratti, Jr., that if he, the said plaintiff Frank Miratti, Jr., paid to the said bank the said sum of $2240.00, the defendants would employ detectives, without cost to the said plaintiff Frank Miratti, Jr., and would make an exhaustive investigation of said matter and endeavor to locate and recover the said sum of $2240.00, and that the defendants were convinced that the same would be recovered; that thereafter, and on or about the 13th day of October, 1921, the defendants, at and within the County of Santa Barbara, repeated the aforesaid statements and representations to the plaintiff Pasqualina Miratti."

The complaint then goes on to allege that the plaintiff Frank Miratti, Jr., and his mother, the plaintiff Pasqualina Miratti, were greatly agitated, placed in great fear, etc., and, by reason of the statement just herein referred to, executed and delivered to the defendant bank a promissory note in the sum of $2,240, and thereafter paid to said bank the said sum of $2,240. The complaint then goes on to allege that the plaintiff Frank Miratti, Jr., was not under any bond whatsoever; that the defendants, at the time they made the statements herein referred to, knew that the plaintiff Frank Miratti, Jr., was not under any bond whatsoever, and that the bank, of which the plaintiff was an employee, had not taken out any bond as alleged by the defendants; that the plaintiffs had no knowledge of the falsity of the defendants' statements. The complaint further alleges that the defendants knew, at the time they were making the statements, that the same were false, and that each and every of the statements herein referred to were untrue, and that the statements were made for the purpose of intimidating the plaintiffs and causing them to pay to the bank the said sum of $2,240; that the statements made by the defendants relative to employing detectives to ascertain what had become of the money, and secure its repayment to the bank, were made without any intention whatever, on the part of the defendants to perform, and that said defendants had no such intentions at the time said statements were made, but were falsely made for the purpose of inducing the plaintiffs to execute and deliver to the defendants a promissory note for said sum of $2,240, and to thereafter pay the same. The complaint then further alleges that the falsity of the statements made by the defendants was not discovered until after the said $2,240 had been paid to said bank, to wit, on or about the month of April, 1926. The complaint asks for the recovery of said sum of $2,240, with 7 per cent. interest, and also for exemplary damages.

[1] The appellants in their presentation of this cause have presented authorities having to do with circumstances involving the embezzlement of funds where the embezzlement has been established as a matter of fact or admitted, and promissory notes given to cover the amount of funds embezzled, and our attention is called to a number of cases where statements that the parties whose funds have been embezzled would take legal proceedings for the recovery of the loss so incurred and where statements of that kind have been held insufficient to support an action for recovery. There seems to be no reason why we should review the authorities dealing with conditions such as we have just stated, for the simple reason that those conditions are not presented to us upon the pleadings upon which the trial court based its order denying the defendants' motion for a change of place of trial. Whether the plaintiff Frank Miratti, Jr., was or was not liable to the bank in the sum of $2,240 or any other sum is really immaterial, unless such liability is an admitted fact or must necessarily be concluded from the complaint itself. We are not dealing with the facts, but only with the pleadings in determining this question. We think it clear that there is nothing in the complaint which would justify the court in finding as a fact that the plaintiff Frank Miratti, Jr., was, at the time of the giving of the promissory note by himself and his mother to the bank, or at the time of paying the sum of $2,240 to the bank, liable to the bank in any sum whatever. So far as the complaint is concerned, it appears therefrom that the defendants entertained no such idea, but that it would simply be better for the reputation of Frank Miratti, Jr., if said sum of money were paid by him and his mother to the bank. This presents a situation which we think supports the ruling of the trial court in denying the motion for a change of place of trial, and that is, the complaint upon its face shows an entire want of consideration for the payment of any money by the plaintiff Pasqualina Miratti to the defendants. It also shows that the plaintiff Pasqualina Miratti was induced and caused to sign the note and pay the money by reason of the alleged fraudulent and untruthful statements of the defendants. While the complaint itself does not in so many words charge fraudulent acts, it does charge statements as untrue and made for the purpose of deceiving the plaintiffs which, especially as to the plaintiff Pasqualina Miratti, are denounced as fraudulent by section 1572 of the Civil Code. To constitute a fraud within that section to induce one to enter into a contract to pay money, subdivision 1 of the section provides: "The suggestion, as a fact, of that which is not true, by one who does not believe it to be true," is sufficient to constitute fraud. Likewise, subdivision 4: "A promise made without any intention of performing it" is sufficient to constitute a fraud. And subdivision 5: "Any other act fitted to deceive." We may also call attention to section 1570 of the same code, in so far as it applies to the plaintiff Pasqualina Miratti, which shows that the allegations of the complaint are sufficient as to menace, to wit, subdivision 3 of the section relating to injury to the character of such person. While there is no allegation in the complaint as to injury to the character of the plaintiff Pasqualina Miratti, there are allegations in the complaint as to the statements of the defendants relative to the threatened injury to the character and reputation of the plaintiff Frank Miratti, Jr., the son of the plaintiff Pasqualina Miratti. We state this as showing that the plaintiff Pasqualina Miratti was induced to sign the note and make payment to the bank, as alleged, without any valid consideration, and that a cause of action exists on her part for the recovery of the money from the defendants, and also for damages, if any, on account of the fraudulent acts of the defendant, U. Dardi, the manager of the bank.

[2] That the complaint may not be good as against special demurrer is entirely immaterial. Likewise, this is true if it be admitted that the facts attempted to be alleged are defectively stated. It may also be true that the plaintiffs' cause of action is barred by the statute of limitations. These are questions which can only be considered upon their presentation to the court by way of demurrers on the part of the defendants. Thus, as said in the case of McClung v. Watt, 190 Cal. 155, 211 P. 17: "Allegations which do no more than shadow forth the semblance of a cause of action are proof against assault upon the ground that they are sham and frivolous." And further: "It is enough upon the hearing and determination of a motion for a change of place of trial by an individual defendant in an action brought against him and a corporation in the county of the latter's residence, that the cause of action purported to be stated against the corporation was apparently pleaded in good faith and is not, prima facie, so glaringly and vitally defective as to be beyond correction by amendment." (We have quoted from the syllabus.) Thus, it may be admitted in the present case that the complaint is defective; that the trial court would be justified in sustaining a

demurrer directed to certain defects therein; but if it appears that the pleading is such that the defects can be cured by amendment, then and in that case the motion for a change of place of trial was properly denied.

We think, with the respondents, that the case which we have just cited is conclusive, and that the motion for a change of venue was properly denied, and the order is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 117

PEOPLE v. BROWN et al. (Cr. 1532.)★

District Court of Appeal, First District, Division 2, California. May 23, 1929.

Hearing Denied by Supreme Court June 20, 1929.

1. Conspiracy ⚷47—Evidence held to sustain conviction for conspiracy to rob.

Evidence warranting conviction of defendants of joint robbery *held* sufficient to sustain conviction of conspiracy to commit robbery.

2. Conspiracy ⚷23—Criminal conspiracy is criminal agreement.

A criminal conspiracy is a criminal agreement.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Bertha Brown and another were convicted of conspiracy to commit robbery, and they appeal. Affirmed.

Leo A. Sullivan and J. L. Royle, both of Oakland, for appellants.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendants, charging them with robbery, and in the second count charging them with conspiracy to commit robbery. They pleaded not guilty. Both were tried together before the court sitting with a jury. The jury found each defendant not guilty of robbery, and it found each defendant guilty of conspiracy to commit robbery. Both defendants have appealed.

[1] In presenting their appeal the defendants assert that the evidence introduced was not sufficient to prove that a conspiracy was formed. We think that the point is not well founded and that the evidence was abundantly sufficient to prove that a conspiracy was formed.

Prior to December 8, 1928, the alleged date of the offense, the two defendants had been living together as man and wife. On the evening of that day and prior to the appearance of the complaining witnesses the two defendants had been together for several hours. On that same evening the complaining witnesses, Peter Olson and Olaf Jurgensen, two brothers, registered at the San Pablo Hotel, in Oakland. A few minutes later they went out on the street to find an eating place. On approaching a restaurant they found it was locked, and, as they were about to turn away, Bertha Brown turned to them and asked, "What do you want?" At the time that she spoke to them she stood by the side of an automobile that was parked near the sidewalk, and was talking to a man who was seated in the automobile. The complaining witnesses answered Bertha by saying they wanted something to eat. Thereupon she remarked that she would assist them. They followed her to a restaurant, but it was closed. She then proposed that they get a drink. She asked them their names, and, on being told, she took them to a bootlegger's, introduced them, and they had some drinks. Olson took one drink, but Jurgensen and Bertha took several. Bertha asked the complaining witnesses to go with her to a private place, which she said she could get into; however, it was finally agreed that they would all return to room 514 of the San Pablo Hotel. The two complaining witnesses were taken up to the room by the night clerk, who operated the elevator. Bertha remained outside for the time being and later went up the stairs and entered room 514.

While the night clerk was taking the complaining witnesses up in the elevator the defendant Hoffer entered the house. He looked at the register and then went up the stairway. When the clerk heard that Hoffer had entered he went upstairs and found Hoffer standing alone outside of room 514. At that time no one else was present in the hallway. On being asked what he was doing there, Hoffer ran. Later he was found on the third floor in one of the stalls with the door closed. On being found he came out, went downstairs, registered under the name of "Williams," was assigned to room 428, went to his room, left his hat there, and then walked up the stairs and met Olson in the hall. As stated, there is hearsay evidence in the record that two taxi drivers saw Hoffer enter, and that they told the clerk. Whether they saw the defendant Brown enter, whether both defendants entered together or separately, and, if separately, which entered first, there is no evidence.

After Bertha entered room 514 Olson stepped out, leaving Jurgensen and Bertha alone. While the two were in the room Bertha proposed a drink and produced a flask and two glasses. She gave Jurgensen a good-sized drink, and from that time, as Jurgensen testified, everything seemed to go black, hazy. When he took the drink the witness had in his trouser pockets between $65 and $70.

★Hearing denied by Supreme Court.

When he came to, his pockets were turned inside out and he had no money.

When Olson left the room he went into the hallway, and soon afterwards he left the hall for a short period of time and then returned and took a seat near the stairway. After he had been seated there a while the defendant Hoffer came up the stairs and asked him if there was a woman in room 514. Olson said there was. Hoffer asked him if he would tell her when she came out to come to his room, 428. In a few minutes Olson knocked on the door. Bertha called, "Come in." He opened the door wide, and Bertha was standing in the middle of the floor, looking toward the door. As Olson entered the room Bertha pointed toward the door and said, "What do you mean by talking to my husband?" Hoffer was then standing in the doorway. Taking Bertha by the arm Olson said, "If that is your husband, you had better go." At about that time Hoffer struck Jurgensen squarely in the face and knocked him down and out. He then commenced striking Olson. While the two men were fighting Bertha picked up the crockery cuspidor and, from behind, hit Olson two severe blows on the head. Realizing that he was in a losing fight, Olson dropped to the floor, with his head under the bed, and pretended to be unconscious. Almost immediately he felt a hand pulling his purse from his hip pocket. The purse contained about $45. Bertha then said: "Let's get out of here before the police come." Together the two defendants left the hallway. They walked to the lower floor together, Hoffer carrying Bertha's coat on his arm and having no hat on his head. At once they attempted to leave the house. When they got outside they attempted to flee, but both were stopped and arrested by the police. Two days later Hoffer appeared at the hotel and inquired for his hat. The clerk produced the hat, and then followed a conversation in which Hoffer stated to the clerk that he would pay $75 if the clerk would take $40 to the police and tell them it was found in the room when the room was being cleaned up.

[2] A criminal conspiracy is a criminal agreement. People v. Flanagan, 65 Cal. App. 268, 275, 223 P. 1014. The Code fixes no time at which the conspiracy must be entered into. People v. Holmes, 118 Cal. 444, 460, 50 P. 675. Notwithstanding the verdict of the jury the facts are not debatable that the defendants actually robbed Olson and Jurgensen. The facts delineated were sufficient on which the jury might, and doubtlessly did, base the inference that after Olson and Jurgensen left the defendant Brown and went up in the elevator the defendant Brown communicated with Hoffer and either advised him of the names of their victims or the number of the room and that she was going to their room, and that they then agreed to do what they later did do.

The judgment and order appealed from are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

VAIL v. JONES et al. (Civ. 6209.) ★

District Court of Appeal, Second District, Division 1, California. May 14, 1929.

As Modified on Denial of Rehearing June 13, 1929. Hearing Granted by Supreme Court July 8, 1929.

1. Appeal and error ⚷914(1)—Presumption of due service must be disregarded, where evidence is insufficient to support recital thereof in judgment (Code Civ. Proc., §§ 411, 415, 670).

Where record purports to disclose entire evidence, on which recital in judgment that defendant was served with summons was based, and such evidence is insufficient to support finding, ordinary presumption of service in accordance with Code Civ. Proc., §§ 411, 415, 670, must be disregarded, though fact that service was not made by constable is not conclusive that it was not made by another.

2. Quieting title ⚷12(4)—Rule that equitable owner out of possession cannot quiet title against legal owner in possession is inapplicable, where complaint alleges that defendants' asserted title was fraudulently obtained through void judgment.

General rule that complaint to quiet title cannot be maintained by equitable owner out of possession as against legal owner in possession is inapplicable, where complaint alleges that defendants' asserted legal title was fraudulently obtained through void judgment in another action and that they have no legal or equitable title; complaint not admitting any title in defendants.

3. Appeal and error ⚷1039(2)—Defendants held not prejudiced by failure of complaint to state essential facts supporting allegations that judgment, sought to be vacated, was founded on false affidavit of service of summons (Code Civ. Proc., §§ 426, 452).

Where defendants fully understood issue whether judgment, sought to be vacated, was founded on false affidavit of service of summons and copy of complaint, and exhaustively presented evidence relating thereto, they were not prejudiced by failure of complaint to state essential facts as basis therefor, in view of Code Civ. Proc., §§ 426, 452, requiring plaintiff to state case in ordinary and concise language, which must be liberally construed.

4. Judgment ⚷336, 403—Relief against judgment for failure to serve summons held properly sought by suit in equity to vacate judgment, rather than motion (Code Civ. Proc. § 473).

Relief against judgment for failure to serve complaint and copy of summons on defendant

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★Hearing granted. 287 P. 99.

held properly sought by suit in equity to vacate judgment, rather than by motion under Code Civ. Proc., § 473.

5. Judgment 🔑456(1)—Suit to vacate judgment quieting title over year after date thereof held not barred.

Suit to vacate judgment quieting title in defendants, and to quiet title in plaintiff, *held* not barred by lapse of more than one year between date of judgment and commencement of action.

6. Appeal and error 🔑1170(3)—That complaint in suit to vacate judgment for want of service did not allege plaintiff's ability to prove facts alleged held not prejudicial to defendants (Const. art. 6, § 4½).

That complaint in suit to vacate judgment quieting title for failure to serve plaintiff's intestate with summons and copy of complaint did not allege plaintiff's ability to prove facts alleged, or means for establishment thereof, *held* not prejudicial to defendants, as required by Const. art. 6, § 4½, to authorize reversal of judgment, where there was no claim that they were misled and case went to trial largely on such issue; action being founded on alleged want of jurisdiction to render judgment, rather than actual fraud.

7. Judgment 🔑452—Administrator may sue to vacate judgment against intestate for failure to serve latter with summons and copy of complaint.

Administrator may sue to vacate judgment against his intestate for failure to serve latter with summons and copy of complaint as against contention that such action will not lie on behalf of successor in interest of person against whom judgment was rendered.

8. Public lands 🔑114(2)—Title acquired by issuance of patent to grantor after conveyance relates back so as to confirm title in grantee.

Title acquired by issuance of patent to grantor after execution and delivery of quitclaim deed relates back so as to confirm title in grantee.

9. Equity 🔑65(2)—Failure of one present when process was served on another than defendant to inform plaintiff of mistake held not to warrant finding of unclean hands precluding him from suing as administrator of defendant's estate to vacate judgment.

Failure of one present when process was inadvertently served on another than defendant to inform plaintiff of mistake made *held* insufficient to warrant finding of unclean hands, precluding such person from suing as administrator of defendant's estate to vacate judgment against defendant.

10. Equity 🔑65(2)—Administrator's false testimony held not to justify finding of unclean hands, precluding vacation of judgment against intestate.

False testimony of administrator, on trial of his suit to vacate judgment against intestate, *held* not to justify finding of unclean hands, barring such relief to prejudice of rights of heirs and possible creditors of estate.

11. Taxation 🔑668—Tax sale of entire tract, assessed as four separate parcels, for amount including penalties charged against each, held void (Pol. Code, §§ 3628, 3650, 3770, 4125).

Tax sale of entire tract of land, assessed and described in assessment roll as four separate parcels under Pol. Code, §§ 3628, 3650, 4125, for amount including penalties charged against each parcel under section 3770, *held* void.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Suit by Albert Vail, as administrator of the estate of Annie H. Vail, deceased, against G. H. Jones and others. Judgment for defendants, and plaintiff appeals. Modified.

Crouch & Sanders, of San Diego, for appellant.

Herbert C. Kelly, of San Diego, for respondents.

HOUSER, J. One of the purposes of the suit upon which the appeal herein is predicated was to vacate a judgment rendered in a former action in which title was quieted as to certain real property. Primarily the basis for the vacation of such judgment was that the complaint and the copy of the summons therein were never served on Annie H. Vail, who was one of the defendants in the action. In that regard the judgment contains the recital that each of the defendants therein (including Annie H. Vail) had been "duly, regularly and personally served with process. * * *"

In the instant case, with reference to the issue as to whether service of process in the former action had been made on Annie H. Vail, the trial court found that "in truth and in fact the said A. A. Crosbie did not serve the said Annie H. Vail with the said summons or with a copy thereof, or with the said complaint or with a copy thereof, on the said 25th day of July, 1923, or at any other time; that it is not true that the said Annie H. Vail was never served with said summons or with the said complaint by any other person. * * * The court finds that said Annie H. Vail was in fact served with summons attached to a copy of the complaint in said action. * * *"

The evidence relating to such finding showed that, although process was never served on Annie H. Vail, personally, a copy of the complaint and the summons in the action had been left by the constable with the son and the daughter of Annie H. Vail at the home occupied by all of them as one household, and that each of such persons had made statements which tended to show that a copy of the summons and the complaint in question in some manner had come into the personal possession of Annie H. Vail and that she was fully informed of the fact that "an action had been started to quiet title." No evidence was introduced to the effect that in rendering judgment in the former suit the trial court had before it any affidavit of service of the summons and the complaint therein other than the erroneous, but unintentionally false, affidavit of the constable that he had served the required process on Annie H. Vail personally.

[1] At the outset, it should be noted that by the provisions of section 411 of the Code of Civil Procedure a "summons must be served by delivering a copy thereof * * * *to the defendant personally*," and that unless made by the sheriff, proof of the service of summons and complaint *must be by the affidavit of the person making it.* Section 415, Code Civ. Proc. Section 670 of the Code of Civil Procedure provides that "in case the complaint is not answered by any defendant, the summons, *with the affidavit or proof of service*" shall constitute a part of the judgment roll. Although, as illustrated in the case of Hahn v. Kelly, 34 Cal. 391, 407 (94 Am. Dec. 742), the fact that service was not made by the constable is merely argumentative of the conclusion that service was not made by some other person, and the recital in the judgment that the defendant "was in fact served with the summons attached to the complaint in said action" is presumptive of service in accordance with statutory requirements (In re Eichhoff, 101 Cal. 600, 36 P. 11; Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Bank of Commerce & Trust Co. v. Kenney, 175 Cal. 59, 165 P. 8), nevertheless, in consideration of the provisions of the statutes to which reference has been had herein, this court is constrained to hold that, inasmuch as the record herein purports to disclose the entire evidence upon which the recital in the judgment was based and that such evidence is insufficient to support the finding of due and legal service, the presumption which ordinarily would obtain must be disregarded. Houghton v. Tibbets, 126 Cal. 57, 58 P. 318; Sichler v. Look, 93 Cal. 600, 29 P. 220; County of Yolo v. Knight, 70 Cal. 431, 11 P. 662; 1 Freeman on Judgments, § 130, and cases there cited.

In the case of Houghton v. Tibbets, 126 Cal. 57, 60, 58 P. 318, 319, it is said: "* * * But respondent contends that if there is no evidence of service upon Curtis except as found in the judgment we must, in support thereof, presume that he was duly served. The point is, that if there is no evidence of service upon William T. Curtis, the recital in the judgment that he was served is sufficient to confer jurisdiction. This we understand to be the rule upon collateral attack (Freeman on Judgments, sec. 130, and cases cited); but when from the whole record it appears even upon such attack to be untrue, or when the record discloses the evidence upon which the recital was based, and such evidence overthrows rather than supports the recital, the recital in the judgment will be disregarded. * * *"

The complaint in the action which resulted in this appeal contained two causes of action. The first of such causes of action, as hereinbefore stated, was for the purpose of vacating a former judgment which assumed to quiet title of the defendants herein to certain real property; and the second of which causes of action sought to quiet the title of plaintiff herein in the same property. In the second cause of action several of the allegations contained in the first cause of action were adopted by reference only—among which was an allegation to the effect that defendants claimed to be the holders of the legal title to the property alleged to have been acquired by them by virtue of the judgment rendered in the former action, which judgment was predicated upon a false return of service of the complaint and summons in that action.

[2] Respondents raise the question of the sufficiency of plaintiff's pleading, and contend, first, that a complaint to quiet title cannot be maintained by one who is out of possession, but who is the holder of the equitable title, as against one who is in possession and who is the holder of the legal title. Although it may be conceded that in ordinary circumstances the rule is as stated by respondents, at the same time it is apparent that, if by the allegations of the complaint it appears that the asserted legal title in the defendants in effect was fraudulently obtained through the medium of a void judgment rendered in another action, and that in fact they have no title whatsoever, either legal or equitable, the general rule should have no application. It is only because of the asserted or assumed validity of the title in the defendants that the real owner of the title seeks redress. By his pleading, he does not admit any title whatsoever in the defendants. To the contrary, he denies their title, and asserts title in himself. There is no middle ground. Either plaintiff has no title of any sort, or he is the absolute owner of the property. If, as an ultimate deduction or inference from the allegations contained in the complaint, the utter invalidity of the apparent legal title in the defendants appears, the real spirit and intent of the rule here suggested by the respondents is not violated.

[3] With reference to the contention on the part of plaintiff that the judgment was founded on a false affidavit of service of summons and a copy of the complaint therein, the record shows that the complaint contained the allegation: "That in truth and in fact the said A. A. Crosbie did not serve the said Annie H. Vail with the said summons, or with a copy thereof, or with the said complaint, or with a copy thereof, on the said 25th day of July, 1923, or at any other time, nor was the said

Annie H. Vail ever served with the said summons, or with the said complaint, by any other person, or in any other manner, and at the time of her death, as aforesaid, she did not have, nor at any time prior thereto did she have, any notice of, or knowledge of, the commencement of the said action, or of any of the other proceedings thereafter therein had and taken."

Referring to such allegation, respondents urge the point that it constituted but a conclusion of law (Lindley v. Lindley, 49 Cal. App. 631, 194 P. 85), and consequently failed to state the essential facts as a basis for the complaint. Considered from a standpoint of what constitutes an example of perfect pleading, it is possible that the position assumed by respondents is correct; but also considering the rule that the plaintiff is required to state his case in "ordinary and concise language" (sec. 426, Code Civ. Proc.), which must receive a liberal construction (sec. 452, Code Civ. Proc.), and also remembering that which appears from the remainder of the record in the case, to wit, that the issue thus presented by plaintiff was fully understood by defendants and the evidence in their behalf relating thereto exhaustively presented by them, it is clear that in any event no prejudice of any sort resulted to defendants by reason of the defect in question.

[4, 5] Further objection by respondents to the complaint herein is that relief should have been sought by plaintiff by way of motion under the provisions of section 473 of the Code of Civil Procedure, rather than by a suit in equity; and that in any event, because more than one year elapsed between the date of the judgment in the suit in which the title of defendants herein purportedly was quieted in the property in question and the date when the instant action was commenced, plaintiff should not be permitted to maintain it. That in the instant case neither of such positions is well taken, see: Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 P. 600; Baker v. O'Riordan, 65 Cal. 368, 4 P. 232; Wickersham v. Comerford, 96 Cal. 433, 31 P. 358; California B. S. Co. v. Porter, 68 Cal. 370, 9 P. 313; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 87 P. 19; Hawley v. State Assurance Co., 28 Cal. App. 41, 151 P. 153; Holmes v. O'Brien, 28 Cal. App. 264, 151 P. 1151; Altpeter v. Postal Tel.-Cable Co., 25 Cal. App. 255, 143 P. 93; Swallow v. Tungsten Products Co. (Cal. Sup.) 270 P. 366; Vaughn v. Pine Creek Tungsten Co. (Cal. App.) 265 P. 491.

[6] Respondents urge that the complaint was also defective in that it contained no allegation regarding the ability of plaintiff to make proof of the facts alleged or the means by which such proof was to be established; and cite certain cases as authority therefor. Although in proper circumstances, especially as pointed out in the authorities to which reference is had, where actual fraud is the basis of the action, good pleading may require a compliance with the condition here demanded by respondents, nevertheless it should be remembered that the instant action is not founded on actual fraud of one of the parties against the other, but rather arises from an alleged want of jurisdiction in the court to render the judgment because of noncompliance by the plaintiff in the former action with a statutory regulation regarding the manner of bringing his opponent into court. In effect the complaint herein contained the essential allegation that the plaintiff in the former action had failed to serve the defendant in that action with a summons and a copy of the complaint. No claim is made that defendants herein were in any wise misled by such a statement, and the record herein abundantly testifies to the fact that the case went to trial largely on that issue. In the circumstances, regardless of the true rule of pleading, it is apparent that no harm ensued so far as defendants were concerned. It is well established that error must be shown to have resulted in prejudice before it may be considered a reason for the reversal of a judgment. (Section 4½, art. 6, Const.)

[7] Respondents also suggest the rule that an action of the character of that here involved will not lie on behalf of a successor in interest of the person against whom the former judgment was rendered; and their brief contains many well-considered authorities in apparent support thereof. None of them, however, was a parallel of this action so far as concerns the parties to the litigation. In each of them the plaintiff was a stranger to the original proceeding, and in the action to have it vacated he appeared merely as a grantee or assignee of the defendant in the former action. In the instant case the defendant in the former action is deceased and the plaintiff herein appears as her administrator. Such distinction is commented upon and extensively treated in the case of Collins v. O'Laverty, 136 Cal. 31, 68 P. 327, where in principle it is held that an action of the character of that here involved may be maintained. To the same effect is the case of Rianda v. Watsonville W. & L. Co., 152 Cal. 523, 93 P. 79, where, however, owing to the particular circumstances surrounding the controversy, it was held that the action could not be maintained. See, also, Sec. 1582, Code Civ. Proc.; Rice v. Carey, 170 Cal. 748, 151 P. 135; Pennie v. Hildreth, 81 Cal. 127, 22 P. 398; Doherty v. Courtney, 150 Cal. 606, 89 P. 434. It is therefore concluded that respondents' objection to the complaint is not well taken.

[8] But assuming that the allegations in the complaint in the instant case were sufficient to constitute a cause of action against the defendants, respondents advance the point that on the trial thereof plaintiff failed to show that title was ever lodged in the deceased Annie H. Vail as to 100 acres of the 343 acres involved in the controversy; and that as to the remainder she was legally possessed of an undivided five-sixths interest therein only. As to the first of such contentions, namely, that which affected the specified 100 acres, it appeared that the husband of Mrs. Annie H. Vail, under whom she claimed title, had acquired the property (which at that time consisted of an inchoate interest in public land) by quitclaim deed which had been executed and delivered by the grantor prior to the time that patent to the land was issued to him by the United States government. In such circumstances the weight of authority in this state is to the effect that on the issuance of the patent to the grantor the title thereby acquired relates back so as to confirm title in the grantee. 9 Cal. Jur. 278, 279; Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108; Crane v. Salmon, 41 Cal. 63; Schmitt v. Giovanari, 43 Cal. 617; Thompson v. Spencer, 50 Cal. 532; Watkins v. Lynch, 71 Cal. 21, 11 P. 808; Wholey v. Cavanaugh, 88 Cal. 132, 25 P. 1112; Walsh v. Abbott, 145 Cal. 285, 78 P. 715, 104 Am. St. Rep. 38.

[9, 10] Among the "findings of fact" made by the trial court in the instant action was one "that plaintiff in this action does not come into court with clean hands"; which decision is relied upon by respondents as a determination of a question of fact which is binding and conclusive upon this court. Without setting forth herein the evidence in the case, it may suffice to state that the finding under consideration depended generally upon evidence relating to the situation hereinbefore outlined, to wit: That plaintiff was present at the time process was inadvertently served on the sister of plaintiff, who was a daughter of Mrs. Annie H. Vail, and that at no time did he make any attempt to inform the plaintiff in that action of the mistake which had been made by the person who erroneously made the affidavit of service. It will be remembered that by further finding of the trial court it is made plain that at the time when the service of process was attempted to be made on Mrs. Vail no actual service was made upon her. That decision involved one of the principal issues in the case, and the determination thereof was made in accordance with and reliance upon the testimony given by plaintiff. The fact that plaintiff made no effort to correct the error into which the serving officer had fallen is clearly insufficient evidence upon which to base a finding of "unclean hands." Nor would the further fact, as respondents claim, that as to other matters plaintiff gave untrue testimony on the trial of the case, present a situation which would justify the conclusion that by reason of the falsity of his individual testimony in that regard (which fact is not established by the findings) the estate which plaintiff represented as administrator thereof should be made to suffer therefor. Incontestably the record discloses the fact that plaintiff is acting solely in a representative capacity and his personal shortcomings should not prejudice the rights of heirs or possible creditors of the estate. This court is therefore unable to concur in the conclusion that the "unclean hands" of plaintiff should present an insuperable obstacle to a correct determination of the dependent issues in the case.

As a general answer to each of the objections both now and heretofore interposed by defendants as affects the complaint as well as the appeal herein, it is manifest that, if it be concluded that in equity defendants have no title to the property involved in the action, no substantial right of defendants in the premises is in any wise prejudiced by reason of either or any or all of the conditions of which they complain.

[11] Assuming the correctness of the foregoing conclusions, ordinarily it would follow that the judgment in the former action to which reference has been had should be vacated. However, by the parties to this litigation it seems to be conceded law that in an action of the character of that here under consideration, in addition to a showing that process was not served upon the defendant Annie H. Vail in the former action, before relief may be obtained in this action from the consequences of the former judgment the burden devolves upon the plaintiff herein to establish that he has suffered a real and substantial injury therefrom; in other words, that Annie H. Vail had a good defense to the action in question, and that, if in truth and reality she had been served with process therein, she would have maintained such defense, and thereby and therefrom no judgment would have been rendered against her. In accordance with such understanding of the law (as to which this court finds it unnecessary to express an opinion), on the trial in the lower court of the instant action, among other things, plaintiff endeavored to establish the invalidity of the title of the plaintiff in the former action, which primarily rested upon a sale by the state of the property involved in the action on account and by reason of the failure of plaintiff's predecessor in interest to pay the taxes levied thereon. In that connection plaintiff has specified numerous alleged defects, of which but one will receive consideration by this court. It has to do with one of the items which goes to make up the total amount chargeable against a given piece of property on a sale for the nonpayment of delinquent taxes. The property which is the subject-matter of the instant action consisted of one entire, compact parcel

of land of approximately 343 acres. In levying the assessment, instead of describing the land as one parcel, it was described by the assessor as of four parcels. In connection with a sale of property for failure to pay the taxes levied thereon, section 3770 of the Political Code provides that: "The tax-collector must collect, in addition to the taxes due on the delinquent-list, together with the penalties for delinquency, fifty cents on each lot, piece, or tract of land separately assessed. * * *" The ultimate question presented by appellant is whether under the law, although the property consisted of but one entire parcel of land, the tax collector was authorized to add 50 cents to each of the four separate parcels described by the assessor on the assessment roll. If in the exercise of an authority not lawfully possessed by him the property of plaintiff was charged with an amount of money not legally chargeable against it and the property was sold for an amount including such illegal charge, it is clear that the sale was void.

By section 4125 of the Political Code the assessor is charged with the performance of such duties as are elsewhere prescribed in the Political Code. Section 3628 of the Political Code requires that "* * * land shall be assessed in parcels, or subdivisions, not exceeding six hundred forty acres each, * * *"; and by section 3650 of the Political Code it is provided that: "The assessor must prepare an assessment-book, * * * in which must be listed all property within the county, and which shall show under the appropriate head: * * * Land, by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, not exceeding in any tract six hundred forty acres. * * *"

In the case of Cooper v. Miller, 113 Cal. 238, 45 P. 325, one of the questions involved therein was the authority of the county assessor to unite and assess as one parcel five separate but adjoining lots on which a livery stable was situated. Following the case of People v. Morse, 43 Cal. 534, in which a similar question was before the court, it was held that such a course was within the authority of the assessor. To the same effect is Houghton v. Kern Valley Bank, 157 Cal. 289, 107 P. 113. In the case first cited, in deciding the particular point to which reference has been had, in part the Supreme Court said: "* * * In People v. Morse, 43 Cal. 534, it was held that an entire block or a half block owned by a single individual might be assessed in one parcel, and this notwithstanding the blocks were divided into lots, *and in sound reason there is no more cause for assessing a block of land owned by one party in lots, than there is in assessing a section of land owned by a single individual in eighty or one hundred and sixty acre tracts.* * * *" It is apparent that the court might have carried its illustration farther by saying that no more cause existed for making a separate assessment of each of the lots in a block owned by one person than for assessing a section of land of 640 acres owned by a single individual in 640 one-acre lots. Perhaps the absurdity of the situation would have been heightened if, instead of contrasting the uniting of all the lots in a block into one assessment with a section of land arbitrarily divided by the assessor into 640 one-acre lots and so assessed by him, the court had suggested the possibility of the illegal division by the assessor of a 50-foot city lot into 50 one-foot strips and the levying of his assessment in accordance therewith. It is apparent that under such a void assessment of the 50-foot lot, assuming that the owner thereof should fail to pay the taxes thereon, and the tax collector should advertise the lot for sale as a whole, in addition to the several penalties imposed by law, 50 separate charges of 50 cents each would be added to the sum for which the lot would have to be sold.

As hereinbefore stated, in the instant case the 343 acres which forms the subject-matter of the action consisted of one entire, compact parcel, which was readily describable as such. For some undisclosed reason the assessment thereof was entered as of four separate parcels. On the failure of the owner to pay the taxes levied thereon within the time allowed by statute, the necessary statutory steps were taken by the state to sell the property. In so doing, and as a part of the statutory procedure, the property was advertised in a so-called delinquent or addenda tax list. Having been divided by the assessor into four separate parcels and so "assessed" by him, in accordance with the provisions of section 3770 of the Political Code, the tax collector added to the regular charges and penalties for the delinquency of the owner in paying the taxes, fifty cents to each of the four parcels into which the 343 acres had been divided. However, in advertising the property for sale, instead of describing it therein as four separate parcels of land, as to each of which theretofore had been added the various statutory charges and penalties, the 343 acres were described as a single parcel of land, and the several amounts so charged against each of the four parcels into which the 343 acres had been divided by the assessor were aggregated into one total sum and represented as one gross amount chargeable as against the entire tract. It is manifest that the property owner was substantially prejudiced by such procedure. In the first place, his property having consisted of a single parcel of land, he was entitled to have it so assessed, and, if he failed to pay the taxes levied thereon, neither the tax collector nor any other officer had authority to place penalties and charges against it not provided by law. In the second place, assuming that the charges and penalties made against each of the four parcels into which the land had been arbitrarily divided by the assessor were authorized by statute, then certainly the tax collector thereafter had no right to combine the four parcels so as to make one single parcel and advertise it for sale as such.

On the opening of the trial of the case in the lower court, plaintiff submitted to defendants and filed in court his "offer to do equity," which consisted of an offer to pay defendants for a release of all their claim upon the real property described in the complaint, the amount paid by them to the county tax collector for the purchase of said property at the sale thereof by the state, also all amounts paid for taxes thereon subsequent to the said sale, together with all amounts by them expended in or about the said property, with 7 per cent. interest upon each of said sums, and for such other amounts as the court might find the defendants entitled to.

As from the record herein it appears that at the time the instant action was commenced defendant G. H. Jones was the owner of an undivided one-sixth interest in the property described in the complaint, the conclusion of this court is that the judgment herein should be modified so that the title as to an undivided five-sixths interest in the property described in the complaint should be quieted in plaintiff, subject to the condition that on the going down of the remittitur herein, evidence be taken by the trial court as to the amount of defendants' expenditures, with interest thereon, included in plaintiff's "offer to do equity," as shown on page 44 of the transcript on appeal; which total sum, after deducting therefrom plaintiff's costs in the lower court as well as on appeal, with like interest thereon, should be secured by a lien on the premises in controversy. It is so ordered; and it is further ordered and directed that the findings of fact made by the lower court be amended so as to accord with the conclusions herein indicated.

We concur: CONREY, P. J.; YORK, J.

207 Cal. 285

GENERAL ACCEPTANCE CORPORATION OF CALIFORNIA v. ROBINSON.
(S. F. 12736.)

Supreme Court of California. May 25, 1929.

Contracts ⚷127(4)—Agreement between parties to contract as to place of trial held void and not binding on guarantor (Code Civ. Proc. § 395 et seq.).

Agreement between parties to contract that action thereon should be brought in a particular county, which was contrary to Code Civ. Proc. § 395 et seq., relating to place of trial of civil actions, was void and not binding on guarantor of contract, who was entitled to be sued in county of his residence.

In Bank.

Appeal from Superior Court, San Francisco County; Walter E. Herzinger, Judge.

Action by the General Acceptance Corporation of California against E. C. Robinson. From an order granting defendant's motion for change of venue, plaintiff appeals. Affirmed.

Arnold C. Lackenbach, of San Francisco, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondent.

RICHARDS, J. This appeal is from an order granting a change of place of trial from the city and county of San Francisco, where the action was brought, to the county of Alameda, the residence of the defendant herein. The action was one to recover upon an alleged contract of guaranty claimed to have been made by the defendant in the course of a certain transaction involving the sale or agreement to sell certain automobiles and the transfer of such agreement from the seller thereof to the plaintiff herein. The contract for such transfer was made and entered into by the Auburn Motor Sales Company, seller, and contained certain agreements by which the seller undertook to assure to the transferee of said contract the bona fides thereof and the ability of the purchaser under said agreement to fulfill the terms thereof. The obligation of the seller under such agreement was therein declared to be an absolute and unconditional one as distinguished from that of a surety, guarantor, or indemnifier, and it was agreed therein that said obligation should be enforceable, even though the purchaser's obligation under the original agreement for the sale of said automobiles should for any reason be suspended or impaired. The seller's agreement contained the final provision "that should suit be brought upon the contract or this assignment, that the trial of said action be in the City and County of San Francisco, State of California." The defendant had placed his name at the foot of said contract as "E. C. Robinson, guarantor."

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The original contract not having been performed, and the Auburn Motor Sales Company not having fulfilled the aforesaid obligation on its part to be performed, this action was commenced in the city and county of San Francisco against the defendant as such guarantor for the recovery in several counts of sums aggregating the sum of $4,534.71, claimed to be due to the plaintiff for the breach of the aforesaid agreement. The defendant, upon being served, appeared by demurrer, and, at the time of such appearance, duly demanded that the place of trial of said action be changed to the county of Alameda, and, upon such demand, gave notice of motion in due form for the change of such place of trial, supporting the same by a proper affidavit to the effect that the place of residence of the defendant was at all the times mentioned in said complaint in the county of Alameda. He also presented and filed in due form an affidavit of merits. It is not contended by the appellant that there was any defect in the form or substance of the defendant's moving papers upon said motion, and the sole ground on which the same was resisted upon the hearing thereon was that under the terms of said agreement and of the defendant's guaranty thereof it had been agreed that the place of trial of any action brought thereon should be in the city and county of San Francisco. The trial court granted the motion for a change of place of trial, and from the order made in that regard the plaintiff prosecutes this appeal.

The sole question presented upon this appeal is that under said agreement and the guaranty thereof the defendant had entered into a binding agreement that the place for the commencement and trial of said action should be the city and county of San Francisco, and not elsewhere, and that the order of the trial court granting the defendant's motion for change of place of trial was void as in violation of the terms of said agreement.

On behalf of the respondent it is urged, first, that under the peculiar wording of the terms of the agreement it must be held that the guarantor's obligation was not to be extended so as to cover that portion thereof which related to the place for the commencement and trial of any action instituted for the enforcement of the seller's said agreement; and, second, that, even if it should be determined that the defendant's guaranty is so far inclusive as to embrace the aforesaid condition in the agreement, it is ineffectual, for the reason that any agreement between the parties thereto as to the place of trial of actions to be brought thereon is void as in violation of the provisions of law with respect to the place for the institution and trial of civil actions. We shall first consider the respondent's second contention, for the reason that, if we shall conclude to uphold the same, it will become immaterial and unnecessary to consider and decide his first contention.

The appellant places its main reliance upon the case of State ex rel., etc., v. Superior Court of King County, 61 Wash. 681, 112 P. 927, Ann. Cas. 1912C, 814, wherein the Supreme Court of that state upholds the view that parties to an agreement may properly stipulate therein as to where any action may be brought thereon, or for the violation thereof, and that the courts will uphold and enforce such agreements. On the other hand, the respondent directs our attention to the fact that the aforesaid decision of the Supreme Court of the state of Washington is based upon an express provision of the statutes of that state relating to the place of trial of civil actions, to the effect that the parties to said actions may by stipulation in writing agree as to the place of trial thereof (Rem. & Bal. Code, § 216), and that, in so far as the laws of California are concerned relating to the same subject, there is no such statutory provision. The respondent further proceeds to show that the precise question presented upon this appeal was decided adversely to the appellant's contention in the case of General Motors Acceptance Corporation v. Codiga, 62 Cal. App. 117, 216 P. 383, wherein that court not only gave express and careful consideration to the state of our California Code provisions (section 395 et seq., Code Civ. Proc.), relating to the place of trial of civil actions, but also, expressly considered the scope and application of the aforesaid Washington decision to the state of the law in California governing the place of trial of civil actions. The respondent further directs our attention to the case of McCarty v. Herrick, 41 Idaho, 529, 240 P. 192, wherein the Supreme Court of Idaho, construing the statutes of that state, which are substantially identical to the like provisions in our California Code, held that the Washington case was not to be given application, for the reason above set forth. Respondent further refers to the cases of Rabinowitz v. Lipschitz (Sup.) 127 N. Y. S. 486; Nashua River Paper Co. v. Hammermill, 223 Mass. 8, 111 N. E. 678, L. R. A. 1916D, 691; Stoddard v. Stoddard, 187 App. Div. 258, 175 N. Y. S. 636, and Christensen v. Morse Dry Dock, etc., Co., 216 App. Div. 274, 214 N. Y. S. 732, 741, in each of which last-named cases the respective courts deciding the same held that contracts relating to the place of trial of civil actions for the enforcement of contracts made by the parties thereto were void. In so doing each of said courts referred to the case of Benson v. Eastern Building & Loan Association, 174 N. Y. 83, 66 N. E. 627; Id., 67 App. Div. 319, 74 N. Y. S. 507, upon which the appellant herein also relies, and distinguishes said case upon the facts thereof, and in so doing directs attention to the fact that the Benson Case is authority for the general statement that "jurisdiction of the court is beyond the agreement of the parties." See Christensen v. Morse Dry Dock, etc., Co., supra. The case of Nute v. Hamilton Ins. Co., 6 Gray (Mass.) 174, is quite in point. In that case a clause in an insurance contract requiring any action thereon to be commenced in a particular county was held to be invalid as in violation of the provisions of the Massachusetts statutes determining in what court and county actions may be brought. In so declaring, the Supreme Court of Massachusetts aptly said: "The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience. Such contracts might be induced by considerations tending to bring the administration of justice into disrepute." We are satisfied that the foregoing authorities cited by the respondent herein sufficiently sustain his second contention to the effect that the agreement between the parties to the contract upon which this action was brought was void, and hence that the defendant, as the guarantor of the contract, was not to be held bound thereby, even though it should be determined that otherwise his agreement to guarantee was broad enough to cover and include that particular clause in the contract. Having reached this conclusion, it becomes immaterial to this inquiry to further construe the terms of said contract.

It follows that the order granting the change of place of trial to the county of Alameda should be affirmed, and it is so ordered.

We concur: SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

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207 Cal. 312

PEOPLE v. ROWLAND. (Cr. 3209.)

Supreme Court of California. May 29, 1929.

1. Criminal law 🔑829(1)—Refusal of instruction covered by instructions given held not error.

Refusal to give self-defense instruction requested by defendant in prosecution for murder *held* not error, where court fully instructed jury and embodied in one of its own instructions not only substance, but much of language, of instruction refused.

2. Criminal law 🔑1171(3)—In prosecution for murder of convict confined in state prison at Folsom, argument respecting conditions at such prison which were common knowledge throughout state held not prejudicial.

In prosecution for murder of convict confined in state prison at Folsom, district attorney's argument directed to condition existing in such prison, being in nature of comments on what was common knowledge throughout state, *held* not prejudicial error, since every juror was familiar with situation, especially where no objection or specifications of error were made at time and no exceptions taken to remarks.

In Bank.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Paul Rowland was convicted of murder in the first degree with sentence of death, and he appeals. Affirmed.

Mark L. Burns, of Sacramento, for appellant.

U. S. Webb, Atty Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WASTE, C. J. The defendant, a convict confined in the state prison at Folsom, was indicted, tried, and convicted of murder of the first degree for the killing of Elgar Morrison, a fellow prisoner. The jury made no recommendation as to the penalty. A motion for a new trial was made and denied, and the defendant has appealed from the judgment imposing the sentence of death and from the order denying his motion.

The defendant and the deceased worked together in and about the prison grounds. Rowland claimed that Morrison borrowed tobacco from him which he did not return. While the prisoners were at liberty in the prison yard on the morning of October 15, 1928, Rowland approached Morrison and stabbed him with a knife or stiletto, causing the death of Morrison a short time thereafter. Rowland's defense was that he did not intend to kill Morrison, but cut him with the knife in self-defense. There was ample evidence of a number of eyewitnesses establishing beyond any doubt that the killing was premeditated and unprovoked murder.

The appellant claims there were discrepancies in the testimony of the witnesses for the people, who were, for the greater part, attendants and prisoners at Folsom, but he fails to point them out. We discover nothing of importance in that behalf.

[1] Appellant presents another point, asserted error in refusing to give all the instructions requested by the defense; but he specifies but one—an instruction in regard to self-defense, based on the language of the District Court of Appeal in People v. Vernon, 71 Cal. App. 628, 235 P. 737. The court did, however, fully instruct the jury, and, on the subject of self-defense, it embodied in one of its own instructions not only the substance, but much of the language, of the one refused.

[2] Complaint is made that in several instances the district attorney's oral argument to the jury as to the verdict which should be rendered was prejudicial to the defendant. The objectionable remarks were aside the

record, but were directed to conditions existing in the state prison at Folsom, where the murder was committed, and were in the nature of comments on what was common knowledge throughout the state of California at the time of the trial of this defendant. It is almost inconceivable that every juror was not familiar with the situation at the prison at that time. No objections or specifications of error were made at the time, and no exceptions were taken to the remarks.

We have carefully considered the cause on appeal and the record in the court below. The jury disbelieved the story told by the appellant, and he stands convicted of a vicious murder by an abundance of testimony given by eyewitnesses to the affray.

We find no prejudicial error in the record, and the judgment and order denying the motion for a new trial are, and each is, affirmed.

We concur: SEAWELL, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

207 Cal. 296

BRYANT v. BOYLE, Auditor. (S. F. 13413.)

Supreme Court of California. May 27, 1929.

Municipal corporations ⚷886—Money for recreation centers held payable from general fund, without recourse to regular parks' appropriation (San Francisco City Charter, art. 14A, § 10, and amendment; art. 14, § 11; art. 3, c. 1, § 11).

Money necessary for construction and maintenance of recreation centers by park commissioners, as required by amendment to San Francisco City Charter, art. 14A, without requiring supervisors to provide funds therefor, as for maintenance of parks and playgrounds under section 10, *held* payable from general fund, without recourse to regular parks' appropriation, which cannot exceed 10-cent tax limit fixed by article 14, § 11; article 3, c. 1, § 11, limiting tax rate to $1 per $100 valuation of property assessed, applying.

In Bank.

Application by J. A. Bryant for a writ of mandate to Thomas F. Boyle, Auditor of the City and County of San Francisco. Writ granted.

William F. Humphrey and A. T. O'Connell, both of San Francisco, for petitioner.

Frank L. Fenton, of San Francisco, for respondent.

H. W. Hutton, of San Francisco, amicus curiæ, for petitioner and in pro. per.

PER CURIAM. This matter comes before us upon an alternative writ of mandate directed to the auditor of the city and county of San Francisco requiring him to audit and approve a demand of petitioner or show cause for his refusal to do so.

Petitioner alleges that, pursuant to a contract between himself and the board of park commissioners of the city and county of San Francisco, he did certain work in enlarging and improving Kezar Stadium, and under the terms of his contract the sum of $7,640 is due and owing to him; that a demand has been made therefor against the general fund, which demand was approved by the board of park commissioners, by the board of supervisors, and by the mayor of the city and county of San Francisco, and the defendant auditor refused to approve the same, on the ground that the budget appropriation of $250,000 for the construction and completion of said Kezar Stadium was in excess of the 10-cent tax limit fixed by section 11 of article 14 of the charter for moneys to be expended by the park commissioners for the maintenance, preservation, and improvement of parks, squares, avenues, and grounds, and that payment of the demand on this fund was unlawful. This presents the only question involved in the proceeding.

By article 14 of the charter, the park commissioners are given the exclusive management and control of the parks, squares, and public pleasure grounds and the exclusive right to erect and superintend the erection of buildings and structures thereon, and while the money necessary for the maintenance, preservation, and improvement of the parks, squares, avenues, and grounds is provided by section 11, there is no charter provision for money for the erection of buildings and structures.

Article 14A gives the playground commissioners jurisdiction over the children's playgrounds and similar public recreation centers in the city and county of San Francisco, and by section 10 of that article the supervisors are required to provide money for the development, equipment, and maintenance of such playgrounds and recreation centers.

By an amendment added at the end of article 14A, but without being numbered as a section, the recreation centers known as "the Aquatic Park," situate adjacent to Ft. Mason; "Fleishhacker Pool and Playfield," situate south of Sloat boulevard and adjacent to the Pacific Ocean; the "Municipal Golf Links," situate in the Lake Merced lands; and "The Stadium," opposite the Polytechnic high school, together with such land now acquired or hereafter acquired by the city and county adjacent to said centers which the supervisors shall designate, shall be under the exclusive control and management of the park commissioners. There is no provision in the charter requiring the supervisors to provide funds for the maintenance and development of these recreation centers. The people of San Francisco placed them under the control of the park commissioners and required their maintenance and development, but did not create a specific charter fund like the one created for the parks and playgrounds, and therefore, there being no other fund created or provided, the maintenance and development of these recreation centers must be paid for from the general fund. This construction has been placed upon this provision of the charter by the officials of the city and county.

We think that, since the voters sought to charge the park commissioners with the construction and maintenance of recreation centers which are outside of the ordinary park activities, it must be held that the voters, by necessary implication, intended that the park commissioners should receive the money necessary to carry on the additional work without recourse to its regular appropriation for the operating expenses of the parks. Unless it be held that recreation centers separately constructed and placed under the jurisdiction of the park commissioners by the voters by an amendment to article 14A can be provided for under separate appropriation, the entire plan of the people in creating these centers by charter amendment must fail and the will and desire of the voters and taxpayers be defeated for lack of necessary funds to build and maintain these centers. Article 3, c. 1, § 11, of the charter, limiting the annual maximum tax rate, except for the purposes therein mentioned, to $1 on each $100 valuation of the property assessed, furnishes a guaranty against extravagance in such appropriations from the general fund.

Let the writ of mandate issue as prayed.

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207 Cal. 275

SHIELDS et ux. v. KING.

SHIELDS v. SAME.

(S. F. 13012, 13013.)

Supreme Court of California. May 24, 1929.

1. Automobiles 🔑224(6)—Elderly woman held not contributorily negligent in not insisting that driver stop speeding automobile and alighting therefrom at isolated point on rainy day.

Sixty-year old woman, injured when automobile, in which she was riding on cloudy and rainy day, skidded and went over embankment, *held* not contributorily negligent in not insisting that car be stopped and alighting therefrom at isolated point when driver failed to heed her warning to slacken speed.

2. Automobiles 🔑224(1)—Automobile passenger must exercise ordinary care for his safety.

A passenger in an automobile is bound to exercise ordinary care for his own safety.

3. Automobiles 🔑245(87)—Whether automobile passenger exercised ordinary care is fact question for jury, unless evidence is all one way.

Whether passenger in automobile exercised ordinary care for his own safety is a question of fact, which must be submitted to a jury, unless the evidence is all one way.

4. Appeal and error 🔑1002—Jury's determination of disputed question whether automobile passenger exercised ordinary care is conclusive.

Jury's determination of disputed fact question whether passenger in automobile exercised ordinary care for his own safety is conclusive on appeal.

5. Automobiles 🔑224(5, 6)—Whether automobile passenger was negligent in not remonstrating against excessive speed or alighting from vehicle depends on particular circumstances.

Whether passenger in automobile failed to exercise ordinary care for his own safety by failing to remonstrate against excessive speed or alight from vehicle when reasonable opportunity was afforded him depends on circumstances of particular case.

In Bank.

Appeals from Superior Court, San Benito County; John L. Hudner, Judge.

Actions by Francis W. Shields and wife and by Francis W. Shields alone against C. S. King. Judgments for plaintiffs, and defendant appeals. Affirmed.

A. Dale Thomson and J. Hampton Hoge, both of San Francisco, and A. M. Runnells, of Hollister, for appellant.

James Snell, of Hollister, for respondents.

PRESTON, J. The judgment entered in each of the above-entitled cases is hereby affirmed. The reasons impelling this conclusion are properly set forth in one opinion as by stipulation of the parties, the actions were tried together before a jury, and both appeals by defendant argued in a single set of briefs.

On November 22, 1926, by reason of an accident which resulted from defendant's alleged negligence and failure to use ordinary care in the operation of his automobile, plaintiff Bertha A. Shields received severe personal injuries, for which by said first case, S. F. 13012, she and her husband seek to recover damages; the second action, S. F. 13013, is for consequential damages suffered by the husband. The jury in cause S. F. No. 13012 returned a verdict upon which judgment was entered for plaintiffs in the sum of $6,000, and in cause S. F. 13013, returned a verdict upon which judgment was entered for plaintiff in the sum of $800. Defendant has appealed from both judgments, urging as his sole ground for reversal thereof that the undisputed facts established by the evidence show that plaintiff Bertha A. Shields was guilty of contributory negligence as a matter of law. The word "plaintiff" where hereinafter used will refer to the plaintiff Bertha A. Shields. The following is a brief résumé of the facts:

On the date above mentioned said plaintiff, a woman of approximately 60 years of age, was en route by automobile from Hollister to Napa, Cal., as the guest of defendant, the husband of her stepdaughter. Defendant's wife and son were also with him on the trip. Defendant was driving; plaintiff occupied one of the back seats. The day was cloudy and rainy. Between San Rafael and Black Point, at a place along the sloughs where the road was wet and slippery, with defendant driving at a good rate of speed, possibly 35 or 40 miles an hour, the car skidded and went over the embankment, thereby rendering plaintiff unconscious and causing the severe and permanent injuries of which she complains. Plaintiff, who was not seated within view of the speedometer, testified that she had no fear of defendant's driving, nor did the speed of the machine seem excessive to her, until the latter part of the trip. Then, although he failed to heed her warning or to slacken his speed, she twice took occasion to caution him, saying the first time, "Clement, don't drive so fast on the wet pavement;" and again saying about ten minutes later, and but a short time before the accident, "Clement, don't drive so fast; we had better be out longer than not to get home at all."

[1] It is principally upon the testimony just quoted that defendant bases his contention that plaintiff was guilty of contributory negligence in that he claims it is apparent that she had ample opportunity to insist that the automobile be stopped and to alight therefrom; that in failing so to do, and in remaining upon the ride, she assumed the risk of defendant's continued carelessness and was thus guilty of individual contributory negligence as a matter of law.

We cannot subscribe to this construction of the evidence. We do not believe that it was incumbent upon this elderly woman, even granting that the driver might have acceded to a request from her that he stop the machine, to alight therefrom alone upon a rainy highway at an isolated point, leaving to chance the possibility of reaching shelter or her destination by some other conveyance, in order to hold herself free from the charge of contributory negligence.

[2-4] Numberless cases in this and other jurisdictions, recognizing that the negligence of the person operating a vehicle is not imputed to his passenger, uphold the doctrine here applicable, that a passenger is bound to exercise ordinary care for his own safety; but whether or not he has exercised such care is a question of fact, which, unless the evidence is all one way, must be submitted to a jury, and their determination thereof is conclusive. Parmenter v. McDougall, 172 Cal. 306, 309, 156 P. 460, and many cases there cited; Nichols v. Pac. Elec. Ry., 178 Cal. 630, 174 P. 319; Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207, 107 P. 317; Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 P. 236; Drouillard v. Southern Pac. Co., 36 Cal. App. 447, 450, 172 P. 405; Carpenter v. Atchison, etc., Co., 51 Cal. App. 60, 195 P. 1073; Wyseur v. Davis, 58 Cal. App. 598, 209 P. 213; Marchetti v. Southern Pac. Co. (Cal. Sup.) 269 P. 529.

[5] In this case, however, we are forced to the even broader statement that, in our opinion, the record contains no showing whatsoever of any contributory negligence on the part of plaintiff, but, on the contrary, shows that she acted as any reasonably prudent person would have done, and under the circumstances set forth in the evidence the jury would not have been warranted in finding other than as it did. As stated in Curran v. Earle C. Anthony, Inc., supra, at page 471, of 77 Cal. App. (247 P. 239), citing Dowd v. Atlas T. & A. Service Co., 187 Cal. 523, 202 P. 870: "The duty of a passenger to remonstrate against excessive speed or to withdraw from the vehicle, a reasonable opportunity therefor being afforded, is not absolute, the question whether by failing to do either he is wanting in ordinary care being dependent upon the circumstances of the particular case."

The case of Clark v. Traver, 205 App. Div. 206, 200 N. Y. S. 52, relied upon by appellant, recognizes this rule. Plaintiff there, a guest passenger, made a polite protest against the speed of the automobile, but did not quit the car; thereafter defendant slowed down, but even then his speed was so excessive as to almost immediately overturn the machine when rounding a curve in the road. Affirming the judgment for plaintiff, the court said: "We think it was for the jury to say whether there was an acquiescence on the part of the plaintiff in the wrongful conduct of the defendant, and that there is evidence upon which to sustain the finding of the jury that there was no such acquiescence." The case of Sheehan v. Coffey, 205 App. Div. 388, 200 N. Y. S. 55, is likewise in harmony with this holding, although the circumstances there compelled a reversal of the judgment for plaintiff upon the ground that the finding of the jury was against the weight of the evidence and contrary to law and the damages awarded were excessive.

The above reasoning sufficiently supports, without further comment, the conclusion first herein announced.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

207 Cal. 279

BENJAMIN v. NOONAN et al. (S. F. 13028.)

Supreme Court of California. May 24, 1929.

1. Automobiles 🔑245(87)—Automobile guest held not contributorily negligent, as matter of law, in not protesting against speed of automobile, nor in seeking to leave car.

Guest injured in collision between automobile in which she was riding and another automobile *held* not contributorily negligent, as matter of law, in failing to protest against speed of 20 to 30 miles an hour in residence district on a foggy day, or in failing to request that driver either diminish speed or permit her to leave car, where she had never driven an automobile and was not qualified to judge the safety or nonsafety of driving conditions.

2. Automobiles 🔑224(1)—Automobile guest must exercise ordinary care for his safety.

A guest passenger, traveling by automobile, is bound to exercise ordinary care for his own safety.

3. Automobiles 🔑245(87)—Whether automobile guest exercised ordinary care is fact question for jury, unless evidence is all one way.

Whether a guest in automobile has exercised ordinary care for his own safety is a question of fact, which, unless the evidence is all one way, must be submitted to a jury, whose determination is conclusive.

4. Automobiles 🔑171(2)—Instruction that violation of statute limiting speed and regulating operation of automobiles at intersections is negligence as matter of law held correct (Motor Vehicle Act).

Instruction that violation of Motor Vehicle Act (St. 1923, p. 517), providing that vehicles shall be driven at careful, prudent, reasonable, and proper speed, so as not to endanger life, limb, or property, and that it shall be lawful to drive at speed not exceeding 15 miles an hour in traversing intersection where view is obstructed, constitutes negligence as matter of law, *held* not erroneous, as against contention that such violation of statute is merely evidence of negligence.

5. Automobiles 🔑246(47)—Instructions that automobile driver was negligent if he proceeded at intersection in reckless disregard of obvious danger held warranted under evidence.

In action for injuries to automobile guest in collision at intersection on foggy day, instructions that, even though driver of colliding automobile had right of way at intersection, he had no right to proceed blindly in reckless disregard of obvious danger, but was required to keep machine under such control as would enable him in exercise of ordinary care and skill to avoid a collision, and that, if he failed in these respects, or by use of ordinary care and skill could have stopped his automobile within 15 feet and failed to do so, he was guilty of negligence proximately causing injury to plaintiff, *held* warranted under evidence.

6. Appeal and error 🔑1033(5)—Instruction that it must reasonably appear that plaintiff's physical condition must continue or grow worse because of injuries before jury could consider such condition in computing damages held favorable to defendants.

Instruction that, even though jury believed plaintiff's physical condition might continue or grow worse as result of her injuries, it had to appear with reasonable certainty that such condition would continue or grow worse before that fact could be considered in computing any verdict in her favor, *held* favorable to defendants, and they could, therefore, not complain that there was no premise therefor in the evidence.

7. Appeal and error 🔑1067—Refusal of instruction respecting plaintiff's duty to use ordinary care in securing necessary medical aid after injury held not prejudicial error.

Refusal to give defendants' requested instructions respecting plaintiff's duty to use ordinary care in securing and continuing to have all necessary medical aid after her injury, based on charges of plaintiff's negligence in making only some two or more visits to her physician during period of over a year after accident, *held* not prejudicial error, in view of testimony of her physician and given instruction respecting injured person's duty to submit to treatment prescribed by attending physician and that such person may not by failing to use reasonable care allow damages to be unnecessarily increased.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Aimee Benjamin against John F. Noonan and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Robert L. McWilliams and Ralph H. Lachmund, both of San Francisco, for appellants.

Lasher B. Gallagher, of San Francisco, for respondent.

PRESTON, J. In this cause the judgment for plaintiff is affirmed. The action is one to recover damages for personal injuries received as the result of an automobile accident which occurred in San Francisco on August 14, 1926, at about 10:40 p. m., while plaintiff was riding as his guest in the automobile of appellant John F. Noonan. Said appellant, with plaintiff in his car, was driving west on Irving street at a speed varying from 20 to 30 miles an hour; at about the same time appellant Harold Gallagher at the wheel of a Studebaker roadster, accompanied by defendant H. C. Gallagher and another person, was proceeding south on Forty-Eighth avenue at a slow speed, perhaps 15 miles per hour, having stopped just previously to avoid hitting an obstruction in the street. The night was very foggy and the two automobiles collided where Forty-Eighth avenue intersects

Irving street. Plaintiff was thrown from the car and severely injured in the manner hereinafter described. She subsequently commenced this action for damages, including as defendants the drivers of both machines. Trial was had before a jury and a verdict was returned in her favor for the sum of $6,000. Judgment followed, from which both defendants Noonan and Harold Gallagher have appealed, claiming first, that plaintiff was guilty of contributory negligence as a matter of law, and, second, that the court erred in the giving of certain instructions and the withholding of others requested to be given.

[1-3] The claim of contributory negligence is based upon the argument that, notwithstanding the foggy weather and poor visibility, plaintiff negligently permitted her host to travel the entire distance between Thirteenth and Forty-Eighth avenues, on Irving street, a residential and business district, at a speed ranging from 20 to 30 miles an hour, without the slightest protest, remonstrance, or request that he either diminish his speed or permit her to leave the car, which failure on her part to either so speak or act amounted to contributory negligence as a matter of law and that the court erred in refusing to give a requested instruction bearing upon this point. This claim is urged in the face of plaintiff's undisputed testimony that she had never driven an automobile and was not qualified to judge the safety or nonsafety of driving conditions and that, although she was of a nervous temperament, the speed at which appellant Noonan drove on the night in question did not seem to be excessive or fast enough to arouse any sense of fear in her. It is unnecessary to discuss the point at length. This very situation was before us and received our full consideration in the recent case of Shields v. King (Cal. Sup.) 277 P. 1043, this day decided. Upon that authority, and the cases there cited, and for all the reasons therein set forth, we hold the contention that plaintiff here was guilty of contributory negligence as a matter of law and that the court erred in refusing to give the instruction mentioned to be wholly without merit. In other words, a guest passenger, traveling by automobile, is bound to exercise ordinary care for his own safety; but whether or not he has exercised such care is a question of fact, which, unless the evidence is all one way, must be submitted to a jury, and their determination thereof is conclusive.

[4] Appellants complain of an instruction given by the court at its own instance which first stated the provisions of the Motor Vehicle Act (Stats. 1923, p. 517) to the effect that vehicles shall be driven on the public highways at a careful, prudent, reasonable, and proper speed, so as not to endanger the life, limb, or property of any person and that it shall be lawful to drive at a speed not exceeding 15 miles an hour in traversing an intersection of highways where the view is obstructed, etc., and then charged that a violation thereof constituted negligence as a matter of law. They contend for the distinction that an infraction of said provisions would constitute not negligence per se, but mere evidence of negligence which might or might not amount to proof of negligence.

We find no error in said instruction. As said in Scragg v. Sallee, 24 Cal. App. 133, 144, 140 P. 706, 710: "While it is undoubtedly correct to say that the act of driving a vehicle over a street or public highway beyond the speed limit established by a municipal ordinance or a statute merely constitutes evidence of negligence in cases where damage has followed the infraction of such an ordinance or law, the rule in this state is, however, that it is conclusive evidence of negligence [citing cases]. Therefore, the statement that such an act is 'of itself negligence,' or 'negligence as a matter of law' or 'negligence per se' (equivalent expressions) is, in this state, strictly correct." See, also, Baillargeon v. Myers, 180 Cal. 507, 508, 182 P. 37; Flynn v. Bledsoe Co. (Cal. App.) 267 P. 887; Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010; Greeneich v. Knoll, 73 Cal. App. 1, 238 P. 163. We find nothing in the cases cited by appellants at variance with the rule above set forth.

[5] Appellant Gallagher attacks three instructions which told the jury in effect that, even though he had the right of way at the intersection in question, he had no right to proceed blindly in reckless disregard of obvious danger, but it was his duty to keep his machine under such control as would enable him in the exercise of ordinary care and skill to avoid a collision, and if he failed in these respects, or if by the use of ordinary care and skill he could have stopped his automobile within 15 feet and failed to do so, then he was guilty of negligence proximately causing injury to plaintiff. To our mind the evidence amply warranted instructing the jury as to appellant's duty under the circumstances, which duty was properly limited in all three instructions to the use of ordinary care and skill to avoid an accident. In fact, an instruction almost identical with one of them was approved in Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471. See, also, Rush v. Lagomarsino, 196 Cal. 308, 317, 237 P. 1066; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125; Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 L. R. A. (N. S.) 1027; Truitner v. Knight, 83 Cal. App. 655, 661, 257 P. 447; Broedlow v. Le Gros (Cal. App.) 263 P. 1027.

[6] Appellant Gallagher further contends that there was no premise in the evidence for the instruction given the jury to the effect that, even though they believed plaintiff's physical condition might continue or grow

worse as a result of her injuries, it had to appear with reasonable certainty that such condition would continue or grow worse before that fact could be considered in computing any verdict in her favor. Said appellant should not complain of an instruction which could not have prejudiced him as it was favorable both to himself and his codefendant; moreover, evidence was adduced relating to the possible continuance of after effects resulting from plaintiff's injuries.

[7] We find no prejudicial error on the part of the court in refusing to give certain instructions requested by appellant Noonan with respect to the duty of plaintiff to use ordinary care in securing and continuing to have all necessary medical aid after her injury. The complaint alleged that plaintiff sustained as a result of the accident severe and permanent injuries, to wit, a transverse fracture of the sacrum, concussion of the brain, a contused wound on the left elbow, a scalp wound in the occipital region, wrenching and straining of the back, lacerations, contusions, and abrasions of limbs and body. She was confined to the hospital for several weeks and her physical condition became much improved; however, she had always been of a highly nervous temperament and the experience so heightened her nervousness and fears that she was thereafter subject to more frequent fainting spells than she had ever before had; was practically unable to drive by automobile for any distance or to even sit or remain quiet for any length of time. Under these facts appellant charges her with negligence and claims that the jury should have been instructed upon this subject, in that during the period from October, 1926, to January, 1928, she made only some two or more visits to her physician. However, the doctor himself testified that he kept no record of her case after she left the hospital, as he knew she was able to call upon him when she needed help; that she did visit him several times and, with his approval, went to stay with her sister at Napa and while there at his suggestion took sun bath treatment and endeavored to hasten recovery through a complete rest. Furthermore, the court instructed the jury as to the requirement that an injured party submit to the treatment prescribed by his or her attending physician and that such party may not by his or her own failure to use reasonable care allow damages to be unnecessarily increased.

We have carefully examined all the points urged by appellants and find no reversible error; hence our conclusion first herein announced.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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207 Cal. 290

LAKE et al. v. DOWD et al. (L. A. 9476.)

Supreme Court of California. May 27, 1929.

1. Cancellation of Instruments ⚷35(1)—All owners of undivided interests in tract joining in agreement to convey to trustee held necessary parties in action to set aside agreement (Code Civ. Proc. § 378).

Where plaintiffs and other owners of undivided interests in tract of land conveyed property to trustee, to carry out their written contract to convey to defendant, *held* that, in action by plaintiffs against trustee and defendant to set aside trust agreement, and for cancellation of deed as to them, owners of other undivided interests were necessary parties under Code Civ. Proc. § 378; section 369, authorizing trustee of express trust to sue without joining beneficiaries, being inapplicable.

2. Vendor and purchaser ⚷89—After purchaser made at least two payments, owners of certain undivided interests held not entitled to withdraw for delay in perfecting contract.

Where plaintiffs and other owners of undivided interests in tract of land conveyed property to trustee to carry out their written contract to convey tract to defendant, *held*, that plaintiffs, having actively participated in proceedings to remedy defects in title, were not entitled to withdraw from agreement for alleged delay in perfecting contract of sale, due to such defects in title, after at least two payments had been made by defendant and two deeds delivered to him by trustee.

3. Trusts ⚷11(2)—Written agreement between owners of undivided interests to convey to trustee to carry out sale contract held valid trust (Civ. Code, § 857).

Written agreement by owners of undivided interests in tract of land to convey property to trustee, for purpose of having him convey tract to purchaser, *held* valid trust, within Civ. Code, § 857.

In Bank.

Appeals from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Fred W. Lake and another against Mervyn R. Dowd and others. From the judgment, both parties appeal. Reversed, and plaintiff's appeal dismissed.

For opinion of the court in Department, see 270 P. 212.

Henry C. McPike and Fred W. Lake, both of Oakland, for plaintiffs.

Charles Reagh, of San Francisco, for defendants.

PER CURIAM. The judgment in department was set aside and the hearing in bank ordered, to the end that the questions involved might be given further consideration. Upon such further consideration we are satisfied with the opinion in department prepared by Mr. Justice Preston, and adopt the same as the opinion of the court in bank. It is as follows:

By stipulation cross-appeals are submitted on one bill of exceptions. Defendants appeal from the whole judgment. Plaintiffs appeal from that portion of the judgment only which withholds the full relief prayed for by them. If the defendants prevail upon their appeal, the whole judgment must be reversed, and the appeal by plaintiffs becomes abortive.

[1] A careful consideration of this cause, together with independent search of the authorities, convinces us that the appeal of defendants must be sustained, and the whole judgment reversed. Plaintiffs and some 10 other persons owned in undivided interests 240 acres of a half section of 320 acres of land in the county of Kern. The remaining 80 acres were held in a like undivided interest by one C. T. Dunkle. Dunkle desired to purchase in 10-acre blocks the interests of the other owners. On December 14, 1923, plaintiffs and their associates, binding themselves together by mutual covenants, entered into a written contract wherein they constituted Mervyn R. Dowd as a trustee for the purpose of selling their said property to said C. T. Dunkle, and to that end and for that purpose agreed to and did execute and deliver to the said Dowd, as grantee, an ordinary grant, bargain, and sale deed of their respective interests in said property. The written agreement above mentioned contained the terms and conditions of sale, and rested upon the mutual covenants therein contained, the last and most significant of which was as follows:

"Upon receipt by the said trustee of the first payment of one thousand ($1,000.00) dollars, each of the grantors hereby agrees with all of the other grantors that his or her interest in said lands shall thereupon be converted into and deemed to be and held as an interest in common in said entire half section with all other owners and not in severalty."

Acting under said contract and the deed made pursuant thereto, said trustee Dowd transferred and conveyed certain portions of said land to the said Dunkle and received certain moneys from him on account thereof. Plaintiffs brought this action against the said Dowd as trustee and against the said Dunkle to have said trust agreement declared void as to them, to have the deed canceled as to them, and to have their title to their former interest in said lands declared and quieted against the claims of said defendants. The defendant Dunkle, it is claimed, was a purchaser with notice of their rights, and further plaintiffs alleged that they had been damaged in the premises in the sum of $5,000. Defendants answered, denying the grounds set up for the cancellation of said deed and for the quieting of plaintiff's title to said land, and in addition thereto filed their cross-complaint, asking that said underlying agreement be declared valid, and that the title of said trustee be quieted as to said real property as against said plaintiffs and cross-defendants Fred W. Lake and Fannie D. Lake, and that said plaintiffs be estopped, enjoined, and forbidden from asserting any right, title, or interest in and to the premises, save such interest as they might have under the written contract above described.

The court made findings and gave judgment in favor of the plaintiffs quieting their title to five-twelfths, or 180 acres, of said tract, and restraining and enjoining defendants from claiming or asserting any interest therein adverse to them, but refused to give plaintiffs judgment for the sum of $5,000, or any other sum, as damages. Defendants, as above stated, appealed from the whole of said judgment, and plaintiffs appealed from so much thereof as refused their prayer for damages.

It will be noted from the above description of the pleadings that the 10 other persons who joined with plaintiffs in the agreement between themselves to sell said lands through said defendant trustee were not made parties to the suit by plaintiffs, nor were they made parties to said suit by defendants under their cross-complaint. Defendants, at the opening of plaintiffs' case, objected to the introduction of any evidence, upon the ground that the other signatories to said contract had not been joined as parties defendant, and were not before the court, and at the close of plaintiffs' case said defendants moved for nonsuit upon the same grounds, taking the position that all the parties to said contract were necessary to a full determination of the issues, and the court could make no decree in the premises, unless said parties were before it. This motion was denied.

Defendants' position is well taken. Plaintiffs seem to overlook the fact that the mutual covenants between the signers of said contract were sufficient to give to each of said signers a joint interest in the whole subject-matter. The contributing of the several interests of the parties signing said contract and the surrender to a common agent or trustee of their rights and interests therein were a sufficient consideration to make said contract binding as between themselves and the contract is in reality as though it were made between them for the direct sale of the property, instead of the sale through a trustee. Each party to said contract is, therefore, a proper and necessary party for a determination of any rights in said property held by the trustee under said deed. Code Civ. Proc. § 378.

A case not cited by either counsel and determinative of this question is Mitau v. Roddan, 149 Cal. 1, 6, 7, 84 P. 145, 6 L. R. A. (N. S.) 275. There a debtor executed a deed of trust to secure debts to two persons. The trustees brought a suit to have the court declare the interests of the respective parties under the deed of trust and to foreclose same. But one of the persons for whose benefit the trust was created was not made a party thereto, and the point was made that a court of equity could not properly dispose of the case until such party was before it, and that the trustee could not properly represent such absent creditor or beneficiary. Lengthy quotations from this case are unnecessary; a reference thereto will reveal the rule, the reason for it, and the equitable principles upon which it is founded. The cases of McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129, and O'Connor v. Irvine, 74 Cal. 444, 16 P. 236, cited in the above-mentioned case, also fully sustain the holding here announced.

It will be noted that section 369 of the Code of Civil Procedure, which authorizes a trustee of an express trust to sue without joining the beneficiaries, is inapplicable to this case, as this is not a controversy between a trustee and strangers to the trust. Said section is for the same reason inapplicable to the cross-complainants, who undertook to try their title against the claims of said plaintiffs without joining the other beneficiaries.

[2] This position determines the issues involved in this appeal. We have, however, in view of a probable retrial of the cause, examined the record on the merits as to the other questions presented. It is our conclusion that in this aspect also the cause must be reversed, upon the insufficiency of the evidence to support the findings and judgment. The judgment is predicated upon the asserted right of the plaintiffs to withdraw from said agreement at any time because of the delay or failure of the trustee to complete the sales contract with Dunkle so long as the withdrawal was prior to the actual consummation of any such binding contract; the theory being doubtless that, the trustee having paid no consideration to plaintiffs, they could withdraw at any time prior to action on his part under the trust. The assertion is that such withdrawal occurred in this manner and at such time.

This argument is, as above stated, a misconception of the relation of the parties to said agreement. The question is not, May plaintiffs withdraw because of the failure of the trustee to act? But the true question is, Do plaintiffs show grounds upon which to withdraw from the agreement for failure of consideration, or other cause, as against all of the cosigners of said agreement? The trustee is but the agent upon whom authority has been conferred. The real contract is between the parties of the first part thereto. The delay in perfecting a contract of sale was a defect in the title of said parties of the first part to the said lands to be conveyed. In other words, the delay was in perfecting their title, and such defect affected the owners alike. Plaintiffs actively advocated the remedying of this defect, participated in the proceedings necessary therefor, and paid a large portion of the expense thereof from moneys paid to the trustee by Dunkle. The formal notice of withdrawal of May 17, 1924, was nullified by their own admitted conduct. The attempted withdrawal of November 17, 1924, was after the consummation of the contract with Dunkle, and after at least two payments by him, and after at least two deeds to him had been made by the trustee.

There is no substantial conflict in any of the evidence material to this issue. The evidence shows no ground whatever to cancel this agreement as against any one, and particularly as against the coparties to same. The contention that plaintiffs did what they did upon an understanding that Dunkle would complete at once a cash purchase of the whole tract does not, under the admitted facts and under the circumstances then obtaining, raise a conflict in the evidence.

[3] Neither do we discern any ground upon which it may be said that said trust is invalid or void upon its face. The instrument is clearly a trust to convey, and the powers conferred are succinctly and clearly set forth. Section 857, Civ. Code.

The judgment is reversed and the appeal of plaintiffs is dismissed.

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99 Cal. App. 134

In re SCHULTZ. (Cr. 1534.)

District Court of Appeal, First District, Division 2, California. May 24, 1929.

1. Appearance ⚷20—Where one not served in proceedings regarding custody of child voluntarily appeared, failure of minutes to note waiver of service was not prejudicial.

Where one in whose home minor child was placed was not served with process in proceeding involving custody of child, but her voluntary appearance was undisputed, failure of minutes to note a waiver of service was not prejudicial to her.

2. Appeal and error ⚷440—Court could correct clerical error after appeal had been perfected.

Court could correct clerical error relating to section of statute applying in case in order to make decree speak the truth after an appeal had been perfected.

3. Infants ⚷19—Evidence held sufficient to support finding that home in which child was living was unfit place for child.

Evidence showing that woman with whom child was left had given birth to illegitimate child, and that men in home were of questionable repute, *held* sufficient to support finding that home in which minor child was living was an unfit place for child, so that decree adjudging child to be ward of juvenile court was proper.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Proceeding involving the custody of Walter Schultz, a minor. From a decree adjudging him to be a ward of the juvenile court and depriving Jeanette Connors and her mother, Mrs. Lena Connors, of the custody of such ward, an appeal was taken. Affirmed.

Bryce Swartfager, of Santa Rosa, for appellant.

Carl Barnard, Dist. Atty., and E. T. Koford, Deputy Dist. Atty., both of Santa Rosa, for respondent.

NOURSE, J. This is an appeal from a decree adjudging Walter Schultz a ward of the juvenile court and depriving Jeanette Connors and her mother, Mrs. Lena Connors, of the custody of said ward.

Walter Schultz is an illegitimate child of about five years of age. About four years ago his mother, who has since disappeared, left the child with Jeanette Connors, an unmarried woman, upon the promise to pay her for its care. Miss Connors lived in the home of her mother, Mrs. Lena Connors, and with two adult brothers. The court found, upon evidence amply sufficient for the purpose, that this home was not a fit place for the child, because Jeanette Connors had recently given birth to an illegitimate child in the home, and that the two sons were men of questionable repute.

[1] On this appeal it is argued that Mrs. Lena Connors has been deprived of the custody of the child without legal process. The record does not show that she was served with process, but it does show that she appeared at the hearing personally and with counsel, and made no objection to the want of service. Though the evidence is somewhat conflicting, it was sufficient to support the conclusion that the child had been placed in the custody of Jeanette Connors, and that Mrs. Connors was not one upon whom service of process was necessary to confer jurisdiction over the child. Even so, her voluntary appearance is undisputed, and the failure of the minutes to note a waiver of service is in no way prejudicial to her.

[2] It is argued that the findings are insufficient because it adjudged the child a person coming within the provisions of subdivision 13 of section 1 of the Juvenile Court Law (St. 1915, p. 1225), whereas the evidence disclosed that he came within the provisions of subdivision 4 of that section. The reference to subdivision 13 was an obvious clerical error, which was duly corrected by the court after notice and hearing. It is objected that the trial court was without jurisdiction to so "amend" its findings because the transcript on appeal had then been filed. But that act was not an amendment of findings; it was merely a correction of a clerical error in the decree. It is unnecessary to cite authorities to the rule that a court may correct clerical errors of this character in order to make the decree speak the truth, and that such correction may be made after an appeal has been perfected.

[3] The argument that the evidence is insufficient to support the finding that the home was an unfit place for the child is answered by the statement of the conditions found in the home heretofore made. We do not know what further evidence of vice and immorality appellants contend should have been shown, but we are certain that the very purpose of the law is to empower the juvenile court to take over the custody of children living under such environment as was shown here.

The decree is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

98 Cal. App. 784

BELL v. REDWINE. (Civ. 3495.)★

District Court of Appeal, Third District.
California. May 15, 1929.

Rehearing Denied June 14, 1929. Hearing Denied by Supreme Court July 11, 1929.

1. Mortgages ⟹522—Refusal of purchaser at mortgage foreclosure to pay authorized resale, notwithstanding subsequent sale by mortgagor and tender of redemption money (Code Civ. Proc. §§ 695, 726).

Where highest bidder at mortgage foreclosure sale to whom property was declared to be sold refused to pay amount of bid, and no certificate of sale was issued, and no return of sale made, and thereafter E. purchased mortgaged lands from mortgagor, and tendered to commissioner amount required for redemption, and demanded certificate of redemption, which tendered commissioner accepted only as mere tender, such tender and check in commissioner's possession was immaterial in subsequent proceeding by plaintiff in foreclosure suit to require commissioner to resell property, situation being merely one of refusal of purchaser at foreclosure sale to pay amount of his bid, authorizing commissioner to again sell property to highest bidder and recover any deficiency from original bidder, under Code Civ. Proc. §§ 695, 726.

2. Execution ⟹237—Word "may" in statute authorizing resale of property sold under execution to highest bidder failing to pay held construable as "must" (Code Civ. Proc. § 695).

Since private persons are interested in performance of official duty prescribed by Code Civ. Proc. § 695, providing that, if purchaser refuses to pay amount bid by him for property struck off to him at sale under execution, officer may again sell property at any time to highest bidder, and, if any loss be occasioned thereby, officer may recover amount of such loss with costs from bidder so refusing in any court of competent jurisdiction, word "may" therein is to be construed as "must."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, May.]

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by R. R. Bell, as executor of the last will and testament of J. W. Swales, deceased, substituted for J. W. Swales, against G. E. Redwine. From an adverse judgment, defendant appeals. Affirmed.

W. D. L. Held and Keith C. Eversole, both of Ukiah, for appellant.

Hale McCowen, Jr., of Ukiah, for respondent.

FINCH, P. J. [1] In an action to foreclose a mortgage on real estate, prosecuted by J. W. Swales against Joseph Burns, judgment was entered in favor of the former against the latter for $3,927.90, and the appellant herein was appointed commissioner to sell the mortgaged property. December 13, 1924, the commissioner duly offered the property for sale at public auction. Hale McCowen, Jr., one of the attorneys for the plaintiff in the foreclosure proceeding, became the highest bidder, and the commissioner thereupon publicly announced that the property was sold to McCowen. It is not claimed that McCowen purchased the property for his client, but the answer alleges "that respondent sold each of said lots or parcels to said Hale McCowen, Jr., on the personal credit of said Hale McCowen, Jr., and upon his promise and assurance that he would pay the purchase price on demand." McCowen has at all times refused to pay the amount of his bid for the property, and no certificate of sale has been issued to him or to any other person, and no return of sale has been made.

December 15, 1924, Keith C. Eversole purchased the mortgaged lands from Burns. On the same day Eversole tendered to the commissioner $231.24, the amount required for redemption, and demanded a certificate of redemption. Two days later Eversole tendered to the commissioner "a check for the sum of $231, the amount of the bid of the said McCowen; * * * said action on the part of said K. C. Eversole was not done at the request of or with the knowledge of the said McCowen, * * * but on the contrary, the said action of said K. C. Eversole has been disavowed and disaffirmed by the said Hale McCowen, Jr." Appellant testified in relation to the tender last mentioned as follows: "I took the check. * * * I told him at the time that it would be considered as a tender and not a payment." Swales demanded that the appellant proceed to resell the property, but he refused, and this proceeding was commenced for the purpose of requiring him to do so. Judgment was entered as prayed for by the plaintiff, and the defendant has appealed.

It appears from the evidence and the findings that the appellant has no moneys in his hands which can be reached by the judgment creditor in the foreclosure action. Appellant is holding a check for $231, not as payment, but as a mere tender. Eversole, the maker of the check, is not a party to this proceeding, and would not be bound by any judgment entered herein. The tender and the check, therefore, may be eliminated from consideration as immaterial, and it is unnecessary to consider what would have been the effect of an acceptance of payment by the appellant from Eversole. The situation, therefore, is the simple one of the refusal of a purchaser at a foreclosure sale to make payment of the amount of his bid.

"Upon the failure of the purchaser to comply with the terms of the sale, the sheriff may, in some jurisdictions, proceed against the purchaser for the full amount of his bid, but his usual remedy, which in some jurisdictions it is his duty to pursue, is to resell the property and proceed against the defaulting purchaser for any deficiency between the amount bid by him and the amount realized on the resale." 23 C. J. 651.

An action against a purchaser for the amount of his bid, in many cases, would be an inadequate remedy by reason of the expense and delay incident to such a suit. A simpler remedy is provided by section 695 of the Code of Civil Procedure, which reads as follows:

"If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction."

[2] The provisions of section 695 are applicable to sales made by commissioners in foreclosure proceedings. Code Civ. Proc., § 726. Since private persons are interested in the performance of the official duty prescribed by section 695, the word "may" therein is to be construed as meaning "must." Brenner v. Los Angeles, 160 Cal. 72, 79, 116 P. 397; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 599, 229 P. 1020; County of Los Angeles v. State, 64 Cal. App. 290, 297, 222 P. 153.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

99 Cal. App. 10

Ex parte GRIMES. (Cr. 1821.)

District Court of Appeal, Second District, Division 1, California. May 16, 1929.

1. Bail 🔑49—Complaint that district attorney, after order permitting bail, forbade bond to be written, should not be made in habeas corpus or to appellate court.

Complaint that district attorney, after order admitting defendant to bail, issued instructions that bond should not be written for defendant under any circumstances, could not be made to appellate court or in habeas corpus proceeding to secure reduction of bail.

2. Bail 🔑51—Judge fixing amount of bail could consider fact that defendant was fugitive from justice.

Judge in fixing amount of bail had right to consider fact that at time of her arrest accused was fugitive from justice.

3. Bail 🔑42—On application for admission to bail after indictment returned, court must assume defendant is guilty of offense charged.

On an application for admission to bail after indictment has been returned, court must assume that defendant is guilty of offense with which he is charged.

4. Bail 🔑53—It must clearly appear trial court abused discretion before higher court will reduce amount of bail.

On an application to Court of Appeal for reduction of bail upon ground that amount fixed by court is excessive, it must clearly appear that trial court has abused its discretion before higher court will reduce amount.

5. Bail 🔑43—Moral turpitude of offense, as well as penalty, are matters for consideration in admitting to bail.

Moral turpitude of offense, as well as penalty provided by law, are matters for consideration in admitting to bail.

6. Bail 🔑53—Petitioner, a fugitive from justice, charged with conspiracy to maliciously procure another's arrest, held not entitled to reduction of bail fixed at $20,000, though bail of codefendants was fixed at $2,000.

Petitioner, a fugitive from justice at time of arrest on charge of criminal conspiracy to falsely and maliciously procure another to be arrested and charged with crime, who was allowed bail in sum of $20,000 which she was unable to procure, *held* not entitled to reduction of bail, where codefendants were admitted to bail in sum of $2,000 each.

Application by Callie Grimes for writ of habeas corpus to be directed to the Sheriff of Los Angeles County to secure reduction of bail. Writ denied, and petitioner remanded.

Leo D. Dazé, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and George B. Bush, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, P. J. On the 18th day of February, 1929, in the superior court of Los Angeles county, an indictment was returned whereby the petitioner and seven others were charged with the crime of criminal conspiracy, a felony, to wit, a conspiracy to commit the crime of falsely and maliciously procuring another to be charged and arrested for a crime in violation of subdivision 2, § 182, of the Penal Code. Prior to that date petitioner had been a witness before the grand jury in relation to said matter, and knew that the subject of the proposed indictment was being considered. Between the time of the filing of the indictment and issuance of a warrant for petitioner's arrest she left the state of California. On March 11th she was arrested in the state of Texas, waived extradition proceedings, and returned in the custody of the arresting officers to the county of Los Angeles, Cal., where she was brought before the superior court, and was allowed bail in the sum of $20,000, which she has not been able to procure.

By her petition in this proceeding, petitioner alleges that said amount of bail is per se unreasonably large and disproportionately excessive; that the court abused its discretion in fixing her bail at said sum, especially in view of the fact that each of her codefendants was admitted to bail in the sum of $2,000.

[1] At this point we will digress from the main issue to take notice of the allegation in the petition that several bond companies have informed petitioner that for political reasons her bond could not be written, and the further allegation "that in one instance the attorney for your petitioner learned that the district attorney of Los Angeles county had issued instructions that bond should not be written for your petitioner under any circumstances." We venture to suggest that such conduct of the district attorney after an order admitting a defendant to bail would constitute contempt of court and would be an unlawful interference with the order of the court, and that, if in fact the attorney for petitioner has knowledge of any such conduct, he might appropriately bring the facts before the proper tribunal, which, however, is not this court or in this proceeding. It must not be inferred, however, that we have given any weight or credence to the charge.

[2-5] It is not denied by petitioner that she was present in the state of California at the time of the commission of the offense charged in the indictment. The facts show that at the time of her arrest in Texas she was a fugitive from justice. In re Jackson, 82 Cal. App. 719, 256 P. 250; In re Thurber, 37 Cal. App. 571, 174 P. 112. The judge by whom the amount of the bail was determined had a right to take that fact into consideration. Upon an application for admission to bail

after indictment returned, the court must assume that the defendant is guilty of the offense with which he is charged. Upon an application to a court of appeal for reduction of bail upon the ground that the amount fixed by the court is excessive, it must clearly appear that the trial court has abused its discretion, before a higher court will reduce the amount. Ex parte Ruef, 7 Cal. App. 750, 752, 96 P. 24. It is sometimes stated that in order to justify such interference, the bail demanded must be per se unreasonably great and clearly disproportionate to the offense involved. The moral turpitude of the offense, as well as the penalty provided by law, are also matters for consideration in admitting to bail.

[6] In the matter now before us the evidence presented is not convincing of the contention that the amount of bail required by the court is necessarily excessive. The facts which may have been presented to the judge, and upon which he deemed it reasonable to admit the other defendants to bail in the sum of $2,000, are not before us. On the face of the matter it would be just as reasonable to assume that the bail required of these other defendants was too low in amount as to say that the amount required of this petitioner was excessive. The other defendants did not occupy, as did the petitioner, the unfavorable position of a defendant brought in as a fugitive from justice.

The application for reduction of bail by this court is denied, and the petitioner is remanded to custody.

We concur: HOUSER, J.; YORK, J.

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IRER v. GAWN et al. (three cases).★

BUCHANAN v. KITTS et al. (two cases).

(Civ. 3727–3729.)

District Court of Appeal, Third District, California. May 16, 1929.

Rehearing Denied June 15, 1929. Hearing Denied by Supreme Court July 15, 1929.

1. Joint adventures ⟹5(2)—Evidence held to warrant finding that agreement between owner of land and party furnishing money for construction of building was joint adventure.

Evidence that owner of land and party furnishing money for construction of bungalow were to share profits and receive pay for personal services when employed in construction of building *held* to warrant finding that transaction was joint adventure.

2. Joint adventures ⟹1—Legal principles applicable to joint adventure so far as affecting principals are same as if agreement were copartnership.

So far as interests of principals to joint adventure are concerned, it is immaterial whether agreement be deemed copartnership or joint adventure; legal principles applicable being same.

3. Trial ⟹397(3)—Findings need not be made on subject as to which pleadings make no issue.

Findings on subject as to which no issue is presented by pleadings need not be made.

4. Joint adventures ⟹2—Agreement may be terminated at any time by mutual consent of contracting parties.

Agreement of joint adventure may be terminated at any time by mutual consent of contracting parties.

5. Joint adventures ⟹4(1)—Either party may require property to be applied on dissolution to discharge of valid debts.

On dissolution of joint adventure, either of parties to enterprise may require its property to be applied to discharge of valid debts.

6. Joint adventures ⟹4(1)—Share of profits or losses of joint adventure is not necessarily determined by proportion of capital contributed.

Relative amounts contributed by parties to joint adventure does not necessarily determine proportions of profits or losses which are to be enjoyed or borne by interested parties, unless contract so provides.

7. Joint adventures ⟹5(2)—In absence of express agreement, losses of joint adventure are presumed to be shared equally between parties (Civ. Code, §§ 2403, 2404).

In absence of express agreement between parties to joint adventure, it will be presumed that losses are to be borne equally between parties, in view of Civ. Code, §§ 2403, 2404.

8. Trial ⟹29(2)—Trial judge's criticism of unsatisfactory testimony of claimant held not misconduct, in view of his allowance of substantial part of claim, notwithstanding referee's disallowance of entire claim.

In view of unsatisfactory character of testimony of claimant, trial judge's criticism thereof *held* not misconduct, in view of allowance of substantial amount, notwithstanding referee's disallowance of entire claim.

9. Appeal and error ⟹259, 719(1) — In absence of exception or assignment, claim of misconduct or prejudice of judge cannot be raised for first time on appeal.

In absence of exception to trial judge's remarks or assignment of misconduct reserved during process of trial, claim of prejudice or misconduct of trial judge cannot be raised for first time on appeal.

10. Evidence ⟹213(1)—Counsel's compromise offer to allow part of claim in interest of saving time is not admission of merits of claim, where not accepted.

Counsel's offer in the interest of saving time to allow part of appellant's claim as compromise is not admission of merit of claim, where offer was not accepted.

★Rehearing denied. Hearing denied by Supreme Court.

11. Appeal and error 🔑757(3), 760(2)—Where no evidence is printed and no reference made to typewritten record, mere declaration that specific finding or judgment is unsupported by evidence will not be considered (Supreme Court Rule 8, part 5, as amended in 1928; Code Civ. Proc. § 953a).

In absence of compliance with Supreme Court Rule 8, part 5, as amended in 1928, no consideration will be given on appeal taken pursuant to Code Civ. Proc. § 953a, to mere declaration that specific finding or judgment is not supported by evidence, where no evidence is printed in briefs nor any reference made to typewritten record where such may be found.

12. Appeal and error 🔑863—Judgment 🔑355—Judgment may be set aside on motion, where erroneous conclusions of law are inconsistent with findings of fact; on appeal from order granting motion to set aside erroneous conclusions of law and enter another judgment, question to be determined is whether original conclusions of law were in conflict with findings of fact (Code Civ. Proc. §§ 663, 663a).

Under Code Civ. Proc. § 663, a judgment may be set aside on motion and another judgment entered in lieu thereof, where erroneous conclusions of law are adopted which are inconsistent with findings of fact, and, on appeal under section 663a from such order, question to be determined is whether original conclusions of law were in conflict with findings of fact.

13. Frauds, statute of 🔑34—Agreement to apply to payment of debts of joint adventure proceeds of securities pledged by party to supply capital, not being in writing, signed by parties to be charged, was unenforceable.

In suit to dissolve joint adventure and settle liabilities of parties, fraud not being pleaded, agreement to apply $1,800, realized from securities pledged by one party to supply capital, to payment of debts of business, was not enforceable, where not in writing, signed by interested parties to be charged.

14. Receivers 🔑142—Sale of bungalow property of joint adventure did not pass other real or personal assets.

Sale by receiver of bungalow property of joint adventure *held* not to pass to purchaser any real or personal property separate and distinct from such bungalow property.

15. Judgment 🔑355—Trial court was authorized on motion to set aside judgment and enter new judgment, where original conclusion of law erroneously decided that sale of specific real property of joint adventure passed title to other assets (Code Civ. Proc. § 663).

Trial court's conclusion of law that sale of bungalow property of joint adventure passed title to other assets of business was erroneous, and, under Code Civ. Proc. § 663, court was authorized to set aside judgment on motion and render another judgment in accordance with corrected conclusions of law.

16. Pleading 🔑4—Allegations of pleadings, not its title, determine its nature.

Pleadings will not be measured by its title alone, but its nature will be determined by appropriate allegations which it contains.

17. Pleading 🔑279(1)—Permitting filing of pleading denominated supplemental complaint was not error, notwithstanding facts alleged therein did not arise after filing of original complaint, but might have been expressly alleged in amended complaint (Code Civ. Proc. §§ 379, 464).

Where appellant was proper party to action, there was no error in permitting him to be made party under Code Civ. Proc. § 379, and to permit filing of pleading denominated supplemental complaint, notwithstanding that under section 464 office of supplemental complaint is to allege only new matter which occurs after filing of original complaint or answer, where matter alleged in such pleading would have been appropriate in amended complaint.

18. Receivers 🔑110—Receiver holds custody of property in behalf of court for real owners, and court may direct delivery to receiver of specific property involved.

Receiver merely holds custody of property involved in litigation in behalf of court for real owners thereof, and court may direct delivery by receiver of specific property involved.

19. Receivers 🔑179—Custodian of property cannot complain that receiver was not party to action in which he was ordered to deliver property to such receiver.

Custodian of property cannot, on appeal, complain that receiver was not made party to action in which delivery of property to receiver was ordered.

20. Parties 🔑80(6)—Objection on ground of nonjoinder of parties is waived, unless presented by demurrer or answer.

Objection on ground of nonjoinder of parties plaintiff or defendant must be presented by demurrer or answer in manner provided by statute, or it will be deemed to have been waived.

21. Appeal and error 🔑187(2)—Objection to misjoinder of parties cannot be made on appeal for first time.

Objection to misjoinder of parties plaintiff or defendant cannot be made for first time on appeal.

Appeals from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Actions by Henry Irer against J. D. Gawn and others, in which defendant Gawn filed a cross-complaint, and in which H. M. Buchanan and W. J. Kitts and others were made parties defendants, each filing a separate cross-complaint, and by H. M. Buchanan against W. J. Kitts and others, consolidated for trial. Defendants Buchanan, Irer, Gawn, and Kitts appeal. Affirmed.

Carleton & Keating and Frank E. Carleton, all of Los Angeles, for Buchanan.

Raymond B. Wells and Albert E. Sherman, both of Los Angeles, for Irer.

Max Schleimer, of Los Angeles, for Gawn.

R. L. Horton, of Los Angeles, for Hammond Lumber Co.

C. Ibeson Sweet, of Los Angeles, for Kitts.

THOMPSON, J. From the judgment and findings covering a group of three consolidated cases which involved an accounting of a joint adventure to construct a bungalow court several appeals were perfected and will be considered conjointly.

The plaintiff Irer owned three lots in the city of Los Angeles. December 1, 1923, he entered into a written contract with the appellant Gawn to engage in a joint adventure, by the terms of which they agreed to construct a bungalow court on these lots. For the purposes of this enterprise, the lots were valued at $10,000. Gawn contributed $4,000, which he secured by obtaining credit for $2,200 to purchase materials for the bungalow court from the Hammond Lumber Company, in payment for which he transferred to that company a trust deed upon other property. The remaining $1,800 he procured by transferring to W. J. Kitts a note and mortgage, with instructions to sell the securities and pay as directed existing bills for labor and materials also used in the building. An additional sum of $20,000 was raised by mortgaging the property. Two-sevenths undivided interest in the property was conveyed to Gawn. The contract provided that, in the event of a sale of the property, each party was to be first reimbursed the amount of his contribution to the enterprise, after which the net proceeds of sale were to be equally divided between them. There was no provision concerning the subject of losses. Regarding the obligation for paying the cost for construction in excess of the initial sums contributed, the contract provided (paragraph 8): "If the said sum of $4,000 and the proceeds of said mortgage in the sum of $20,000 shall not be sufficient for the erection and construction of said bungalow court * * * each of said parties shall forthwith advance one-half of the amount or amounts necessary for the completion of the improvement." After providing for reimbursement for the original specified sums of contribution, the contract declared that (paragraph 15): "In the event of a sale * * * each party shall be entitled to one-half of the net profits of said matter." By the following June all of the funds were expended in the process of constructing the bungalow court. It was still incomplete, and required several thousand dollars to finish the contract. Dissensions arose between the parties. Both refused to expend more money on the enterprise, and the work ceased. The plaintiff Irer thereupon commenced suit for dissolution of the relationship which existed between them, and for an accounting. The appellant Gawn answered the petition and filed a cross-complaint, praying that "said joint venture may be dissolved"; that a receiver be appointed; and that an accounting be had. Upon application to the trial court, both W. J. Kitts and the Hammond Lumber Company, to whom the appellant Gawn had transferred securities to obtain credit for his share of the contribution to the joint adventure, were made party defendants, and each filed a separate cross-complaint for the value of the materials furnished. A receiver was duly appointed by the court, and the bungalow property was sold and conveyed to H. M. Buchanan for $2,000, subject to all existing incumbrances, liens, and claims. Buchanan was then also made a party defendant, and filed a cross-complaint; setting up his equities. Prior to Buchanan's appearance as a defendant in the Irer case, he had commenced a separate suit for accounting against W. J. Kitts and the Redlands Building & Loan Association as holders of the Gawn note and mortgage for $1,800, claiming that they were a part of the assets of the enterprise, which he had purchased with the bungalow property. These suits were subsequently consolidated for trial. An accounting was had, resulting in a conflict over several items. Findings were adopted, and an interlocutory decree was rendered. Subsequently on motion this decree was set aside, and modified conclusions of law were filed, based upon which an amended judgment was entered. The chief change adopted in these findings and judgment, of which the appellant Gawn complains, is that the court finally held that each of the joint adventurers, Irer and Gawn, were bound to pay one-half of the losses of the enterprise. Separate notices of appeal were filed by the defendant Gawn from each of said judgments, and another appeal was taken from the order setting aside the first findings and decree. Both Kitts and Buchanan also perfected separate appeals from the last judgment entered and from the order setting aside the first findings and decree. Gawn's appeal is presented by means of a clerk's transcript prepared pursuant to section 953a of the Code of Civil Procedure. The other appeals are presented in the form of bills of exceptions, including, however, no evidence, but being composed only of the judgment roll and the proceedings necessary to the prosecution of the appeals.

In the several appeals which have been perfected in this combination of consolidated cases, numerous grounds of alleged error are urged, among which it is contended that the court erred in failing to find that the transaction constituted a joint adventure; or that the contract was breached by the appellant Gawn. It is further asserted that the assets of the enterprise were distributed between the parties in improper proportions; that the court was without jurisdiction to set aside the original findings and judgment, or to modify and enter the final judgment; that the court erred in charging each of the joint adventurers with the obligation of paying one-half of the net loss of the enterprise, instead of fixing the relative proportions of loss according to the value of their respective contributions. Finally, it is asserted that the findings and judgment are not supported by the evidence; that the trial judge was guilty of misconduct; and that the appellant Gawn was not accorded a fair trial.

[1, 2] In both the original and amended conclusions of law the court did correctly find "that the said agreement * * * constituted a joint adventure." The single transaction of becoming joint owners of real property upon which a bungalow court is constructed for sale from the joint contributions of the interested parties, under the circumstances disclosed by the record in these cases, clearly indicates that the parties intended to create a joint adventure. The nature of this transaction, as a joint adventure, is not changed by the fact that the agreement incidentally provided that the respective parties were to render personal services in the construction of the buildings, and, when so employed, they were to receive $10 per day, which allowance was to be charged as "items of expense in the construction." But, so far as the interests of the principals in this transaction are concerned, it is immaterial whether it be deemed to be a copartnership or a joint adventure, for the legal principles which are applicable are the same. 14 Cal. Jur. 760, § 2, Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601.

[3-6] It is asserted by the appellant Gawn that the court erred in failing to find that the contract of joint adventure was broken by him; that this is fatal, for the reason that the losses must be borne alone by the party who is guilty of the breach. In the present cases, however, the joint adventure was apparently terminated by mutual consent. The pleadings allege without dispute, and the court found, that dissensions arose between the parties, that the operations in the construction of the bungalow court ceased about June 1, 1924, leaving the building incomplete, with unpaid bills in the aggregate sum of about $10,000, and that the respective parties agreed to terminate the venture, hold an accounting, and appoint a receiver to take charge of the property and liquidate the debts. In truth, the appellant Gawn prayed for this very relief in his cross-complaint. It is unnecessary to adopt findings upon a subject upon which no issue is presented by the pleadings. 24 Cal. Jur. 952, § 191. It was therefore unnecessary for the court to adopt findings on this subject. The court subsequently ordered the receiver to sell the property to satisfy the obligations. An agreement of joint adventure may be terminated at any time by the mutual consent of the contracting parties. 33 C. J. 848, § 21; Nevins v. Heckscher, 223 N. Y. 551, 119 N. E. 1061. In the event of a dissolution of a joint adventure, either of the parties to the enterprise may require its property to be applied to the discharge of the valid debts. Section 2405, Civ. Code. In the present cases, the amounts contributed by the respective parties were not equal. By the terms of the contract it was agreed that the value of the lots which were contributed by the plaintiff Irer was $10,000, while the appellant furnished only $4,000 to the enterprise. In spite of these unequal contributions, the contract provided that the "net profits shall be divided equally." It is true that the contract conveyed to the appellant Gawn only a two-sevenths undivided interest in the land, which was his share according to the relative proportion which his contribution of $4,000 bore to the agreed value of the property, which was estimated at $10,000. The aggregate amount which was contributed was therefore $14,000, two-sevenths of which the defendant Gawn supplied. The relative amounts contributed to a joint adventure do not necessarily determine the proportions of profits or losses which are to be enjoyed or borne by each of the interested parties, unless the contract so provides. In 33 C. J. 861, § 67, it is said:

[7] "In the absence of an express agreement between the parties to a joint adventure as to the proportions in which they are to share in the profits thereof, the law presumes that they intended that each should share equally with the others, notwithstanding an inequality in the amounts contributed by them to the capital employed in the venture."

Reason prompts the application of the same rule to the participation in the losses of such an enterprise, where the contract fails to specify the relative obligations of the parties. 14 Cal. Jur. 762, § 3. The rule prescribed by the statutes of California with respect to partnership profits and losses announces only the common-law doctrine which is applicable to the circumstances of the present cases. Section 2403 of the Civil Code provides: "In the absence of any agreement on the subject the shares of partners in the profit or loss of the business are equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss."

This means that, in the event of the termination of a contract of joint adventure, the respective parties are entitled to be reimbursed to the extent of the value of their original contribution, less their proportion of the loss sustained. Section 2404 of the Civil Code also provides that: "An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated."

These sections of the Code are in accord with the common-law rule applicable to the relationship of a partnership or joint adventure, where the contract is silent as to the participation in losses. Whatever inferences may be drawn from the contract in the present cases lead to the conclusion that it was the intention of the parties to participate equally in the losses as well as the profits of the enterprise. It follows that the court therefore properly held that the respective parties to this joint adventure were bound to participate equally in the losses.

[8, 9] The appellant Gawn complains of alleged misconduct and prejudice on the part of the trial judge, depriving him of a fair trial. It is asserted that, while he was a witness and testifying in his own behalf in support of a claim for $805 for personal services as carpenter and care taken of the premises for 80½ days between May 17 and August 14, 1924, at the agreed rate of $10 per day, the court became displeased with the conduct of the witness, and criticized the unsatisfactory character of his evidence. In a colloquy with counsel, the judge said: "I think this man did some work, Mr. Wells, during that time. I think he has padded his bill very badly. * * * I don't blame the referee for disallowing the claim entirely."

Later, in reply to this appellant's attorney, the court again said: "* * * To be very frank with you * * * I was rather disgusted with your client on the witness stand, his manner of answering questions, and I came to the conclusion he was padding his report. I didn't want to do him an injustice. I could just as easily have said, I approve the report of the referee (who disallowed the entire bill), and let it go (without allowing him anything on this claim for $805). * * * Your client impresses me he wasn't entitled to anything."

[10] The record discloses evidence which tends to warrant the court in discrediting the merits of this claim. It included only 21 days' actual carpenter work. The balance appears to have been for care of the premises to August 14th. But the construction work ceased June 1st, and this suit was commenced June 4, 1924. It may well be said there is not much merit in a claim for more than 60 days' pay at $10 per day for a mere inspection of the premises after the work ceased and the suit for accounting was commenced. The record is indeed unsatisfactory with respect to this claim. The referee disallowed this entire claim, and the court seemed satisfied that nothing should have been allowed, yet, with an evident disposition to compromise it, out of an abundance of precaution for appellant's welfare, he allowed him $320. This procedure may not be said to indicate a prejudiced mind on the part of the court or unfairness toward this appellant. Certainly no misconduct on the part of the judge is shown. No objection or exception to these remarks was reserved by the appellant. The question of prejudice on the part of the trial judge is raised for the first time on appeal. In order to avail himself of the benefit of alleged prejudicial utterances of a trial judge, exception to the remarks or an assignment of misconduct must be reserved during the process of the trial. Compton-Gardena Milling Co. v. McCartney, 69 Cal. App. 708, 710, 231 P. 764; Franceschi v. Nardi, 77 Cal. App. 78, 81, 246 P. 130; Hughes v. Hartman, (Cal. Sup.) 273 P. 560. In support of the validity of this claim it is urged that plaintiff's attorney acknowledged its merits by offering to allow one-half of the claim. He did say: "I think the testimony shows conclusively that the bills are padded. * * * I am willing, for the purpose of saving time * * * that one-half of this amount claimed be allowed." This offer to compromise was, however, not accepted. It was specifically made in the interest of saving time. A proffer of compromise under such circumstances is not an admission of the merit of the claim. Jones on Evidence (3d Ed.) 437, § 291; 5 Cal. Jur. 408, § 20.

[11] The appellant Gawn contends that the amended findings and judgment, to the effect that the fund of $1,800 in the possession of the defendant Kitts belongs to the joint adventure and must be paid to the receiver of the enterprise, are not sustained by the evidence. In support of this assertion, no evidence whatever is printed in his briefs, nor is any reference made to the typewritten record where the subject may be found. In the absence of a compliance with Supreme Court rule 8, part 5, as amended in 1928, no consideration will be given on appeal to a mere declaration that specific findings or the judgment is not supported by the evidence. It would require too arduous a task for an appellate judge to search the record to confirm or disprove a general statement not supported by any attempt to quote the evidence, or point out the defect relied upon. It is true that upon this subject the construction of section 953c of the Code of Civil Procedure has been modified by the Supreme Court rule above cited, since the decisions were rendered in Wong Ah Sure v. Ty Fook, 37 Cal. App. 465, 174 P. 64, and Jones v. Express Pub. Co. (Cal. App.) 262 P. 78. That rule, however, still requires the substance of the record relied upon to be printed either in narrative form or otherwise, with reference to the page and line of the transcript for verification. It now reads: "Where the parts of the typewritten record relied upon on appeal are required to be printed in the briefs (Code Civ. Proc., § 953a et seq.) it shall be sufficient to state therein the substance of such record parenthetically referring to the line and page of the typewritten transcript for verification. * * *" Because of the failure to comply with this rule, it must be assumed that the challenged findings are amply supported by the evidence.

November 30, 1926, findings of fact and conclusions of law were adopted and filed, based upon which a judgment was entered. Subsequently, upon motion, these findings and judgment were set aside, and other findings with modified conclusions of law were adopted and a new judgment entered thereon. From the order setting aside the later findings and judgment, an appeal has been perfected.

[12] A judgment may be set aside upon motion and another judgment entered in lieu thereof, where erroneous conclusions of law are adopted which are inconsistent with the findings of fact. In the event of such modification, the conclusions of law should be amended to conform to the findings of fact and a judgment entered accordingly.. Section 663, Code Civ. Proc.; Gale v. Dixon (Cal. App.) 267 P. 342; Modoc Co-operative Ass'n v. Porter, 11 Cal. App. 274, 104 P. 710. From the order granting this motion an appeal may be taken in the same manner as from an order which is made after final judgment. Section 663a, Code Civ. Proc. Upon appeal from this order, the question to be determined is whether the original conclusions of law were in conflict with the findings of fact. A single set of findings and judgment were entered in the three consolidated cases which are under consideration. In the case of Buchanan v. Kitts, which is one of these three cases, the facts heretofore narrated, constituting the cause directly involved in the joint adventure of Irer and Gawn, were alleged, together with additional facts to the effect that Gawn, as a part of his contribution to the enterprise, had delivered to Kitts a certain mortgage upon other property, with directions to sell it and apply the proceeds to the payment of claims for labor and material furnished in the construction of the bungalow court; that obligations were incurred on that account in the aggregate amount of $1,780.60, which claims were paid by Buchanan and then assigned to him for a valuable consideration, and that he thereupon became the owner and holder thereof; that the mortgage was sold by Kitts for $1,800, which money he refused to apply on said claims pursuant to instructions, but still holds the same in violation of his trust; that the enterprise was abandoned, a suit was commenced for an accounting between the joint adventurers, and by mutual consent a receiver was appointed, and the bungalow property was sold and conveyed to the plaintiff Buchanan for $2,000, subject to all mortgages, claims, and liens.

The plaintiff prayed that Kitts be required to account for and pay to him said sum of money. The answer admitted substantially all the facts alleged, except that it was stated that the $1,800 was held by Kitts to be applied on the payment of said bills only when directed by the joint adventurers, and that the bungalow court was never completed and the defendant Kitts was not instructed to pay the claims. Upon trial, the court found all of the aforesaid allegations of the complaint to be true, except that it was not found that the claims had been assigned to the plaintiff Buchanan. The court further found that Buchanan bought the bungalow property because of the promises made to him by the receiver, Gawn and Kitts, to the effect that the $1,800 held by Kitts would be applied to the payment of the claims, but that this promise was made without the knowledge or consent of Irer. It was then found that the equity of Irer and Gawn "*in and to said real property*" was sold and conveyed to Buchanan in consideration of $2,000 "subject to all existing encumbrances, liens and claims * * * amounting to approximately $10,000 in addition to the $20,000 mortgage against the property."

[13-15] Based upon these findings, as a conclusion of law, the court first held that Buchanan was entitled to a judgment against Kitts for the sum of $1,800. This conclusion seems to have been based upon the theory that the sale of the property was procured by the fraudulent oral promise of the referee, Gawn, and Kitts to see that the $1,800 was contributed to the payment of debts. The court seems also to have first assumed that the purchase of the real property carried with it all the other assets of the joint adventure. Fraud, however, was not pleaded, and unfortunately the alleged agreement to apply the $1,800 to the payment of debts was not in writing or signed by the interested parties to be charged. It was, therefore, not enforceable. Moreover, it was found by the court to have been made without the knowledge or consent of Irer, one of the material parties to the joint adventure, who was vitally interested in the enterprise and the sale of the property. According to the findings, the sale does not purport to convey any assets belonging to the joint adventure, except the right, title, and interest in the bungalow property. The $1,800 constituted a trust fund, which was a money asset of the joint enterprise entirely independent of the sale and conveyance of the real property. It cannot be said that real or personal property entirely separate and distinct from the bungalow property, which was all that was sold, would pass to the purchaser in the absence of a written contract to that effect. If an assignment of these claims had actually been made to the plaintiff Buchanan, an appropriate action would lie against Kitts, the holder of the trust fund. The court, however, failed to find that such an assignment occurred, and in this action for an accounting the court first erroneously concluded that this $1,800 fund passed to the plaintiff Buchanan by virtue of the purchase of the bungalow property. It therefore follows a discrepancy existed between the original findings of fact and conclusions of law which the court was authorized to correct pursuant to the provisions of section 663 of the Code of Civil Procedure. This is precisely what the court did, setting aside the conclusions of law and judgment, and adopting modified conclusions of law to conform to its findings of fact, upon which a

new judgment was entered holding that the plaintiff was not entitled to judgment for this fund of $1,800 but that, upon the contrary, the money belonged to the assets of the joint adventure and should be paid to the receiver thereof.

Since this inconsistency existed between the original findings of fact and conclusions of law which authorized the modification of the conclusions of law and judgment, it was not error to add to the judgment a provision holding that the joint adventurers were equally liable for the losses of the enterprise, for this declaration followed the original findings as a mere matter of law. The appeal from the order setting aside the original findings and judgment is without merit. The case of Hughes v. De Mund (Cal. App.) 274 P. 405, cited by appellant Gawn, is not in conflict with the law applicable to the facts of the present case. In that case one judge heard the evidence in an action for partnership accounting, and adopted findings of fact. Another judge who did not hear this evidence subsequently set the findings aside, and adopted other findings of fact. As the court very properly says in its opinion: "The findings of *fact* * * * were final on the issues therein," and could not properly be set aside in the proceeding. But in the present case the findings of fact based upon the evidence formerly adduced were not modified or disturbed, but remained in the precise form in which they were adopted. All that the court attempted to do in the present case was to modify the conclusions of law pursuant to section 663 of the Code of Civil Procedure to conform to the facts adopted by the former trial judge. This became a mere matter of applying the principles of law to the facts which had been previously ascertained and found by another judge. The very purpose of the adoption of the Code provision above mentioned was to permit a trial judge to remedy a mistake of law applicable to the ascertained facts, without the necessity of requiring the cost and delay of an appeal.

[16, 17] Subsequent to the filing of the original complaint by Irer for an accounting, upon motion under section 379 of the Code of Civil Procedure, W. J. Kitts, who held possession of a portion of the joint adventure funds involved in the controversy, was made a party defendant. A pleading which was denominated a supplemental complaint was filed, setting up the facts with relation to the custody of the trust funds. On appeal from the final judgment, the defendant Kitts claims that he was improperly united as a party defendant, and that the office of a supplemental complaint is to allege only new matter which occurs after the filing of the original complaint or answer. Section 464, Code Civ. Proc. He asserts that all of the facts which are alleged in the pleading designated as a supplemental complaint existed before the filing of the original complaint. This is true. The facts, however, indicate that he was a proper party to the action, and that the new matter would have been appropriate to set up in an amended complaint. A pleading will not be measured by its title alone. The appropriate allegations which it contains will determine the nature of the document. There was no error in permitting the filing of this pleading. Stark v. Hoeft (Cal. Sup.) 269 P. 1105, 1107.

[18-21] The defendant Kitts may not complain because the receiver was not made a party to the action. A receiver merely holds the custody of the property involved in litigation in behalf of the court for the real owners thereof, and the court may direct the delivery to the receiver of specific property which is involved in the litigation. 22 Cal Jur. 493, § 79. An objection on the ground of nonjoinder of parties plaintiff or defendant must be presented by demurrer or answer in the manner provided by statute, or it will be deemed to have been waived. 20 Cal. Jur. 573, § 56; Stackpole v. Pac. Gas & Elec. Co., 181 Cal. 700, 186 P. 354; Breitenbucher v. Oppenheim, 160 Cal. 98, 116 P. 55. The objection on the part of the defendant Kitts to the nonjoinder of the receiver as a party defendant comes too late when it is urged on appeal for the first time, and is therefore without merit.

The records in these consolidated cases seem to be free from prejudicial error. The order of January 13, 1927, vacating the findings and judgment dated November 30, 1926, and which order authorized the amendment and modification of the conclusions of law so as to conform to the findings of fact theretofore adopted, and permitting the entry of an amended judgment, is affirmed. The subsequent judgment dated and filed February 3, 1927, from which the several appeals are herein prosecuted, is also affirmed.

I concur: PLUMMER, Acting P. J.

99 Cal. App. 106

FLINN v. POTTER. (Civ. 3777.)

District Court of Appeal, Third District, California. May 22, 1929.

Deeds ⚷66—Evidence held not insufficient, as matter of law, to support finding that deed from wife to husband was delivered.

Evidence *held* not insufficient, as matter of law, to support finding that deed from wife to husband was delivered.

Appeal from Superior Court, Santa Barbara County; John L. Hudner, Judge.

Action by Charles H. Flinn against Robert J. Potter, sometimes known as Robert F. Potter. From a judgment for defendant, plaintiff appeals. Affirmed.

Coleman E. Stewart, of Santa Barbara, for appellant.

S. J. Bingham, of Santa Barbara, for respondent.

FINCH, P. J. August 5, 1922, Emma D. Potter, plaintiff's mother, signed and acknowledged two deeds, purporting to convey real property to her husband, the defendant herein, who is the stepfather of the plaintiff. The first amended complaint contains three counts. The first and third counts allege mental weakness on the part of Mrs. Potter and undue influence on the part of the defendant. The second alleges that the deeds mentioned were never delivered. At the trial, "the attorney for plaintiff in open court withdrew the first and third causes of action stated in plaintiff's first amended complaint and stipulated that plaintiff would go to trial on his allegations of the second cause of action, that said deeds were never delivered during the lifetime of the grantor." Judgment was entered in favor of the defendant, and the plaintiff has appealed.

The defendant testified that, without any request or solicitation on his part, his wife said "she wanted me to have it all what there was without any trouble"; that, at her request, he went with her to the office of a lawyer, where the deeds were signed and acknowledged; that immediately after leaving the office she handed him the deeds, and said, "I hand you these deeds so there won't be any trouble"; or she said, "Take them"; that he took the deeds home and placed them in his wife's "community trunk," in which he kept his best clothes. The trunk was kept in the bedroom occupied by the defendant and his wife. Another witness testified that about a week before Mrs. Potter's death he saw some of the defendant's clothing in the trunk. The foregoing summary contains the substance of all the material evidence given at the trial.

By abandoning his first and third causes of action, the plaintiff eliminated the issues of mental weakness and undue influence, leaving nothing to be tried except the question of delivery. Appellant contends that the evidence is insufficient to show a delivery of the deeds with intent to pass title. No citation of authorities is deemed necessary to show that it cannot be held, as a matter of law, that such evidence, standing uncontradicted, is insufficient to support the findings and judgment.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

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99 Cal. App. 178

PEOPLE v. McGEE. (Cr. 1780.)

District Court of Appeal, Second District, Division 1, California. May 28, 1929.

1. Criminal law ⚷1159(2)—Finding of jury where circumstances reasonably justify inference of guilt is conclusive on appellate court.

Where circumstances are such as to justify inference of guilt, finding of jury is conclusive on appellate court though an inference of innocence might also have reasonably been drawn.

2. Criminal law ⚷1134(3)—Question of law is presented where inference of guilt is wholly unwarranted.

Where inference of guilt is wholly unwarranted, or evidence is such that court is authorized to conclude that there is no evidence to support the verdict, a question of law is presented.

3. Criminal law ⚷752½—Motion to dismiss in manslaughter prosecution, on ground of corpus delicti was not proven, raised no question other than sufficiency of evidence.

Motion to dismiss in prosecution for manslaughter at conclusion of state's case predicated, on ground that corpus delicti was not proven, did not raise any question except sufficiency of evidence.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

George W. McGee was convicted of manslaughter, and he appeals. Affirmed.

Buel R. Wood, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for the People.

YORK, J. The defendant was charged with the crime of manslaughter on an indictment found by the grand jury of Los Angeles county, and when brought to trial thereon, he waived a jury trial and consented that the trial be had before the court without a jury. He was found guilty of manslaughter and sentenced accordingly.

[1, 2] There was sufficient evidence to justify the trial court in finding the defendant guilty as charged. The most that can be said

in favor of appellant's argument is that the evidence, in relation to some of the probative facts, was conflicting.

As is said in 8 California Jurisprudence, § 584, at page 593: "If the circumstances are such as reasonably to justify the inference of guilt, the finding of the jury is conclusive upon the appellate court, although an inference of innocence might also reasonably have been drawn. But if the inference of guilt is wholly unwarranted, that is to say, if the evidence is such that the court is authorized to conclude that there is no evidence to support the verdict, a question of law is presented."

[3] The appellant also contends that the trial court erred in denying his motion to dismiss said cause at the conclusion of the state's case. It is disclosed by the transcript that this motion was predicated upon the ground that the corpus delicti was not proven. He argued that he was charged with an unlawful and malicious killing, and that there was no evidence thereof. The court called counsel's attention to the fact that manslaughter does not involve malice, and then properly denied the motion. This motion would not raise any other question except the sufficiency of the evidence, which has heretofore been passed upon herein.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

99 Cal. App. 108

SORIA v. COWELL PORTLAND CEMENT CO. (Civ. 6658.)★

District Court of Appeal, First District, Division 2, California. May 23, 1929.

Rehearing Denied June 19, 1929. Hearing Denied by Supreme Court July 22, 1929.

1. Master and servant 🔑412—Finding of negligence of employer, not insured, will not be disturbed, where evidence is not in conflict with statutory presumption (Workmen's Compensation Act, § 29(b), as amended by St. 1925, p. 495).

In an action under Workmen's Compensation Act (St. 1917, p. 831, as amended), § 29(b), as amended by St. 1925, p. 495, against employer failing to insure, where there is no conflict between the statutory presumption that injury to employee was result of employer's negligence, and the evidence, jury's finding of negligence cannot be disturbed.

2. Master and servant 🔑356—Defense of contributory negligence is expressly denied in action against employer failing to insure (Workmen's Compensation Act, § 29(b), as amended by St. 1925, p. 495).

In action against employer failing to insure, under Workmen's Compensation Act (St. 1917, p. 831, as amended), § 29(b), as amended by St. 1925, p. 495, the defense of contributory negligence is expressly denied to defendant.

3. Master and servant 🔑404—That employer endeavored to take out insurance, or applied for permission for self-insurance, is inadmissible in action against noninsured employer for injuries (Workmen's Compensation Act, § 29(b), as amended by St. 1925, p. 495).

In action against employer failing to insure under Workmen's Compensation Act (St. 1917, p. 831, as amended), § 29(b), as amended by St. 1925, p. 495, there was no error in refusing to permit employer to show application for permission for self-insurance, the fact that employer intended or endeavored to take out insurance having no bearing on fact that he was not insured at time of injury.

4. Master and servant 🔑404—That noninsured employer had been acquitted of violation of penal provisions of statute was properly excluded in employee's injury action (Workmen's Compensation Act, § 29(b), as amended by St. 1925, p. 495).

In action against noninsured employer for injuries to employee under Workmen's Compensation Act (St. 1917, p. 831, as amended), § 29(b), as amended by St. 1925, p. 495, there was no error in refusing to permit employer to show that it had been proceeded against under penal provisions of statute and had been acquitted, such fact, if true, not affecting employer's liability for damages.

5. Appeal and error 🔑761—Mere suggestion of unconstitutionality of statute regulating liability of uninsured employers for injuries to employees does not require court to search authorities (Workmen's Compensation Act, § 29(b), as amended by St. 1925, p. 495).

Mere suggestion in appellant's brief that Workmen's Compensation Act (St. 1917, p. 831, as amended) § 29(b), as amended by St. 1925, p. 495, relating to liability of uninsured employer for injuries to employee, is unconstitutional as imposing cruel and unusual punishment on employer, does not require court to search authorities to support appellant's contention.

6. Appeal and error 🔑758(3)—Bare statement in brief that certain copied instructions were erroneous held insufficient.

Appellant's brief, containing copies of certain instructions with bare statement that they were erroneous because covering grounds not specifically alleged in complaint, *held* insufficient to require court to analyze each instruction to ascertain if error might have occurred.

7. Trial 🔑296(3)—That certain instructions on negligence omitted element of proximate cause fully covered in other instructions was not error.

That some instructions on issue of negligence omitted element of proximate cause was not error, where trial judge fully instructed on this element, it not being necessary that every element should be repeated in every instruction given.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Marcos B. Soria against the Cowell Portland Cement Company. Judgment

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★Rehearing denied. Hearing denied by Supreme Court.

for plaintiff, and defendant appeals. Affirmed.

Treadwell, Van Fleet & Laughlin, of San Francisco, and Rodgers & Bray, of Martinez, for appellant.

Jesse G. Benson, of Oakland, and Ford, Johnson & Bourquin, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to recover damages for personal injuries occurring in the course of his employment in the cement plant of the defendant. The jury returned a verdict in favor of plaintiff for $11,500, to which the trial judge added $500 attorneys' fees, the action being prosecuted under the special provisions of section 29(b) of the Workmen's Compensation Act (St. 1917, p. 831, as amended), as amended in 1925 (St. 1925, p. 495). The defendant has appealed upon a bill of exceptions.

The plaintiff plants his case upon the failure of the defendant to insure against liability to pay compensation to its employees under the act, and upon the alleged negligence of the defendant in assigning plaintiff to work upon a cement conveyor in the defendant's plant without having provided any guard or rail to prevent workmen from becoming entangled in the machinery, and, generally, in failing to provide plaintiff a safe place to work.

The evidence of negligence offered by the plaintiff was that this conveyor was fitted with unfastened covers, which lifted off at any time that there was too much cement in the conveyor, leaving the revolving screw, obstructed from view by the loose cement, open and unguarded by a rail or other protection along the side of the conveyor. Plaintiff's duties were to replace these covers on the conveyor in case any of them came off or were forced off by the flow of the dry cement. It was also his duty to watch the tank into which the cement was dumped to ascertain whether the cement was flowing too rapidly or too slowly, and then to signal the operators in another part of the plant for either more or less cement. Along each side of the conveyor there was a runway leading to the top of the tank; at the lower end of the runway a platform and stairs were provided in case any one wished to pass over the conveyor from one runway to the other, and the employees were instructed not to cross over the conveyor except at this crossing.

On the day of the accident the plaintiff went below to give instructions to a new employee, who did not understand the signals. Upon his return along the right-hand runway he observed that one of the covers had been displaced by too great a flow of cement and one end rested on the left-hand runway. He climbed upon the conveyor box and attempted to lean down and over to the left side of the box to replace the cover. While in this position his leg came in contact with the unguarded revolving screw, resulting in the injury complained of.

On the issue of negligence the plaintiff relies upon the presumption of negligence specified in the act and upon the admitted fact that the revolving screw was left unguarded, while the defendant urges that the protected stairway and the instructions given its employees to use this stairway in crossing casts the entire fault upon the plaintiff. On the issue of insurance, the fact that defendant did not carry any is admitted, but the defendant excuses its failure to insure upon the ground that it had applied to the Industrial Accident Commission for "self-insurance," but that, through the neglect of the Commission, permission had not been granted at the time of the accident.

[1, 2] On the issue of negligence the evidence was all in support of the presumption found in the act that "the injury to the employee was a direct result and grew out of the negligence of the employer." This differentiates the case from those cited by appellant to the rule that against a proved fact, or a fact admitted, contrary to a presumption, the presumption has no weight, and there is no conflict. There was no conflict in the evidence as to the conditions under which the machinery was operated, and the jury's finding that these conditions did not constitute a safe place of employment cannot be disturbed. On the issue of contributory negligence of the employee this defense is expressly denied to the employer by the statute.

[3] Appellant complains of the ruling of the trial court refusing to permit it to show that it endeavored to obtain permission for "self-insurance" but was delayed through the fault of the state commission. The evidence was not material to the issues. The statute covers all cases in which the employer is not insured. The fact that an employer intended, or endeavored, to take out insurance has no bearing on the fact that he was not insured at the time of the injury.

[4] Criticism is also made of the ruling denying appellant the opportunity of showing that it had been proceeded against under the penal provisions of the statute and had been acquitted. There was no error in the ruling. If the state were seeking a penalty or forfeiture under the act its previous unsuccessful prosecution under the penal provisions of the act might be a bar, but here the employee is merely acting under the terms of the act which preserve his common-law right of an action for damages for personal injuries in lieu of compensation under the act when the employer, by his failure to insure, has not accepted the compensation features of the act. Certainly, if the state had no Compensation Act, but merely a penal statute making it a misdemeanor for an employer to fail to provide a safe place of employment, such statute, or a prosecution under it, could not affect the right of the employee to sue for dam-

ages for injuries resulting from the employer's negligence.

[5] The appellant attacks the provisions of the act as unconstitutional. The only cases cited to the point sustain acts containing somewhat similar provisions. Appellant's point is that to subject an employer to the penal provisions of the act and to require him to respond in damages to the employee would result in cruel and unusual punishment of the employer. We would need more than the mere suggestion of the point to hold an act of this character unconstitutional, and we do not feel that it is incumbent upon the court to search the authorities to support this attack upon the act.

[6, 7] In the same spirit the appellant has copied into the brief certain instructions with the bare statement that they were erroneous because covering grounds not specifically alleged in the complaint. The issues were fairly before the jury and we should not be required to analyze each instruction to ascertain if some error might have occurred. Complaint is also made that in some of the other instructions given on the issue of negligence the element of proximate cause was omitted, but the trial judge fully instructed the jury on this element and emphasized the necessity of finding that the negligence was the proximate cause of the injury before it could find for the respondent. It is not necessary that every element should be repeated in every instruction given.

Other points raised do not require consideration.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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99 Cal. App. 180

LARSON v. O'BRIEN. (Civ. 3698.)

District Court of Appeal, Third District. California. May 28, 1929.

Logs and logging 🔑3(13)—Agreement to sell and convey timber containing provision for forfeiture on default held not sale of timber precluding forfeiture for breach.

Agreement to sell and convey timber, providing that on noncompliance with terms seller shall be released from obligation to convey and purchaser shall forfeit payments made as liquidated damages, *held* not sale of timber, but agreement to sell, and time being made of essence of contract, trustee in bankruptcy of purchasers cannot avoid forfeiture after breach of such contract.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Louis Larson against P. J. O'Brien, as trustee of the estates of Henry and Albert Christenson, bankrupts. Judgment for plaintiff, and defendant appeals. Affirmed.

Eugene S. Selvage, of Eureka, for appellant.

Denver Sevier and Kenneth D. Sevier, both of Eureka, for respondent.

FINCH, P. J. The plaintiff was given judgment quieting his title to 160 acres of land and "all the trees, timber and wood now growing or lying upon said property." The defendant has appealed from the judgment.

January 18, 1923, the plaintiff entered into an agreement with Henry and Albert Christenson, by the terms of which he agreed to sell and they to buy all the timber on the land mentioned, except certain parts thereof reserved by the plaintiff, for $8,500, of which sum $2,000 was paid on the execution of the agreement and the remainder was to be paid in installments of not less than $500 each, payable every six months thereafter. The Christensons were "to clear the timber off of" 80 acres of the land "on or before August 1, 1926, and the balance of the timber mentioned to be taken off on or before August 1, 1933." The agreement contained the following:

"In the event of a failure to comply with the terms hereof by the parties of the second part, the party of the first part shall be released from all obligations in law or equity to convey said property, and the parties of the second part shall forfeit all right thereto and all moneys theretofore paid hereunder shall be treated as liquidated damages for the nonfulfillment of this contract.

"And the party of the first part, on receiving such payment, at the times and in the manner above mentioned, agrees to execute and deliver to the parties of the second part, or to their assigns, a good and sufficient title conveying said property free and clear of all liens and incumbrances made, done or suffered by the party of the first part.

"And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties, and that time is of the essence of this agreement."

The Christensons proceeded under the agreement to cut and remove timber from the land and they made prompt payment of all installments as they fell due up to and including January 18, 1928, but no subsequent payments have been made. July 6, 1928, Albert Christenson was adjudged a bankrupt and on the 17th of the same month Henry Christenson also was adjudged a bankrupt. At the commencement of this action, August 21, 1928, the defendant, O'Brien, was the trustee in bankruptcy of the estates of both bankrupts.

Appellant argues the case on the assumption that the agreement constitutes a sale of the timber in question, but by its terms it is only an agreement to sell, and title was to be conveyed to the Christensons only on payment by them of the amount agreed upon, "at the times and in the manner above mentioned," and in the event of their default, the plaintiff was to be released from all obligation to convey the property, and the Christensons were to forfeit all right thereto and all moneys theretofore paid by them. The contract provides that "time is of the essence of this agreement." In the respects mentioned, the contract is unlike the one considered in Peterson v. Gibbs, 147 Cal. 1, 81 P. 121, 109 Am. St. Rep. 107, cited by appellant. That contract purported to "grant, bargain, sell and convey all the timber now standing, lying or being" on certain lands. The court said: "The terms of the instrument literally signify an absolute conveyance of the timber, and there is nothing in the provisions relied upon by plaintiff to impair the force of the plain words of present grant." In another part of the opinion it is said: "The question in each case is as to what is the contract between the parties." The contract herein, in which time is made of its essence, is only an agreement to sell and convey. It expressly provides for a forfeiture upon the default of the Christensons, and there is nothing to distinguish the case from numerous others in which forfeitures have been unheld. 25 Cal. Jur. 621; Pedrotti v. American Nat. Fire Ins. Co. (Cal. App.) 266 P. 376, and cases therein cited.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

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99 Cal. App. 169

COOK et al. v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6932.)

District Court of Appeal, First District, Division 1. California. May 28, 1929.

Mandamus ⚷116—Writ lies to require board of supervisors of city and county of San Francisco to levy tax to pay judgment (St. 1901, p. 794).

Mandamus will lie to require board of supervisors of city and county of San Francisco to include, in tax levy, rate or sum sufficient to pay judgment either in whole or in annual aliquot parts, where judgment creditor has complied with St. 1901, p. 794. and there is no fund on hand from which such judgment may be paid.

Mandamus by William H. Cook and others against the Board of Supervisors of the City and County of San Francisco and others to compel the appropriation of money to pay certain judgments against said City and County of San Francisco. Writ granted.

Peter A. Breen and Percy E. Towne, both of San Francisco, for petitioners.

John J. O'Toole, City Atty., and Edmond P. Bergerot, Asst. City Atty., both of San Francisco, for respondents.

PER CURIAM. Proceeding in mandamus. It appears that the petitioners are owners of final judgments obtained respectively by them against the respondent city and county of San Francisco for the recovery of certain unlawful and void taxes paid by said petitioners under protest to said respondent. It further appears that heretofore on August 22, 1928, in compliance with the provisions of an act of the Legislature entitled "An Act to provide for the payment of judgments against counties, cities, cities and counties, and towns" (approved March 23, 1901 [St. 1901, p. 794]), the county clerk of said city and county of San Francisco duly filed with the auditor of said city and county and furnished to the board of supervisors thereof a complete list of all the then existing final judgments against said city and county of San Francisco of record in his office; that the auditor of said city and county thereupon duly examined and audited said final judgments and duly certified the amount thereof to the treasurer of said city and county, and that included in the said list of final judgments were the judgments above mentioned owned and held by the respective petitioners.

It is admitted that the petitioners have complied with all the provisions of said "Act to provide for the payments of judgments, etc.," but that said board of supervisors has failed, refused, and neglected to approve the demands of petitioners that said judgments be paid, and has refused to authorize the payment of said several judgments, and has refused to include in the tax levy for the fiscal year ending June 30, 1930 (being the next fiscal year after the filing and furnishing of the aforesaid list of judgments), a rate or sum sufficient to pay said final judgments, or to pay an aliquot part or fraction of the amount of said judgments not less than one-tenth of the whole.

It further appears from the petition that there is not at this time and will not be at any time during the current fiscal year any money in the surplus fund of said city and county, or in the treasury of said city and county, to the credit of said surplus fund, and no money has heretofore been appropriated or apportioned for the payment of said judgments, and there is no money in said treasury applicable to the payment of said judgments.

These averments of the petition being admitted by the respondents, it follows that the petitioners are entitled to the writ of mandate prayed for, commanding the respondent board of supervisors to include in the tax levy hereafter to be made for city and county purposes for the fiscal year ending June 30, 1930, a rate or sum sufficient to pay said respective final judgments, or to include in said levy a sum sufficient to pay an aliquot part or fraction of each of said judgments (in no case less than one-tenth of the amount thereof); and commanding said respondent, in case it shall include in said levy a sum sufficient to pay only an aliquot part or fraction of each of said judgments, to thereafter levy in each successive year an aliquot part or fraction of said judgments (in no case less than one-tenth thereof) until the whole of said final judgments shall have been fully paid.

Let the writ issue as prayed for.

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99 Cal. App. 163

SCHLECHT v. SCHLECHT. (Civ. 6707.)

District Court of Appeal, First District, Division 1, California. May 28, 1929.

1. Divorce 🔑27(18)—Wife's refusal, without stating reason, to sign note for husband or deed or contract for sale, did not warrant divorce.

Wife's refusal to sign note to enable husband to borrow money, without stating reason for the refusal, causing derogatory comment among defendant's relatives and friends and injuring his credit and resulting in mental suffering, together with similar refusals to sign deeds to husband's separate property or to join in contract for sale, *held* not to warrant divorce on ground of extreme cruelty, since wife merely stood by her strict legal rights.

2. Divorce 🔑27(18)—Wife's passive indifference or lack of feeling on insisting upon her legal rights does not warrant divorce.

Mere passive indifference or lack of feeling upon part of wife in insisting upon her strict legal rights is not sufficient to support husband's charge of extreme cruelty in suit for divorce.

3. Divorce 🔑37(21)—Husband has right superior to wife to select matrimonial domicile.

Husband has right superior to wife to choose matrimonial domicile, and may sue wife for divorce on ground of desertion if she refuses to live in home which husband has furnished suitable to their station in life.

4. Divorce 🔑27(18)—Wife's refusal to permit husband to build new home, and sale of old home compelling husband to go with her to home of daughter, did not entitle husband to divorce.

Conduct of wife in refusing to permit husband to build a new home and in finally selling home in which they had been living, practically compelling husband to go with her and live at the home of their daughter and son-in-law, though it caused mental suffering, *held* not to constitute extreme cruelty warranting divorce at instance of husband.

5. Divorce 🔑49(2)—Husband continuing to live with wife six years after wife's concealment of his Liberty bonds condoned offense, barring divorce.

Conduct of wife in taking and concealing husband's Liberty bonds for purpose of annoying him and with a desire to keep the bonds, if constituting ground for divorce, was condoned by husband by continuing to live with wife for six years thereafter.

6. Husband and wife 🔑4—Husband having sufficient means of his own was not entitled to have wife support him, though he conveyed property to her.

Fact that husband had conveyed property to wife by way of property settlement sufficient to support her did not entitle him to be supported by his wife so long as he had sufficient means of his own.

7. Divorce 🔑27(18)—Wife's commencement of action against husband for separate maintenance, alleging that husband was consuming her resources, held not extreme cruelty warranting divorce for husband.

Wife's commencement of action for separate maintenance on ground that husband had refused to pay any sum towards her maintenance and was consuming plaintiff's private resources *held* not to constitute extreme cruelty such as to warrant decree for divorce in husband's favor.

8. Divorce 🔑27(18)—That wife gave husband cool reception and refused his offer of money as inadequate did not warrant divorce for extreme cruelty.

That defendant, on returning home from extended visit, met with very cool reception from wife, and that wife refused husband's offer of money for his living expenses as inadequate, *held* not ground for divorce as extreme cruelty.

9. Pleading 🔑225(2)—Sustaining demurrer without leave to amend to amended cross-complaint, filed after judgment dismissing original cross-complaint was set aside, was not abuse of discretion, and pleading could not be aided by facts not alleged.

Where demurrer was sustained to original cross-complaint without leave to amend, and judgment of dismissal subsequently entered was set aside, it was not an abuse of discretion to sustain a demurrer to the amended cross-complaint without leave to amend, and defendant was required to stand upon the allegations thereof without aid from other facts appearing in record.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Ada J. Schlecht against Frank W. Schlecht for separate maintenance, in which defendant filed a cross-complaint for divorce. From a judgment dismissing the cross-complaint, defendant appeals. Affirmed.

Leo D. Daze, of Los Angeles, for appellant.

E. R. Young, Harlow Hurley, and Foster C. Bumpus, all of Los Angeles, for respondent.

DOOLING, Justice pro tem. Appellant and respondent are husband and wife. In an action by respondent for separate maintenance appellant filed a cross-complaint for divorce on the ground of extreme cruelty. To appellant's first amended cross-complaint the court sustained a general demurrer without leave to amend, and from a judgment of dismissal following such order appellant has prosecuted this appeal.

[1, 2] The alleged acts of cruelty were separately set out in eight paragraphs. Paragraphs numbered 1, 2, 3, 5, and 6 all have to do with the failure of the respondent wife to join with appellant in signing certain legal documents. They may be considered conveniently together. Typical of these incidents is that alleged in paragraph 1. It is alleged in this paragraph that in 1895, approximately three years after the date of their marriage appellant was hard pressed for money and sought to borrow $800 from a relative. The relative insisted upon the respondent wife joining with appellant in signing this note. Respondent "refused to sign the said note and would give no reason for not signing said note, and refused to discuss the matter" with appellant. This refusal continued for about two weeks and caused discussion and comment derogatory to appellant among his relatives and friends, injured his credit, and humiliated and embarrassed him and caused him grievous mental suffering for many years. It is likewise alleged that respondent was indifferent to and unaffected by appellant's mental suffering, and that this in turn caused appellant additional mental suffering. Paragraphs 2, 5, and 6 have to do with similar refusals to sign deeds to parcels of appellant's separate property in 1901, 1922, and 1923, respectively, and paragraph 3 concerns a refusal to join appellant in signing a contract to sell certain real property in 1917. The allegations are not dissimilar in each instance.

Concerning these particular paragraphs counsel for appellant says in his opening brief: "While it is true that a wife has a right to refuse to sign any contract, deed, note or other instrument, yet in the exercise of that right she has no right to inflict the cruelty complained of in the first amended cross-complaint."

This concession would seem to dispose of these particular allegations. The wife in these transactions stood upon her strict legal rights. In so doing she may have proved unsympathetic, she may have refused to discuss the matters, as she also had a legal right to do, she may have been grasping and acquisitive, and she may have been indifferent to and unaffected by her husband's mental suffering; but while a husband may be unfortunate not to secure from his wife that whole-hearted sympathy and affection and co-operation which is the glory of the married state when it exists in full measure, the want of it, standing alone, has never been held in this state to constitute grounds for divorce, no matter how much suffering the husband may be subjected to thereby. So long as incompatibility of temperament is not recognized as a ground for divorce, we cannot hold that mere passive indifference or lack of feeling upon the part of a wife in insisting upon her strict legal rights is sufficient to support a charge of extreme cruelty.

[3, 4] Paragraph 7 recites that appellant, in 1913, purchased in the name of respondent a home for himself and respondent, and that thereafter on several occasions he requested respondent to permit him to build a new and better home for himself and respondent, but respondent in every case refused, and finally, in 1921, sold the home in which they had been living and "practically compelled" appellant to go with her and live at the home of their daughter and son-in-law, all of which caused appellant great and grievous mental suffering. Husbands, even in this day, have a few legal rights superior to their wives, one of which is the right to choose the matrimonial domicile, and if appellant had furnished a home suitable to their state of life and respondent had refused to live in it for the statutory period of one year, appellant might then have brought suit for divorce on the ground of desertion. But the mere success of the wife, in the give and take of the marriage relation, in imposing her will upon the husband in the matter of the choice of a home, cannot, in our judgment, constitute the extreme cruelty contemplated by the statute. If it should be held to do so, we have no doubt that there are thousands of husbands who, without now realizing it, would find themselves with good cause of action against their wives for divorce.

[5] Paragraph 4 is more serious in its nature. It charges that in 1921, at a time when appellant was sorely in need of money, respondent took and concealed Liberty bonds of value of $1,500, the separate property of appellant, and refused for a long time to admit that she had taken them, and that this was done to vex and annoy appellant and out of a mercenary desire to keep and own said bonds, and that this did annoy and worry appellant and cause him grievous mental suffering. We may concede that respondent in this respect acted in violation of appellant's legal rights, and that if this conduct did in fact cause appellant grievous mental suffering, as alleged, it might justify a court in granting him a divorce. But by continuing to live with respondent from 1921 to 1927 this conduct was condoned, unless the acts alleged in the last paragraph now to be discussed were sufficient to revive the right of action.

The last paragraph sets up: "That in December, 1925, appellant returned to California from an extended visit in South Dakota, suffering from diabetes, and went to the home of respondent, which she had received from appellant in 1922 as her separate property by reason of a property settlement between appellant and respondent effected at that time. That appellant "met with a very cool reception" from respondent, "who made it very clear" that appellant was not welcome, so that appellant went to a hotel to stay. That a few days later appellant obtained permission from respondent to live in a house belonging to respondent at Tujunga, and remained there about three weeks, when respondent came and told appellant that their daughter was worrying because appellant was old and sick and needed care, "and for her daughter's sake" appellant should come and live at respondent's residence. That it was arranged that appellant pay respondent $50 per month for his living expenses, which he continued to do until respondent left for a trip to South Dakota, during which time he paid $20 per month, to respondent and $30 per month to their daughter, with whom he was then living. That upon respondent's return from South Dakota, in October, 1926, appellant offered her $50, which she refused, saying: "I would take nothing before I would take that." That thereafter, on January 12, 1927, respondent caused to be served on appellant her verified complaint for separate maintenance, in which she alleged "that during the last four months plaintiff has demanded of defendant that he support and maintain the plaintiff; that the defendant has refused to pay any sum whatsoever, and now refuses to pay any sum towards the maintenance of the plaintiff, or plaintiff's and defendant's home, * * * still lives at the plaintiff's and defendant's home, and is fast consuming the plaintiff's private resources * * * and has stated that he will not support or maintain the plaintiff." That these allegations were untrue and known to be so by respondent, in that appellant had offered to pay respondent $50 per month, which she had refused, and respondent then owed appellant $555, as she afterwards admitted in court, and that, furthermore, in 1922 appellant had amply provided for respondent's support by a certain property settlement agreement. It is further alleged that all of these facts caused appellant grievous mental suffering.

[6, 7] It is evident, of course, that the suit for separate maintenance was the outcome of a difference of opinion between the spouses as to the amount which should be contributed by the husband to their common support. Conceding that appellant had by way of property settlement conveyed to respondent property amply sufficient to support her, that did not entitle him, so long as he had sufficient means of his own, to be supported by his wife. When she insisted on more than $50 per month, he refused to pay it. It is futile for us to attempt to say who was right in this dispute, but there was a dispute which the wife decided to settle by resort to law. She may have chosen the wrong remedy, and she may, willfully or otherwise, have included in her complaint allegations that exceeded the truth. If she did, the appellant would have his day in court and ample opportunity to defend. The mere bringing of the action in an attempt to settle their respective rights could not be construed as extreme cruelty, and while the courts have held that charges of adultery or gross immorality falsely made in a complaint may constitute extreme cruelty, no case can be found where allegations of the sort herein made by respondent have been held sufficient to do so. The allegations of the complaint for separate maintenance above set out fall so far short of any allegations which have been held to constitute cruelty that we are satisfied the trial court properly held that they did not do so.

[8] The "coolness" of the wife in 1925 and the subsequent bickerings are also clearly insufficient and were apparently condoned.

We have given this appeal a fuller consideration than its importance, and the facts involved would seem to justify because of the apparent earnestness of counsel for appellant in presenting his case on appeal. We have examined all of the cases cited by appellant: Avery v. Avery, 148 Cal. 239, 82 P. 967; Carpenter v. Carpenter, 30 Kan. 744, 2 P. 122, 46 Am. Rep. 108; Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L. R. A. 660; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; Curl v. Curl, 130 Cal. 638, 63 P. 65; MacDonald v. MacDonald, 155 Cal. 665, 102 P. 927, 25 L. R. A. (N. S.) 45; Brandt v. Brandt, 178 Cal. 548, 174 P. 55; McCahan v. McCahan, 47 Cal. App. 176, 190 P. 460; Davis v. Davis, 58 Cal. App. 100, 207 P. 923. In none of them do we find a set of facts at all similar to those set out in the amended cross-complaint or anything which leads us to believe that the allegations of the amended cross-complaint are sufficient to constitute a cause of action.

[9] Appellant seeks to bolster the allegations of the amended cross-complaint by certain facts appearing in the record, but not set out or referred to in his pleading. In view of the fact that a demurrer was sustained to the original cross-complaint without leave to amend and a judgment of dismissal entered thereon, and that this judgment was set aside on motion of appellant to permit the filing of his amended cross-complaint, the trial court was entitled to assume that the amended cross-complaint fully set out the facts. It was not an abuse of discretion to sustain the demurrer to the amended cross-complaint without leave to amend under such circumstances, and appellant must stand upon the allegations which he has seen fit to make.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

99 Cal. App. 113

In re BRYAN'S ESTATE.★

BON v. CRANE.

(Civ. 6804.)

District Court of Appeal, First District, Division 2, California. May 23, 1929.

Rehearing Denied June 19, 1929. Hearing Denied by Supreme Court July 22, 1929.

1. Executors and administrators 🔑380(2)—Devisee of remainder held barred 34 years after probate sale of property from maintaining suit for recovery thereof, though executrix who sold property was life tenant (Code Civ. Proc. § 1573).

Person designated in will as remainderman *held* barred, after lapse of 34 years from sale of property by executrix, from maintaining suit for recovery thereof as against person claiming under the probate sale under Code Civ. Proc. § 1573, though executrix of testator's estate was also life tenant in the property sold, where she never acquired possession of property as life tenant, and acted relative thereto merely in representative capacity.

2. Executors and administrators 🔑75—Executor represents heirs and devisees as trustee.

Executor is agent of heirs and devisees, representing them as trustee.

3. Executors and administrators 🔑380(2)—Statute limiting actions for property sold by representative to 3 years after settlement of final account runs after lapse of reasonable time for settlement, where no account is filed (Code Civ. Proc. § 1573).

Where personal representative fails to file final account, Code Civ. Proc, § 1573, limiting actions for recovery of property sold by executor or administrator to period of 3 years after settlement of final account, commences to run after lapse of reasonable time in which to obtain such settlement.

4. Executors and administrators 🔑380(2)—What constituted reasonable time for settlement of final account as regards limitation against action to recover property sold by executrix held question for trial court (Code Civ. Proc. § 1573).

In suit by person given property as remainderman under will, for recovery of property against defendant claiming under sale thereof by personal representative, what constituted reasonable time for settlement of final account of executrix, for purpose of determining when limitation period, in absence of actual settlement of final account, would run under Code Civ. Proc. § 1573, *held* one for trial court, to be determined under all the circumstances of the case.

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Action by Mary Jane Bryan Bon against Richard L. Crane to terminate the life estate of Elizabeth Bryan, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

William H. Schooler, of San Francisco, for appellant.

Gale & Gale, of Santa Rosa, for respondent.

NOURSE, J. Plaintiff sued under section 1723 of the Code of Civil Procedure to terminate the life estate of Elizabeth Bryan in real property situated in Sonoma county. The defendant had judgment, and the plaintiff has appealed upon a bill of exceptions.

Thomas J. Bryan died testate on April 19, 1882. His wife, Elizabeth Bryan, was named as executrix in the will, and to her he left, during her lifetime, all his estate, both real and personal, and upon her death he devised to all his children then living all this estate, to be divided equally between them. Six children of the union survived the mother, whose death occurred July 9, 1924; they are now the sole heirs at law claiming under this will, and the plaintiff, who is one of these surviving children, sues on behalf of herself and the other five.

During the course of the administration of the estate of Thomas J. Bryan, Elizabeth Bryan, as executrix thereof, petitioned the probate court for leave to sell the property now in dispute. In conformity with an order of sale therefor, the property was sold to one J. L. Winans on August 21, 1891. The purchaser thereupon entered into possession and executed a mortgage thereon. In pursuance of foreclosure proceedings of this mortgage the property was sold to one Nancy Crane on September 14, 1896, and in February, 1919, she deeded it to her son, Richard L. Crane, the defendant and respondent herein, who has since been in exclusive possession.

As a special defense to the action, the defendant pleaded section 1573 of the Code of Civil Procedure, which provides that: "No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by an heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator." The trial court found that plaintiff's action was barred by the provisions of this section, and the correctness of this finding presents the only question on this appeal.

Appellant contends that the petition for the order of sale of the real estate was defective because it did not comply with the terms of the Code; that the sale was therefore void; and that no title passed thereunder. She then argues that, because she and her five brothers were remaindermen under the will of Thomas J. Bryan, deceased, and succeeded as such to the title of his property upon the death of the life tenant, no claim of adverse possession would begin to run against them until July 9, 1924, the date of the death of Elizabeth Bryan.

★Rehearing denied. Hearing denied by Supreme Court.

[1, 2] Respondent, for the sake of the argument, concedes the invalidity of the original sale made in 1891, but contends that the appellant is barred from attacking the transfer by the provisions of section 1573. In this connection it is pointed out that the sale was not made by the life tenant, but it was made by the executrix of the estate. No distribution of the property in suit had been made and no decree had been entered adjudging that Mrs. Bryan was entitled to a life estate or that she took the property as a life tenant. Appellant argues for the application of the rule that a life tenant cannot, by his dealings with the life estate, make his grantee's possession adverse to a remainderman during the term of the life estate. He cites Pryor v. Winter, 147 Cal. 554, 559, 82 P. 202, 109 Am. St. Rep. 162; Akley v. Bassett, 189 Cal. 625, 643, 209 P. 576; Newport v. Hatton, 195 Cal. 132, 144, 231 P. 987; Thompson v. Pacific Electric Railway Co. (Cal. Sup.) 265 P. 220; and other cases to the same point. There is no quarrel with the cases cited, but the rule is not applicable to the case at hand. Here the fact is that the property was sold by the estate, and that it was not sold by the life tenant. In fact, the life tenant never acquired possession of the property as such, and did not do anything as a life tenant to defeat or prejudice the interest of the remaindermen. All her acts relating to the administration and sale of the property were done as executrix of the estate. As such she was the agent of the appellant and of the other heirs under the well-settled rule that the executrix represented the heirs, she as the trustee, they as the cestuis.

Returning to the Code section, it will be noted that it prohibits any action by any heir or other person claiming under the decedent for the recovery of any estate sold by an executor or an administrator, unless such suit be commenced within 3 years next after the settlement of the final account of the executor or administrator. Here it is conceded that the action was not commenced until 34 years after the probate sale. The case is therefore controlled by Dennis v. Bint, 122 Cal. 46, 54 P. 378, 68 Am. St. Rep. 17, and the authorities which have uniformly followed it adhere to the rule that this statute is intended for the protection of those who have remained in possession under color of title believed to be good, and that this protection was not intended to be withheld indefinitely at the option of those who did not assert some invalidity in the sale.

[3, 4] The question remains as to when the statute begins to run in a case of this character. The section fixes the time as of the settlement of the final account. Here it is conceded that, though the executrix remained as such from July 17, 1882, down to the time of her death, on July 9, 1924, she did not file a final account. The same question arose in Dennis v. Bint, supra, and it was held that the statute gave a reasonable time in which to obtain settlement of the final account, and that, failing in this, the statute began to run with the same effect. What is a reasonable time for such purpose is, of course, a question to be determined in each case upon all the facts and circumstances arising. It is a question which is to be determined by the trial court in the first instance. Here the trial court determined the question adversely to the appellant, and, as the appellant has not asserted error in this respect, such determination is final upon this appeal.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

PEOPLE v. SEITZ et al. (Cr. 1759.)

District Court of Appeal, Second District, Division 2, California. May 14, 1929.

1. **Indictment and information 🔑71—Indictment need only name offense and inform defendant of particulars of charge (Pen. Code, § 952, as amended by St. 1927, p. 1043).**

Under Pen. Code, § 952, as amended by St. 1927, p. 1043, indictment need only name offense charged and inform defendant of particulars of charge, so that he may fully prepare defense; proviso that it shall never be necessary to present allegations of matter not essential to be proved not requiring allegations essential to be proved.

2. **Insurance 🔑31—Indictment charging violation of statute defining offense of disposing of property to defraud insurer sufficiently specified offense (Pen. Code, § 548, and § 952, as amended by St. 1927, p. 1043).**

Indictment charging violation of Pen. Code, § 548, "a felony," sufficiently specified offense, as required by section 952, as amended by St. 1927, p. 1043; inspection of former section furnishing sufficient information of nature of crime of destroying, abandoning, and disposing of insured property with intent to defraud insurer.

3. **Insurance 🔑31—Indictment for destroying, abandoning, and disposing of property insured "against theft" held sufficient, though statute requires that property be insured "against loss or damage" by theft (Pen. Code, § 548, and § 952, as amended by St. 1927, p. 1043).**

Indictment charging that defendants, on or about certain date in named county, "did willfully, unlawfully and feloniously destroy, abandon and dispose of" personal property, particularly described, and alleged to have been insured "against theft," sufficiently informed defendant of particulars of charge, as required by Pen.

Code, § 952, as amended by St. 1927, p. 1043, though section 548 requires that property disposed of be insured "against loss or damage" by theft.

4. Insurance 🔑31—Intent to defraud insurer need not be alleged in indictment for destroying, abandoning, and disposing of insured property (Pen. Code, § 548, and § 952, as amended by St. 1927, p. 1043).

Specific intent to defraud insurer, prescribed by Pen. Code, § 548, as assential element of crime of destroying, abandoning, and disposing of insured personalty, is not one of particulars of offense, which section 952, as amended by St. 1927, p. 1043, requires to be stated in indictment; such particulars being date when and county in which crime was committed and nature of personalty disposed of.

5. Indictment and information 🔑19—Court should so construe Code amendments respecting forms of indictments as to hasten administration of criminal law and destroy procedural pitfalls to fullest extent compatible with due protection of right to clear and informing statement of charges (Pen. Code, §§ 951, 952, as amended by St. 1927, p. 1043).

Court should so construe amendments of Pen. Code, §§ 951, 952, as amended by St. 1927, p. 1043, respecting forms of indictments, as to speed up administration of criminal law and destroy its procedural pitfalls to fullest extent compatible with due protection of right of all persons to clear, explicit, and informing statement of criminal charges against them.

6. Criminal law 🔑1167(4)—Amendment of indictment for disposing of insured personalty to defraud insurer by striking allegations as to fraudulent statement and claim of loss, held harmless as merely eradicating duplicity (Pen. Code, §§ 548, 549).

Amendment of indictment for destroying, abandoning, and disposing of insured personalty and making sworn statement and claim of loss with intent to defraud insurer by striking allegations as to such statement and claim *held* harmless to defendant as merely eradicating duplicitous character of indictment, which charged crime under Pen. Code, § 549, as well as section 548.

7. Criminal law 🔑427(4)—Testimony as to defendant's statement concerning arrangement with codefendant for latter's robbery by witness, preliminary to insurance collection, held hearsay, and incompetent to prove conspiracy (Pen. Code, § 548; Code Civ. Proc. § 1870, subd. 6).

In prosecution, under Pen. Code, § 548, for disposing of insured personalty with intent to defraud insurer by means of fake robbery, testimony of one perpetrating robbery as to conversation wherein defendant told witness of arrangement with codefendant and others to relieve them of their diamonds at a party, preliminary to insurance collection, *held* inadmissible as hearsay, and not competent to prove conspiracy, preliminary to introduction of conspirator's declaration against coconspirator under Code Civ. Proc. § 1870, subd. 6.

8. Criminal law 🔑427(4)—Conspirator's declaration is inadmissible to prove conspiracy (Code Civ. Proc. § 1870, subd. 6).

The declaration of an alleged conspirator cannot be admitted in evidence to prove the fact of conspiracy, under Code Civ. Proc. § 1870, subd. 6.

9. Criminal law 🔑427(4)—Evidence held not to show conspiracy to dispose of insured personalty with intent to defraud insurer by means of fake robbery (Pen. Code, § 548).

In trial under Pen. Code, § 548, for disposing of insured personalty with intent to defraud insurer by means of fake robbery, evidence *held* not to show organization of conspiracy between defendant and others for purpose of committing such crime.

Appeal from Superior Court, Los Angeles County; Wiliam T. Aggeler, Judge.

Evan B. Seitz and Ollie Lowe were indicted, and the latter convicted, for feloniously destroying, abandoning, and disposing of insured jewelry with intent to defraud the insurer, and defendant Lowe appeals. Reversed.

W. Joseph Ford, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WORKS, P. J. Defendant was convicted of a violation of section 548 of the Penal Code. She appeals both from the judgment of conviction and from an order of the trial court denying her motion for a new trial.

The prosecution of appellant was based upon an indictment, the charging portion of which, as appellant terms it, read as follows, the italics being ours:

"That the said Evan B. Seitz and Ollie Lowe, on or about the 12th day of April, 1927, at and in the County of Los Angeles, State of California, did wilfully, unlawfully, and feloniously destroy, abandon and dispose of certain diamonds and jewelry, towit: One diamond brooch of the value of Eighteen Hundred Dollars ($1,800.00) in gold coin of the United States; one gold and platinum earring of the value of Eight Hundred Dollars ($800.00), gold coin of the United States; one ring containing three diamonds of the value of Twenty-Four Hundred and Twenty-Five Dollars ($2,425.00) in gold coin of the United States; one black opal ring of the value of Five Hundred Dollars ($500.00) in gold coin of the United States; one white gold dinner ring of the value of Sixteen Hundred Dollars ($1,600.00), in gold coin of the United States, all of the aggregate value of Seven Thousand One Hundred Twenty-five Dollars ($7,125.00) lawful money of the United States, which said property was at the time of such destroying, secreting, abandoning and disposing of, insured against theft; *that on the 16th* *day of June, 1927, the said defendants, Evan B. Seitz and Ollie Lowe, did wilfully, unlawfully, falsely, fraudulently and feloniously make a sworn statement and claim loss covering the said jewelry and diamonds, with the intent then and there* and thereby to defraud and prejudice the insurer."

During the trial, the court ordered an amendment, of the indictment, which was made by striking out the italicized passage in the original as above copied and by inserting new matter. Upon the indictment as thus amended, the trial proceeded. The alleged charging portion of the amended pleading read, with the inserted new matter designated by italics, thus:

"That the said Evan B. Seitz and Ollie Lowe, on or about the 12th day of April, 1927, at and in the County of Los Angeles, State of California, did wilfully, unlawfully and feloniously destroy, abandon and dispose of certain diamonds and jewelry, towit: One diamond brooch of the value of Eighteen Hundred Dollars ($1,800.00) in gold coin of the United States; one gold and platinum earring of the value of Eight Hundred Dollars ($800.00), gold coin of the United States; one ring containing three diamonds of the value of Twenty-four Hundred and Twenty-five Dollars ($2,425.00) in gold coin of the United States; one black opal ring of the value of Five Hundred Dollars ($500.00) in gold coin of the United States; one white gold dinner ring of the value of Sixteen Hundred Dollars ($1,600.00), in gold coin of the United States, all of the aggregate value of Seven Thousand One Hundred Twenty-five Dollars ($7,125.00) lawful money of the United States, which said property was at the time of such destroying, secreting, abandoning and disposing of, insured against *loss or damage by* theft; and *with the intent* thereby to defraud and prejudice the insurer."

In addition, however, to the so-called charging matter, the indictment, both before and after amendment, contained the following preliminary statement:

"[T]he said Evan B. Seitz and Ollie Lowe are accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of violation of section 548 of the Penal Code of the State of California, a felony, committed at and in the County of Los Angeles, State of California, and before the finding of this indictment as follows, towit." Then followed, in the original indictment and in the indictment as amended, respectively, the so-called charging portions which are above set forth.

Section 548 of the Penal Code is directed against any person who "wilfully burns, or in any other manner injures, destroys, secretes, abandons, or disposes of any property which at the time is insured against loss or damage by fire, or theft, or embezzlement, or any casualty with intent to defraud or prejudice the insurer," while section 549 of the same Code declares it a crime to present, or cause to be presented, "any false or fraudulent claim, or any proof in support of any such claim, upon any contract or policy of insurance or indemnity whatsoever," etc. It now becomes material to inquire whether the indictment, as it was couched when it left the grand jury, charged a violation of section 548, as appellant contends that it laid only an offense under section 549, this because the specific intent alleged in the pleading followed, and was in such close juxtaposition with, the allegation concerning an event of June 16, and was so far removed from the reference to the event which is of interest upon a charge under section 548, that of April 12.

[1-3] If we concede that the allegation as to specific intent contemplated the act of June 16 and not that of April 12, we are yet far from a determination that the indictment as originally framed did not charge a violation of section 548. It is clear that before the session of the Legislature which was held in 1927 it was necessary to allege in an indictment or information any specific intent which was an essential element of the crime charged by it. 14 Cal. Jur. 56. Whether such an allegation is now necessary—whether, we should say, it was necessary in the present instance—is a question to be examined here. Section 952 of the Penal Code, as amended in the year named, provides in part: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged." St. 1927, p. 1043.

The striking features of this enactment are that every criminal charge shall contain "a statement that the accused has committed some public offense therein specified," and that it may be made "in any words sufficient to give the accused notice of the offense of [with] which he is charged." In addition to the statement of these two requisites of every such charge, the Legislature has also included in the section a sentence explanatory of the method in which they are to be supplied. The offense may be specified, and the accused may be given notice of the nature of it "in ordinary and concise language," without "technical averments," provided also that it shall never be necessary to present "allegations of matter not essential to be proved." It is to be observed, as most material to a construction of section 952, that the clause from which quotation is last above made is not susceptible of the interpretation that the charge must contain any allegations whatever which *are* "essential to be proved." In other words, the clause is negative and not affirmative. We conclude, then, that the only essentials of a criminal complaint are, first, that the offense charged be named; second, that the defendant be given notice of the offense, that is, that he be informed of the particulars of the charge to the end that he may prepare fully the defense contemplated by law. In the present instance the first of these requisites is furnished by the preliminary statement in the indictment to the effect that appellant was charged with "the crime of violation of section 548 of the Penal Code" of the state, "a felony." This specification of the offense could not have been made more plain. It was as specific and direct as the charge that one has murdered or has manslaughtered another—a form of allegation which is sufficient (Pen. Code, § 951, as amended by St. 1927, p. 1043; People v. Berg [Cal. App.] 274 P. 433)—for an inspection of section 548 furnishes as full information of the nature of the crime charged as do the words "murdered" or "manslaughtered," as the meaning of those words can be ascertained only by an examination of the statute. Under the present indictment as originally framed, the second requisite prescribed by section 952 of the Code is complied with, in that the pleading states the date and venue of the offense charged, and alleges that the defendants "did wilfully, unlawfully, and feloniously destroy, abandon and dispose of" personal property which is described with particularity, and which is alleged to have been insured "against theft." As to this latter matter we note, of course, that section 548 provides that, to constitute the crime there denounced, the personal property disposed of must be insured "against loss or damage" by theft, etc. We think the allegation here appearing showed a sufficient compliance with the statute.

[4, 5] Having come to the conclusion expressed in the last preceding paragraph, after a somewhat general consideration, it is proper before leaving the subject to notice further one of the specific points involved in it. Viewing the indictment as it left the grand jury as an attempt to allege a violation of section 548, why was it unnecessary to allege the specific intent prescribed by the section as an essential element of the offense defined by it? We have said above that section 952 prescribes two requisites of a criminal charge; that the crime be named and that its particulars be stated. We think that the specific intent mentioned in section 548 is not one of the particulars of an offense charged under it. Those particulars are the date upon which and the county within which the crime was committed, and the nature of the personal property alleged to have been "disposed of," etc., this latter to be shown by a specific description of the article or articles of which disposition has been made. The intent named in the section is an element of the crime defined by it—of all of the crimes charged under it—and the intent is specified when the crime is named in the indictment or information, as it was here by the allegation that the defendants were charged with a violation of section 548. If this conclusion be too strong for the stomach of the adept in the science of criminal pleading, let him remember that it was the evident intention of the Legislature, in amending sections 951 and 952, to throw mere form to the winds, a thing which might well have been done long ago. The Legislature having declared itself against the subtler intricacies of criminal pleading, it is our duty to embrace and to enforce the policy to the extreme of reason, and we mean to say by the expression thus employed that we should so construe the amendments to the Code as to speed up the administration of the criminal law and to destroy its pitfalls on the procedural side to the fullest extent that is compatible with a due protection of the right of all persons to a clear, explicit, and informing statement of criminal charges preferred against them. In the present instance we think the defendants were informed by the indictment as originally drawn, considering it as charging an offense under section 548, of everything it was necessary for them to know in preparing for their defense. If that is true, they can ask no more.

[6] It was therefore unnecessary to amend the indictment except for a reason which has not yet been mentioned. We are satisfied that the pleading charged a crime under section 549 as well as under section 548, and that the sole beneficial effect of the amendment ordered by the trial court was to eradicate this duplicitous character of the indictment. It is plain that appellant was not harmed by the amendment.

[7] The prosecution of appellant proceeded upon the theory that she had conspired with others to take her jewelry from her by means of a "fake" robbery to which she was to be subjected, and that the conspiracy was carried out. And it is plain that the consummation of the crime must have been preceded by the formation of a conspiracy, for it is obvious that appellant could not have robbed herself. Before we go to the consideration of the question whether the evidence was sufficient to prove the conspiracy, we shall set down the undisputed story of the robbery, for one actually occurred, whether it was "faked" or real. Mrs. Lowe and a Mrs. Brown went visiting one afternoon at the home of a Mrs. Cummins. Some other women also came in a little later. As the ladies were about to partake of some gin fizzes made from a small bottle of liquor which had been brought to the place by Mrs. Lowe, the doorbell rang. Two men were admitted, upon the statement of one of them that they were federal officers and had reason to believe that liquor was on the premises. This spokesman was one Schaeffer, who was shown at the trial to be a man of many aliases and the possessor of a long criminal record. Among his associates, as he testified himself, he revelled in the impressive title, the Iron Duke. When he and his companion had procured access to the house, the Iron Duke took three of the women, one by one, into a room other than that in which the assembled company was now gathered, and despoiled them of their jewelry. Specifically, he took from Mrs. Lowe the articles described in the indictment. Upon this consummation of their business the two robbers departed with their loot, actual or pretended. Be it understood here that the Iron Duke had never seen Mrs. Lowe before he and his companion made their entry into the house of Mrs. Cummins.

When the trial of appellant commenced, the Iron Duke was the first witness called to the stand. The prosecution at once embarked upon an endeavor to prove by him the alleged conspiracy to enact a pretended robbery, but objections to the testimony were sustained for the time being. Evidence was then introduced showing the events surrounding the robbery; Mrs. Cummins and other women who were present on the occasion being called for the purpose. Toward the close of the prosecution's case, the Iron Duke again took the witness stand. He related conversations with appellant's codefendant, Evan B. Seitz, over objections, during which Seitz told him that he had an arrangement with "a few" women whereby they were to be "relieved of their diamonds" while at a party, and that it was an "insurance collection." Seitz asked the witness to "do the job and relieve them of their stones," this for the reason that, as Seitz said, he was known by some of the uninitiated who were to be at the party. The Iron Duke said that Seitz drove him to the Cummins house and pointed it out as the place where the party was to occur, and the witness went to the place once alone to look the situation over. Other details of the alleged plan were related by him. Seitz himself was not a witness at the trial.

There was no evidence of the alleged conspiracy, we think, unless it be found in the testimony of the Iron Duke. Certain other evidence in the case is looked to by the Attorney General as laying a foundation for the testimony of that individual, but this latter evidence could, we believe, serve no higher purpose than to corroborate the testimony of the Iron Duke, who was an accomplice, if anything, if it were first determined that his testimony was admissible. Respondent, in other words, attempts to render certain evidence which might furnish a corroboration of the story of the formation of the conspiracy into a sufficient introduction to a recital of that story. There is thus furnished a typical instance of the placing of the cart before the horse, and we do not here refer to the order of proof. In order to justify this remark, we must be more specific. Respondent says, in reply to appellant's opening brief: "Appellant first urges the point that the testimony of Schaeffer as to the existence of a conspiracy to commit the crime, in which the defendant was one of the conspirators, and acts in carrying out such conspiracy must fall for want of proof of the conspiracy aliunde." In the first place, this is not a proper reflection of the attitude taken by appellant. The first point made by her is, as indicated by a heading in her brief: "The fact of a conspiracy cannot be proved by evidence of declarations of a co-conspirator." In this division of the brief no reference is made to what respondent several times refers to as "the aliunde rule." The second portion of appellant's brief is headed: "The acts, conduct and relations between Seitz and Schaeffer outside the presence and hearing, and without the knowledge, of Mrs. Lowe were improperly introduced in evidence by the prosecution." And under this head appellant thus refers to "the aliunde rule," by respondent so called: "It is hardly necessary to quote authorities to the effect that neither the acts of the witness Schaeffer, alias the Iron Duke (whether testified to by himself or others), or the acts of Seitz, outside the presence and hearing of Mrs. Lowe, are admissible until it has first been established by proof aliunde that Mrs. Lowe had entered into a conspiracy with them, and then such conspiracy having been established, any acts, conduct or conversations done or made in pursuance of the conspiracy, and during the pendency of the conspiracy, would, of course, be admissible." It will thus be seen that appellant distinctly makes the point that testimony of the Iron Duke concerning anything happening out of the presence or without the knowledge of appellant could be admissible only after due proof of a conspiracy, and then only for the purpose of proving acts done pursuant to the illicit concord. Respondent fails to meet this point. The Attorney General makes no contention that a conspiracy had been proved up to the time when the Iron Duke took the witness stand and was permitted to recite the declarations of Seitz, or that one was proved at any stage of the case by any other witness. This extract from respondent's brief will serve to show the ground upon which an affirmance of the judgment is asked: "There is no doubt about the law being that a conviction cannot be had upon testimony of a conspirator or conspirators without corroboration by testimony outside of and beyond that given by the conspirator himself, but in this case we say that the proposition so advanced by counsel for appellant is met with our earnest contention that the record shows proof, outside of that of the conspirator, that fully satisfies the requirements of the law in that regard."

Following this statement, there is set down a list of the items of the evidence which, in the opinion of the writer of the brief, satisfies what he terms "the aliunde rule." These items may be listed thus:

(1) When the Iron Duke and his companion rang the doorbell at the house of Mrs. Cummins, appellant and a maid employed by the hostess were engaged together in mixing drinks for the party. The maid testified that Mrs. Lowe offered to answer the bell, but that the maid did so herself. The girl also testified that Mrs. Lowe remarked, when the men said they were officers, "Let them in, let them in."

(2) There was testimony that, while the robbers were in the house, appellant was calm, the other ladies being excited.

(3) Appellant took a small bottle of gin to the party.

(4) Before taking Mrs. Brown to the house of Mrs. Cummins, appellant telephoned the latter that they were coming. Mrs. Cummins answered that she had something else to do that day, but appellant persuaded her to put it off until the next day.

(5) Appellant, who had known her codefendant Seitz some considerable time before the robbery, as a lodger in one of the hotels or rooming houses owned by her, made application for a bond for his release on bail after he was arrested.

(6) After the robbery, appellant presented to an insurance company a claim of loss upon the diamonds which had been taken from her, and she later telephoned an insurance adjuster that she would be willing to withdraw the claim in order to procure the release of some man who was in jail.

(7) After the robbery, appellant inspected a "line-up" of prisoners at the jail, among whom was the Iron Duke, and said there was no one in the line whom she recognized.

(8) When appellant and Mrs. Brown were "about to leave" the house of Mrs. Cummins, the robbery not yet having occurred, some other ladies telephoned that they were coming to the place, whereupon appellant asked Mrs. Brown to remain longer, saying that she knew some of those who had telephoned and wanted to see them, and Mrs. Brown assented.

We think it would be a perversion of the law of conspiracy to say that the story of the Iron Duke, reciting the conversation between him and Seitz, was proper evidence. Giving the narrative its full strength, it amounted to no more than a repetition to the jury of a declaration of Seitz that he and appellant had joined in an unlawful concord to defraud the insurers of appellant's diamonds against loss or damage by theft. We think, therefore, that the testimony was plain hearsay. Nor was it admissible under any exception to the hearsay rule. Certainly it was not proper under any of the peculiarities of the law of conspiracy. After proof of a conspiracy, the act or declaration of a conspirator relating to the conspiracy may be received in evidence against his coconspirator (Code Civ. Proc., § 1870, subd. 6), and the Supreme Court has shown in a late case that such a declaration may not be received for the purpose of proving the conspiracy. There the court said, concerning certain books of account: "But it is asserted that these books were admissible as a declaration of Cox, a coconspirator, made during the period of the conspiracy, and in furtherance thereof. If the books were in fact the acts or declarations of Cox, and the record otherwise showed evidence warranting the finding that a conspiracy existed between the appellant and Cox, this position would be sound, provided always that the jury was told that the acts and declarations of a coconspirator were not binding, unless and until, independent of such declarations and acts, a conspiracy had been shown beyond a reasonable doubt to exist, and in no case should such declarations be received as proof of the conspiracy." People v. Doble, 265 P. 184.

[8] As we have already observed, the crime with which appellant and Seitz were charged, considering the theory of the prosecution, could not have been perpetrated without a precedent arrangement whereby some person was to "rob" appellant, in other words, without the formation of a conspiracy. These circumstances render the language of the Supreme Court in another case peculiarly apposite, the italics being those of the opinion itself: "The existence of a conspiracy was a fact to be proven in the case. Without such proof the defendant could not be convicted, as it is not claimed that he was present at the killing, or knew of it until some hours after it occurred. Now, the declaration of Prewett, Fowles, or of any other alleged conspirator, could not be admitted to prove the fact of conspiracy. Such declaration would be rejected, 'lest,' as Greenleaf says, 'The jury should be misled to infer the fact itself of a conspiracy from the declaration of strangers.' (1 Greenl. Ev., sec. 111.) '*After proof of conspiracy*, the act or declaration of a conspirator against his coconspirator, and *relating to the conspiracy*,' is the restriction which is placed upon the evidence of coconspirators by our Code of Civil Procedure, section 1870, lest the jury take the declaration of one not proven by other evidence to be a conspirator, as proof of the conspiracy itself, and then, 'after proof of conspiracy,' by such declarations, use the same evidence to establish the guilt of the defendant." People v. Irwin, 77 Cal. 494, 20 P. 56.

[9] It is clear to us that the eight items of evidence above listed, and relied upon by respondent as showing a compliance with

what is termed "the aliunde rule," show not the slightest indication of the organization of a conspiracy between appellant and any one for the purpose of committing the crime denounced by section 548 of the Penal Code. If they show anything whatever under the law of conspiracy, they are as well susceptible of the interpretation that there was a concord between appellant and the Iron Duke, under which the latter was actually to rob the women other than appellant who were present at the party, and pretendedly to rob appellant, as that the purpose was to violate section 548. But we think the items made no proof whatever of the formation of a conspiracy. Such a character of evidence might, under imaginable circumstances, satisfy the rule of law requiring a corroboration of the testimony of an accomplice, but it is a far cry from that to the kind or degree of evidence which will prove a conspiracy.

The conclusion we reach on this question has nothing to do with the order of proof. That, of course, the court had the right to direct. The eight items of evidence were simply insufficient to bear the burden which respondent seeks to impose upon them, whatever the stage of the trial at which they were developed.

From the foregoing, we conclude that the trial court erred in receiving the Iron Duke's recital of his conversation with Seitz, that there was no proof of a conspiracy, and that the corpus delicti was not established.

We think it unnecessary to consider other points made by appellant.

Judgment and order reversed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

98 Cal. App. 748

BRYAN v. BANKS et al. (Civ. 6738.)★

District Court of Appeal, First District, Division 1, California. May 15, 1929.

Rehearing Denied June 14, 1929. Hearing Denied by Supreme Court July 11, 1929.

1. Corporations ⚷30(6)—Corporation having received partnership assets, and having acknowledged obligation to pay partnership note, held liable thereon.

Where corporation to which partnership transferred its assets, and all of whose stock was owned by the two former partners, agreed to assume, obligation of partnership note given for such assets, *held* that corporation, having received benefits of partnership assets with consent of owners of all its stock, and having ratified and acknowledged debt, could not escape liability on such agreement by plea that contract was made without observing formal requisites prescribed by its charter or by-laws with respect to making of contracts or because of the interest of directors who owned all its stock in subject-matter of contract.

2. Corporations ⚷1—Both law and equity will, to prevent fraud and accomplish justice, treat stockholders and corporation as identical.

Though it is general rule that a corporation is an entity separate and distinct from its stockholders, both law and equity will, when necessary to circumvent fraud, protect rights of third persons and accomplish justice, disregard this distinct existence, and treat them as identical.

3. Corporations ⚷30(6)—Corporation having received benefit of property conveyed to partnership for latter's note, received consideration for its contract to indemnify partners for their liability on note.

Where corporation to which partnership transferred its assets, and all of whose stock was owned by former two partners, agreed to assume, for benefits derived from partnership, obligation of partnership note given for such assets and to hold former partners harmless from liability on note, there was no merit in contention that corporation received no consideration for its contract of indemnity.

4. Indemnity ⚷15(6)—Defense of lack of consideration for indemnity contract was unavailable, where contract was written and lack of consideration was not pleaded (Civ. Code, § 1614).

Under Civ. Code, § 1614, lack of consideration for contract of indemnity was not available as defense, where said contract was in writing and lack of consideration was not pleaded.

5. Licenses ⚷39—Presumption is that transfer of stock under purchaser's agreement to indemnify stockholder for liability on note was made under permit of commissioner of corporations.

Where defendant agreed to hold stockholder from whom he purchased stock harmless of all liability on note given for assets transferred to partnership, and subsequently transferred by partnership to corporation, *held* that, in absence of proof that transfer was made before permit to transfer stock was received under Corporate Securities Act, presumption is that transfer was made under permit of commissioner of corporations, and was legal and valid, in view of presumption of innocence of crime or wrongdoing and in support of findings and judgment.

6. Licenses ⚷39—Burden of establishing defense that contract of indemnity violated Corporate Securities Act was on defendants asserting it (St. 1917, p. 673).

Burden of proving that contract of indemnity violated Corporate Securities Act (St. 1917, p. 673) was on parties asserting such defense.

7. Corporations ⚷30(6)—Payee of note not participating in indemnity agreement alleged to be in violation of Corporate Securities Act was not in pari delicto with parties to agreement (St. 1917, p. 673).

Payee of partnership note given for assets received by partnership, and subsequently transferred to corporation organized by partners, and

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★Rehearing denied. Hearing denied by Supreme Court.

which corporation assumed partners' liability thereon, not having participated in agreement by purchaser of stock from former partner to indemnify partner for liability on note, was not in pari delicto with them, even if transfer of stock under indemnity agreement violated Corporate Securities Act (St. 1917, p. 673).

8. Corporations 🔑30(6)—Corporation taking over partnership business and purchaser of stock held indemnifiers of partners on partnership note, which liability a payee was entitled to enforce (Civ. Code, §§ 1559, 2777).

Where corporation taking over partnership business and obligations by resolution acknowledged that partnership note given for assets received was its own obligation, and expressly agreed to pay it and hold partners free of liability thereon, and purchaser of stock of one of the two stockholders assumed obligations of such stockholder under written agreement mentioning note, corporation and said purchaser became indemnifiers of former partners, and payee of note as person for whose benefit indemnity contract was made, under Civ. Code, §§ 1559, 2777, was entitled to enforce indemnifiers' liability.

9. Common law 🔑11—Common law obtains in California, except where expressly modified by statute.

The common law is still the law of this state, except where expressly modified by statute.

10. Corporations 🔑117—Attempted rescission of sale of stock to one assuming stockholder's liability on note on which action was brought before notice of rescission was given payee held ineffective as to payee (Civ. Code, §§ 1559, 2777, 2854).

Under Civ. Code, §§ 1559, 2777, 2854, stockholder's attempted rescission of sale of his stock to purchaser who assumed stockholder's liability on note given for assets transferred to corporation *held* ineffective as to payee of note, where no notice of rescission was given to payee before action on note was commenced by her indorsee.

11. Corporations 🔑273—Judgment against stock purchaser for installment of corporate note for half of which he agreed to be liable held not erroneous.

Where purchaser of stock agreed to be liable for not more than one-half of amount of note given for assets transferred to corporation, and installment due on note for which action was brought did not equal half of amount of note, judgment against said purchaser for full amount sued for was not erroneous as against contention that only half of amount of judgment should have been directed against said purchaser.

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by Irene Bryan against A. B. Banks and Carrere & Hawley, Inc., and others. Judgment for plaintiff, and named defendants appeal. Affirmed.

Janeway, Beach & Pratt and S. T. Hankey, all of Los Angeles, for appellants.

S. Laz Lansburgh and Alfred C. Skaife, both of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for respondent.

CAMPBELL, Justice pro tem. This is an action on a promissory note of defendants Carrere and Hawley in the sum of $14,400, payable in installments, with attorneys' fees in case of suit, payment thereof being assumed by appellant Carrere & Hawley, Inc., a corporation, and payment of one-half thereof being assumed by appellant Banks; the stock of Carrere & Hawley, Inc., with the exception of one share, issued for the purpose of incorporating, was owned wholly by Carrere and Hawley. On this note $2,400 had been paid, leaving $12,000 unpaid, but only $4,800 thereof was due at the time of the filing of the amended complaint, and for this amount, and not for the full amount of the note, the court rendered judgment against all the defendants, with interest, attorneys' fees and costs. From this judgment defendants Banks and Carrere & Hawley, Inc., have appealed.

The record discloses the following facts: About December 20, 1924, defendants C. F. Carrere and C. O. Hawley acquired from R. W. and Edythe T. Sloan all the shares of the capital stock of the Agency Company of California, an insurance general agency, in consideration whereof they executed and delivered to the Sloans their note for $18,000. Shortly thereafter Carrere and Hawley, thus owning all the shares of stock of that company, caused the company to transfer to them individually all its assets, consisting of its going business, the furniture and fixtures in its San Francisco and Los Angeles offices and its general agency contract with the Home Insurance Company, in consideration of which they assumed the payment of the Agency Company's debts. Disputes having thereafter arisen between them and the Sloans, a compromise was effected about March 11, 1925, by which the Sloans surrendered their note for $18,000 and a prior note for $8,000, and Carrere and Hawley executed the $14,400 note in suit to Mrs. Sloan. Meanwhile Carrere and Hawley formed the Carrere & Hawley, Inc., corporation, issuing to themselves all of its 100 shares of stock, excepting one share issued to one Miller as a qualifying share for the purpose of incorporating, 97 shares thereof being deposited in escrow pursuant to the order of the commissioner of corporations, and on May 4, 1925, after having meanwhile carried on the acquired business as partners, they transferred to the new corporation all of the assets which they had through the Sloans acquired from the Agency Company, the furniture and fixtures valued at $25,000, and the agency contract with the Home Insurance Company. On October 14, 1925, the board of directors of appellant corporation adopted a resolution reciting that Carrere and Hawley "entered into an agreement with R. W. Sloan and Edythe T. Sloan for the payment to them of the sum of fifteen thousand dollars in instalments of $300 per month (note in suit) for and in consideration of all their right, title and interest in and to certain property and assets belonging to and forming a part of the property and assets of Carrere & Hawley, Inc., and whereas this corporation has received the benefit of said contract and is in possession and use of the property aforesaid, and the said obligation is therefore properly the obligation of this corporation and not of Charles F. Carrere and C. O. Hawley as individuals," and resolved that "this corporation does hereby assume and agree to pay the said contract aforesaid (note in question) and to hold harmless the said Charles F. Carrere and C. O. Hawley from the payment of the balance due thereon, and does hereby ratify, confirm and approve any and all payments heretofore made on account of said contract from and out of the funds of this corporation." In pursuance of this resolution appellant corporation executed its formal instrument under its seal by which it "for and in consideration of the sum of $1.00 and other valuable considerations (the receipt whereof is hereby acknowledged) has assumed and agreed to pay the balance due" on the Sloan note. Eight payments of $300 each made on the note were paid by appellant corporation. Further payments thereon were discontinued when a garnishment against R. W. Sloan was levied upon the corporation; the corporation promising to resume payments as soon as the garnishment should be released. During all this time Carrere and Hawley owned all of the capital stock of the corporation, and they continued to own it until appellant Banks, by agreement dated October 4, 1925, purchased from Hawley all the latter's shares in the corporation. By this agreement Banks obligated himself to hold Hawley harmless from "all obligations and liability" growing out of and represented by the Sloan note; the agreement further providing "it being understood and agreed that the obligation assumed * * * extends only to one-half the amount of said note.' At the time this agreement was signed—October 28, 1925—Hawley had applied to the commissioner of corporations for a permit to transfer the stock and the permit was granted on November 27, 1925. Hawley performed his part of the agreement, and Banks kept the stock. True, Hawley testified that at the time of signing the agreement he had not "personally" secured the permit and had no permit. This testimony, however, is not inconsistent with the fact that the permit may have been procured for him by some one else, and in support of the findings, in the absence of other evidence, and in support of the presumption of innocence of wrongdoing, it will be presumed that the agreement was not delivered or the stock sold until after the permit had been obtained. On May 25, 1926, Hawley served upon Banks, but not upon Mrs. Sloan, his "notice of election to rescind and notice of re-entry," in which he notified Banks, "that I elect to rescind said contract and hereby make demand upon you for the delivery to me of the possession of the premises constituting the Los Angeles branch office of Carrere & Hawley, Inc." Appellant Banks never complied with this demand, nor did he transfer the shares to Hawley. On June 10, 1926, Mrs. Sloan indorsed and assigned the note and all her claims against defendants to the plaintiff Irene Bryan, and on June 12, 1926, this action was commenced.

Appellants urge that the judgment is erroneous, for the following reasons: (1) That the indemnity contracts of October 15, 1925, and October 28, 1925, are not contracts made expressly for the benefit of a third person and that therefore the plaintiff's assignor, Edythe T. Sloan, had no right of action against the appellants; (2) that the corporation received no consideration for its contract of indemnity of October 15, 1925, in favor of Carrere and Hawley individually, and therefore the contract is not binding on the corporation; (3) that the resolution of October 14, 1925, is void, two out of three of the directors being disqualified from voting by reason of interest, and the contract of indemnity of October 15, 1925, executed in pursuance of such resolution, is also therefore void; (4) that the contract of indemnity of October 28, 1925, between Hawley and Banks, is void, being in violation of the commissioner's permit of April 6, 1925, and it is therefore unenforceable; (5) that the said contract of indemnity of October 28, 1925, was rescinded by the notice of rescission of May 25, 1926, previously to the commencement of this action; (6) that in any event the decision of the trial court is erroneous, in that it gives judgment against the appellant Banks for the full amount owing under the note and suit, whereas the contract of October 28, 1925, which is the basis of the alleged liability, only obligates him to pay one-half thereof.

[1, 2] As has been said, Carrere and Hawley owned all of the stock of Carrere & Hawley, Inc., from the time of its organization until Hawley's transfer to Banks, including the one qualifying share placed in the name of Miller. They were the only persons interested in the company. They were conducting the business they had acquired from the Sloans, and, upon the organization of the corporation, they transferred this business with its assets to their own corporation. They took over in the form of a corporation the business and assets which they had previously conducted as a partnership, together with its obligations. The corporation was simply the partnership of Carrere and Hawley in another form. The corporation having received the benefits with the consent of the owners of all of the stock, and having ratified and acknowledged the debt, the corporation will not be permitted to dodge or escape liability for the obligations arising upon such agreement by the plea that the contract was made without observance of the formal requisites or prerequisites prescribed by its charter or by-laws with respect to the making of contracts, or because of the interest of the directors, Carrere and Hawley—the owners of the entire stock—in the subject-matter of the contract. Commercial S. Co. v. Modesto Drug Co., 43 Cal. App. 162, 184 P. 964. See, also, Hygienic H. F. Co. v. Grant, 187 Cal. 431, 202 P. 653; Chambers v. Security, etc., Bank, 51 Cal. App. 212, 196 P. 488; San Ramon Valley Bank v. Walden Co., 53 Cal. App. 534, 200 P. 662. While it is the general rule that a corporation is an entity separate and distinct from its stockholders, it is equally well settled that both law and equity will, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, disregard this distinct existence and treat them as identical. Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641. Deming v. Maas, 18 Cal. App. 330, 123 P. 204. Equity will look through form to substance where corporations are but the mere instrumentalities through which the associates acted. Wise Realty Co. v. Stewart, 169 Cal. 176, 146 P. 534; Conover v. Smith, 83 Cal. App. 227, 256 P. 835.

[3, 4] There is no merit in appellants' contention that the corporation received no consideration for its contract of indemnity. Its resolution authorizing the assumption of the note recites that the corporation "has received the benefit" of the note "and is in possession and use of the property (conveyed in consideration of the note) and the said obligation is therefore properly the obligation of this corporation." The agreement was simply a renewal in another form by Carrere and Hawley of their pre-existing obligation, and, the agreement "being in writing, the presumption is that there was a sufficient consideration (section 1614, Civ. Code), and to overcome this presumption it was incumbent upon appellant to allege and prove the contrary." Flint v. Giguiere, 50 Cal. App. 314, 318, 195 P. 85, 88. Furthermore, want of consideration of a promissory note or other written instrument is new matter, and must be specially pleaded (Rivera v. Cappa, 29 Cal. App. 496, 156 P. 1016, 1017), which was not done.

[5-7] As to the claim that the contract of indemnity between Hawley and Banks is in violation of the Corporate Securities Act (St. 1917, p. 673), it may be said that violation of the corporation commissioner's permit is neither pleaded nor proven. The burden of proving such defense rested upon appellants. The evidence shows that a permit for this transfer was obtained, and, if we concede that there is some uncertainty as to just when the transfer was made, it is obvious that, in accordance with the presumption of innocence of crime or wrongdoing, and in support of the findings and judgment, it must be presumed that the transfer was made under permit of the commissioner of corporations, and is legal and valid. It must further be remembered that Mrs. Sloan did not participate in the making of the agreement, and was not therefore in pari delicto with Hawley and Banks.

[8, 9] As has been said, Carrere and Hawley constituted the "close corporation," and, when Banks purchased Hawley's shares and assumed his obligations under the note, he stepped into Hawley's shoes, thus becoming a part of this "close corporation." Carrere & Hawley, Inc., by its resolution acknowledged that the note was properly its own obligation, and expressly agreed to pay it, and Banks in turn assumed Hawley's obligations thereunder by a written agreement specially mentioning this note. As counsel for appellants state, "both contracts are in similar terms, the promisor agreeing to pay the debt owing by the promisee to a third person." Each purchased property subject to pre-existing indebtedness incurred as a part of the purchase price thereof, and each assumed such indebtedness, and in each agreement the note is specially mentioned. It is difficult to see how these agreements could have been more expressly made for Mrs. Sloan's benefit. The common law is still the law of this state except where expressly modified by statute. The provision of section 1559 of the Civil Code that "a contract made expressly for the benefit of a third person, may be enforced by him" is but a restatement of the common law, which, however, goes further. This provision is affirmative only. It is not equivalent to providing that a contract not expressly made for the benefit of a third person cannot be enforced by him. The decisions generally do not limit the remedy of the third party by the word "expressly." As was said in Chung Kee v. Davidson, 73 Cal. 522, 525, 15 P. 100, 102, "it is not necessary that the parties for whose benefit the contract has been made should be named in the contract." In Allen v. Freear, 50 Cal. App. 645, 647, 195 P. 748, 749, the court says: "Where property is held under the consideration, as here, that the purchaser is to pay off the indebtedness of the seller, the creditors, although not mentioned, have a right to come in as being those of a class for whose benefit such contract was made (Sherwood v. Gill, 36 Cal. App. 707 [173 P. 171])," and section 2777 of the Civil Code provides:

"One who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately, to every person injured by such act."

Carrere & Hawley, Inc., and A. B. Banks were the indemnifiers, Carrere and Hawley the persons indemnified. Mrs. Sloan was the person for whose benefit the contract was made—the person injured, and the subsequent default or nonpayment was the future act indemnified against and by which she suffered injury. Therefore appellants became jointly liable with Carrere and Hawley to Mrs. Sloan. The status of an indemnifier has been stated thus: "The action is in substance against the indemnifier—the real party in interest." Dutil v. Pacheco, 21 Cal. 438, 442 (82 Am. Dec. 749). "The indemnifiers are the real parties defendant." Moore v. McSleeper, 102 Cal. 277, 282, 36 P. 593, 595. In Moore v. Los Angeles I. & S. Co. (Circuit Court, S. D. Cal.) 89 F. 73, wherein the liability of an indemnitor was enforced in favor of an injured third person, the court uses this language: "While said section [Cal. Civ. Code, sec. 2777] unquestionably embraces the class mentioned by defendants, it likewise includes, I think, all cases of indemnity against future contingencies. In other words, it broadens and makes applicable to all such cases the rule previously applied by the courts to that class of indemnity contracts where the indemnitor was held to be a joint trespasser or tort feasor with the indemnitee. Thus, the section does in the case at bar what the garnishment did in Anoka Lumber Co. v. Fidelity & Casualty Co. [63 Minn. 286, 65 Minn. 353, 30 L. R. A. 689] supra—makes the policy of assurance inure directly to the benefit of the injured person, and, in addition thereto, allows such person to proceed against the indemnitor separately, or jointly with the indemnitee."

The case of Treloar v. Keil & Hannon, 36 Cal. App. 159, 171 P. 823, cited by appellants, is not analogous to the facts here presented. In that case no obligation was assumed, nor was there any indemnity against obligation and liability, and this distinction is pointed out by the court in that case. The policy provided that no action should lie except for loss actually sustained and paid. The court bases its decision upon subdivision 2 of section 2778 of the Civil Code providing that, upon an indemnity against "claims or demands," no recovery can be had "without payment thereof." The present case comes within subdivision 1 of that section, providing that, upon an indemnity against "liability," the person indemnified is entitled to recover "upon becoming liable." In the recent case of Wurdeman v. Waller (Cal. App.) 263 P. 558, it is held that the promise of a purchaser of a business, made in consideration of the transfer, to assume and discharge an indebtedness of the seller to a third person, is obligatory on him.

We have examined the authorities cited by appellants, and find nothing in any of them at variance with the rule announced in these cases.

[10] Appellants urge that the Hawley-Banks contract was rescinded, citing section 1559 of the Civil Code: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it," and "where nothing is received to be restored, an offer to restore is impossible." McNeese v. McNeese, 190 Cal. 402, 405, 213 P. 36, 38. The "notice of election to rescind and notice of re-entry" do not constitute a present rescission, and are ineffective as to Mrs. Sloan, no notice of rescission being served upon her. The notice states that Hawley "will by the proper legal means and procedure establish the status quo existing prior to the execution of said contract." The actual rescission, such as it was, took place later, after the commencement of the action, when it was a release or rescission in part only, and could not affect Mrs. Sloan or her assignee, the plaintiff. No right of rescission so as to affect the rights of a third party is conferred by either section 2777 or 2854 of the Civil Code. The rights of a third party under each of these sections are vested at the time of the execution of the indemnity agreement in the one case and the receipt of security by the surety in the other, and these rights cannot be divested without the consent of such third party.

The release of July 30, 1926, recites that, by the agreement of October 28, 1925, Hawley had "transferred and assigned" certain shares of capital stock of Carrere & Hawley, Inc., referring to it as a past and completed transaction. Banks retained these shares and other personal property which he had acquired from Hawley under the former contract, thereby ratifying and confirming it, and it was continued in force as to certain of its provisions, including all liability accrued or hereafter to accrue, to the Home Accident Insurance Company and the Home Fire Insurance Company, but not as to the assumption of the note, which they endeavored to release by a release executed after the commencement of the action, which constituted both an acceptance and an enforcement by plaintiff of the contract of assumption (More v. Hutchinson, 187 Cal. 625, 203 P. 97), and it is therefore ineffective as to the plaintiff. As is said in Beckwith v. Sheldon, 165 Cal. 319, 324, 131 P. 1049, 1051, "It is of course, fundamental that where the rights of others have intervened and circumstances have so far changed that rescission may not be decreed without injury to those parties and their rights, rescission will be denied and the complaining party left to his other remedies (Meyers v. Merillion, 118 Cal. 352 [50 P. 662])."

[11] As to the contention that the decision is erroneous as to defendant Banks, in that it gives judgment for the full amount sued for, whereas he only obligated himself to pay one-half, it may be said that the note is in the principal sum of $14,400, "one-half of the amount of the note" is therefore $7,200. The judgment, being for $4,800, besides attorneys' fees, interest and costs, is considerably less than one-half of the amount of the note.

There is no warrant for appellant Banks' contention that his liability extends to only one-half of the amount due on the note. This construction can only be reached by interpolating the words "due on" in the agreement, which are not there.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

99 Cal. App. 90

PEOPLE v. PERRY. (Cr. 1527.)

District Court of Appeal, First District. Division 1. California. May 22, 1929.

1. Criminal law 🔑200(1)—Defendant is subject to indictment, conviction, and punishment for carrying concealed weapon, separate from that for robbery committed at same time (St. 1923, p. 695).

The crimes of robbery and of carrying concealed weapon, in violation of Firearms Act (St. 1923, p. 695), being separate and distinct crimes, defendant was subject to separate indictment, conviction, and punishment for carrying concealed weapon, irrespective of result of prosecution for robbery, and notwithstanding both crimes may have grown out of same continuous transaction and been committed at same time.

2. Criminal law 🔑286—Defendant entering pleas of not guilty and not guilty by reason of insanity and withdrawing latter plea at conclusion of trial on general issue held conclusively presumed to be sane at time crime was committed (Pen. Code, § 1016, as amended by St. 1927, p. 1148, § 1, and § 1026, as added by St. 1927, p. 1149, § 4).

Under Pen. Code, § 1016, as amended by St. 1927, p. 1148, § 1, and section 1026, as added by St. 1927, p. 1149, § 4, where defendant in prosecution for carrying concealed weapon, in violation of Firearms Act (St. 1923, p. 695), entered pleas of not guilty and not guilty by reason of insanity, and at conclusion of trial on general issue withdrew plea of not guilty by reason of insanity, *held* that he was conclusively presumed to be sane at time crime was committed.

3. Criminal law 🔑186—Verdict declaring accused to be insane at time of commission of crime does not operate as acquittal.

Verdict declaring accused to be insane at time of commission of acts constituting crime does not operate as acquittal of charge, but serves only as reason why penalty of law prescribed as punishment for commission of acts constituting crime should not be visited on accused.

4. Criminal law 🔑186—Verdict of insanity in robbery prosecution was not decisive of question of insanity at time of carrying concealed weapon committed at same time (St. 1923, p. 695).

Verdict of insanity in prosecution for robbery was not decisive of question of defendant's sanity at time of commission of crime of carrying concealed weapon, in violation of Firearms Act (St. 1923, p. 695), even though latter crime was committed at same time, and hence could not be made basis of pleas of former acquittal and once in jeopardy.

5. Criminal law 🔑624—Trial of prosecution for carrying concealed weapon held properly proceeded with before final determination of defendant's sanity in prior robbery prosecution arising out of same transaction (St. 1923, p. 695; Pen. Code, § 1368, and § 1026, as added by St. 1927, p. 1149, § 4).

Where crimes of robbery and carrying concealed weapon in violation of Firearms Act (St. 1923, p. 695) arose out of same transaction and were committed at same time, and in robbery prosecution on plea of insanity, order was entered remanding defendant until his present sanity could be determined, at which time defendant sought immediate release without complying with Pen. Code, § 1026, as added by St. 1927, p. 1149, § 4, *held* that, in prosecution for carrying concealed weapon, in which defendant made no suggestion that he was then insane, court properly proceeded with trial without being required, under Pen. Code, § 1368, to wait final determination of proceedings in robbery prosecution as to present sanity.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Robert E. Perry was convicted of a violation of the Firearms Act, and he appeals. Affirmed.

H. S. Whitthorne, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. Appellant was accused by indictment of violating the provisions of chapter 339 of the Statutes of 1923 (Stats. 1923, p. 695); it being charged that, having been previously convicted of and served a term in the state prison for the crime of grand larceny, he did, on March 3, 1928, in the city and county of San Francisco, feloniously possess and carry concealed upon his person a loaded revolver. Upon trial he was found guilty by a jury, and this appeal is taken from the judgment of conviction and the order denying his motion for a new trial. The grounds urged for reversal relate to the trial court's rulings upon matters connected with appellant's pleas of former acquittal and once in jeopardy.

The record discloses the following facts: Between 7:30 and 8 o'clock on the night of March 3, 1928, appellant and a companion named Risbin, both armed with pistols, entered an apartment on upper Market street, San Francisco, occupied by a man named Brenner, and, after robbing Brenner, fled. An alarm was given, and two motor officers took up the pursuit and within a few minutes captured the robbers in the basement of a building several blocks distant from the scene of the robbery. Appellant was immediately searched, and the loaded pistol used by him in perpetrating the robbery was found concealed upon his person, and, when questioned, he admitted having served a term in the penitentiary for grand larceny. He was first charged by information with robbery and with prior conviction of grand larceny. When arraigned on that information, he denied the prior conviction and entered pleas of not guilty and not guilty by reason of insanity to the charge of robbery. He was tried first upon the general issue and found guilty of robbery in the first degree, and the jury found also that the alleged prior conviction was true. He was then tried before the same jury upon the issue of insanity, and the verdict was that he "was insane at the precise time the offense was committed on March 3, 1928, as alleged in the information." Thereupon the trial court ordered that he be sent to the detention hospital for observation by the board of insanity commissioners. About a week later said board returned its findings, declaring him to be sane. The trial court then made an order pursuant to the provisions of section 1026 of the Penal Code (as added by St. 1927, p. 1149, § 4) to the effect that, having observed the defendant in court during the two trials and having heard the testimony given thereat, "and never at any time having any doubt as to the sanity of the defendant," and having been advised by the board of insanity commissioners that appellant was then sane, it was ordered that he be remanded to the custody of the sheriff "until his sanity shall have been finally determined in the manner prescribed by law." About a week later, however, and so far as the record shows, before the proceeding last mentioned was terminated, the indictment in the present case was returned. To this indictment appellant interposed four pleas: Not guilty; not guilty by reason of insanity; former acquittal; and once in jeopardy. At the trial he made no attempt to controvert the evidence introduced by the prosecution establishing the truth of the charge set forth in the indictment, but introduced in evidence the record of the robbery trial, including the proceedings of the trial on the issue of his sanity, and at the close of the evidence presented a motion for an instructed verdict upon the issues of former acquittal and once in jeopardy. The motion was denied, and as to those issues the jury was in effect instructed to find for the people. Such verdicts were returned, together with one finding appellant guilty as charged. A motion for a new trial was then made by appellant and by the court denied, following which appellant withdrew his plea of not guilty by reason of insanity and was sentenced to imprisonment in the state prison.

[1, 2] We are of the opinion that the rulings of the trial court relating to the pleas of former acquittal and once in jeopardy of which appellant complains were not erroneous. The crime charged in the indictment was, as appellant concedes, entirely separate and distinct from the crime of robbery for which he was first tried, and, that being so, he was subject to separate indictment, conviction, and punishment therefor, irrespective of the result of the robbery case, and notwithstanding that both crimes may have grown out of the same continuous transaction and been committed at the same time (People v. Snyder, 74 Cal. App. 138, 239 P. 705; People v. McKee, 80 Cal. App. 200, 251 P. 675; People v. Case, 77 Cal. App. 477, 246 P. 1083); consequently it was incumbent upon appellant to urge in this case all available defenses to the charge and also to bring forward any and all excuses he may have had to offer why the penalty of the law should not be imposed upon him for the commission of the acts constituting the crime here charged, if it was found that he committed such acts; otherwise he is deemed to have waived such defenses and excuses. As already stated, among the numerous pleas interposed by appellant to the present charge were those of not guilty and not guilty by reason of insanity, the effect of which was to deny having committed the acts charged and to assert that, if he did commit the same, he was insane at that time. The present criminal procedure requires that, where such pleas are entered, the accused must be tried first under the general issue of not guilty, during which trial he is conclusively presumed to have been sane at the time the offense is alleged to have been committed (Pen. Code, § 1016, as amended by St. 1927, p. 1148, c. 677, § 1, and section 1026, as added by St. 1927, p. 1149, c. 677, § 4), all evidence relating to the question of sanity of the accused being excluded (People v. Troche [Cal. Sup.] 273 P. 767); and, at the conclusion of such trial, he shall be tried upon the issue of insanity, or, if he enters a plea of not guilty and fails to urge the plea of not guilty by reason of insanity, he is likewise conclusively presumed to have been sane at the time the crime is alleged to have been committed (Pen. Code, § 1016, as amended by St. 1927, p. 1148, c. 677, § 1). Accordingly, in the case at bar, during the trial under the general issue appellant was conclusively presumed to be sane, and any evidence bearing upon the question of his sanity was not relevant to that issue. That trial having resulted in a verdict of guilty, appellant was then entitled under his plea of not guilty by reason of insanity to a trial upon that issue and to introduce any legal evidence tending to establish such plea; but, as stated, at the conclusion of the trial on the general issue he withdrew his plea of not guilty by reason of insanity, thereby eliminating from the case all question as to his sanity, so far as the crime charged in the present case is concerned. In other words, having withdrawn the plea which raised the issue of his sanity as to the present charge, he was conclusively presumed to be sane, and the trial court was justified in pronouncing judgment accordingly.

[3, 4] Appellant's argument in support of his pleas of former acquittal and once in jeopardy is based mainly upon the theory that the verdict in the robbery case finding him to be insane at the time of the commission of that crime operated as an acquittal of that charge, and that, since it was not shown that he had the loaded revolver upon his person at any time other than during the commission of the robbery and the few minutes following, said verdict operated also as an acquittal of any other offense he may have committed at the same time. The contention is without merit, for the reason that under the present law a verdict declaring an accused to be insane at the time of the commission of the acts constituting the crime does not operate as an acquittal of the charge. As said in People v. Troche, supra, it serves only as a reason why the penalty of the law prescribed as the punishment for the commission of the acts constituting the crime should not be visited upon the accused. In the present situation, therefore, the effect of the verdict of insanity in the robbery case was to declare merely that at the time the robbery was committed appellant was mentally deranged to the extent of being incapable of distinguishing between right and wrong in relation to the acts constituting that particular crime, and consequently should not be punished therefor (People v. Troche, supra; 7 Cal. Jur. 86); but it was in no way decisive of the question of appellant's sanity at the time he committed another and distinct crime, even though it was committed at the same time.

[5] Nor are we able to agree to the further contention made by appellant that the trial court was without power to proceed with the trial of the present case until there was a final determination of the proceeding instituted in the robbery case as to appellant's present sanity. Section 1368 of the Penal Code provides that if "at any time during the pendency of an action up to and including the time when defendant is brought up for judgment of conviction a doubt arises as to the sanity of the defendant," the court may suspend the trial or the pronouncement of judgment until the question of his then sanity is determined by a jury in the manner provided by chapter 6, tit. 10, pt. 2, of the Penal Code. The foregoing provisions were at all times available to appellant, but the record discloses that neither at the commencement of the trial of the present action nor at any time during its progress up to the time of pronouncement of judgment did appellant make any claim that he was then insane. On the contrary, it appears that, when the order was made at the conclusion of the robbery case remanding the appellant to the custody of the sheriff until his present sanity could be determined, appellant claimed that he was then sane, and demanded immediate release without going through the formality of the hearing provided for by said section 1026. Therefore, when the present action came on for trial before another department of said court and appellant made no suggestion that he was then insane, the trial court was justified in proceeding with the trial.

After a review of the entire record, we are unable to find wherein appellant has been deprived of any substantial legal right.

The judgment and order appealed from are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

99 Cal. App. 37

PEOPLE v. McALLISTER. (Cr. 1784.)★

District Court of Appeal, Second District, Division 2, California. May 17, 1929.

Hearing Denied by Supreme Court June 13, 1929.

1. Perjury ⚷13—Offense of bribing witness or attempting to fraudulently induce false testimony may be committed, though no action or proceeding is pending (Pen. Code § 137).

To constitute offense of bribing witness or person about to be called as witness or attempting to fraudulently induce any person to testify falsely or withhold true testimony under Pen. Code, § 137, it is not necessary that there be any action or proceeding pending which might be affected by misconduct, since criminal act is committed and criminal intent exists equally whether there is or is not proceeding then pending.

2. Perjury ⚷13—Omission from law prohibiting bribing witness of reference to trial proceeding, inquiry, or investigation held to show intention that offense might be committed without cause pending (Pen. Code, § 137).

Express omission from Pen. Code, § 137, defining offense of bribing witness, of any reference to or mention of trial, proceeding, inquiry, or investigation, *held* to show intention that offense could be committed without there being any cause pending, notwithstanding proximity of statute to other sections, using words "trial," "proceeding," "inquiry," or "investigation," and referring to same general class of offenses.

★Hearing denied by Supreme Court.

3. Perjury 🔑13—Term "falsifying evidence" held to include any interference with production of true evidence whether litigation has been instituted or not (Pen. Code, § 137).

Chapter entitled falsifying evidence, of which Pen. Code, § 137, defining offense of bribing witnesses or attempting to fraudulently induce false testimony, is a part, *held* broad enough to include any interference with production of true evidence whether that interference be part of scheme or plan to obstruct justice designed and begun before litigation has been instituted or afterward.

4. Perjury 🔑27—Contention that information charging bribery of witness contained no allegation of agreement that testimony of witnesses would be influenced held without merit (Pen. Code, § 137).

Where counts in information charging offense of bribing witnesses under Pen. Code, § 137, concluded with direct allegation of understanding and agreement that testimony in case would thereby be influenced, contention that information contained no allegation of understanding or agreement that testimony of witnesses would be influenced by bribes given or offered was without merit.

5. Perjury 🔑27—Information charging offense of attempting to bribe witness held not defective for failure to allege agreement to give false testimony (Pen. Code, § 137).

Information under Pen. Code, § 137, charging offense of attempting to bribe witness to induce false testimony or withhold true testimony, *held* not defective because of failure to allege understanding or agreement, since no meeting of the minds would be involved.

6. Perjury 🔑27—Information for attempt to bribe witness to induce false testimony or withhold true testimony held sufficient (Pen. Code, § 137).

Information, under Pen. Code, § 137, for attempt to bribe witness to induce false testimony or withhold true testimony, *held* sufficient.

7. Criminal law 🔑1144(3)—Appellate court must presume refusal to set aside information was proper, where record did not contain commitment or evidence at preliminary examination.

Where neither copy of commitment nor evidence adduced at preliminary examination was transmitted to appellate court on appeal by the people from an order dismissing the action in a prosecution for bribery, appellate court must presume that order denying motion to set aside information on ground that information did not conform to evidence at preliminary hearing or commitment was proper.

8. Criminal law 🔑1134(8)—Appellate court, on appeal from order dismissing prosecution for bribery, will not consider order denying motion to set aside information.

Appellate court, on appeal by the people from an order dismissing the action in a prosecution for bribery, will not consider correctness of ruling denying motion to set aside information, since to question such ruling appeal should have been taken from order.

9. Indictment and information 🔑147—Grounds of demurrer to indictment or information are limited to those specified in statute (Pen. Code, § 1004).

Demurrers to indictment or information are limited to grounds specified by Pen. Code, § 1004.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Harold McAllister was charged by information with the offense of bribery. From an order dismissing prosecution after order sustaining demurrer to the amended information, the People appeal. Reversed, with directions.

Hearing denied by Supreme Court; SEAWELL and PRESTON, JJ., voting for a transfer.

U. S. Webb, Atty. Gen. and Buron Fitts, Dist. Atty. and Tracy Chatfield Becker, Dep. Dist. Atty., both of Los Angeles, for the People.

William R. Elam, of Los Angeles, for respondent.

CRAIG, J. This is an appeal by the people from a judgment of the superior court dismissing the action after an order sustaining a demurrer to an amended information. The information contained five counts. The first two counts charged the defendant with offenses of offering and giving bribes to persons who were about to be called as witnesses in the case of McAllister v. Lightburn et al., then and there about to be filed in the superior court of the state of California, in Los Angeles county, upon the understanding and agreement that the testimony of said witnesses in said case should be influenced thereby. Counts 3, 4, and 5 are of the same import, and charge the defendant with an attempt by certain means to fraudulently induce the giving of false and withholding of true testimony by having prepared false evidence in writing for the signature of said witnesses, with intent to produce the same as true and genuine, and to contradict the testimony of another person to be given in an action about to be filed.

A motion to set aside the information, and a demurrer which occupies 38 pages of the transcript, were interposed. The demurrer attempts to present points which could not be raised by demurrer. For example, it recites "that the offense charged against the defendant is not shown by the evidence taken at the preliminary examination." This and many other and similar statements are embraced therein.

The district attorney has proceeded upon the theory that the information is sufficient as charging the offense denounced by section 137 of the Penal Code, which reads: "Every person who gives or offers, or promises to give, to any witness, or person about to be called as a witness, any bribe upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any person to give false or withhold true testimony, is guilty of a felony."

[1] It is the contention of the respondent that this section has no application, where, as here, it does not appear that there was any action or proceeding pending which might be affected by any misconduct of the defendant.

At the outset it must be remembered that this is a law primarily to prevent the corrupt interference with the administration of justice. Its purpose is to go back as far as necessary and say, in effect, that any attempt to so influence prospective witnesses that the truth will not be presented in anticipated litigation is felonious. In State v. Holt, 84 Me. 509, 24 A. 951, it was said, in effect, although perhaps the statement is obiter dictum, that, in a prosecution similar to the one before us, the indictment need not aver that the witness had been summoned, or even that a cause was pending requiring the attendance of witnesses. Surely it is not the imminence of the person being called as a witness nor the fact that his being called may be postponed for a time that is determinative of the act coming within the purview of this section. It is the intent of the person interested and his purpose and design that is decisive of that question. True, a person cannot be a witness, unless there is an action pending, but a person may be about to be called as a witness, even though no action is pending. The attempt to wrongfully influence another's testimony might take place a day or an hour before a proceeding was to be instituted, but immediately following the beginning of which a subpœna would be issued for such person to become a witness therein. No reason is suggested, nor is one apparent why it should be unlawful to attempt to bribe or otherwise persuade someone to later defraud the court as a witness, if the attempt be made while an action is pending, but, if the same effort to obstruct justice were used just before the action was begun, it should be exempt from condemnation and entitled to the approval and sanction of the law.

The term "or person about to be called as a witness" in the first part of the section, it seems clear, was used with the legislative intent of including within its denouncement all offers of bribes to any person in contemplation of his becoming a witness. Such anticipation is not affected as to its moral or legal wrongfulness by the fact, if it be one, that the proceeding in which influenced testimony is to be given or withheld has not yet been filed. It seems equally clear that the term "any person" used in the last phrase is intended to include both any witness and any person about to be called as a witness as denominated in the first part of the statute. If A attempts by any means other than bribery to induce B to give false or withhold true testimony, the criminal act is committed, and the criminal intent exists equally whether there is or is not a proceeding then pending, during the progress of which B is to give testimony or withhold it.

These principles are recognized in Re Shepard, 109 Mich. 631, 67 N. W. 971. This proceeding, although not squarely in point, is worthy of consideration here. The corruption and vice of actively blocking the production of evidence, even though no proceeding was pending in which it could be used, but where such a proceeding might be later begun, was denounced. This was a disbarment proceeding. Shepard, an attorney, had taken steps to prevent a woman upon whom an abortion had been performed from making any statement before her death, and the accused was acting on behalf of one who was suspected of being instrumental in causing the abortion. No prosecution or other proceeding had been instituted, but it was held that Shepard was guilty at least of attempting to stifle evidence, and that this was sufficient upon which to predicate the charge of professional misconduct. This conclusion necessarily involves a recognition of the fact that there may be evidence in its legal sense, although no action is pending, in which it could be used. This being so, as an abstract proposition, it is possible to influence testimony, even if it be true that no proceeding has been begun.

Respondent cites People v. Berkowitz, 121 Misc. Rep. 40, 200 N. Y. S. 823; Brown v. State, 13 Tex. App. 358; and State v. Joaquin, 69 Me. 218. In the last-named case the statute upon which the prosecution was based differs materially from the one here involved. The court concluded the true interpretation of the law there involved to be an express provision that a person shall be liable who endeavors to procure another to swear falsely "in a proceeding before the court, tribunal or officer created by law, or in relation to which an oath or affirmation is by law authorized." The opinion in the Texas case above mentioned is of no assistance. It contains no quotation from the statute involved, but it is apparent that the act differs in many respects from section 137 of our Penal Code. From the language used it seems that the existence of a subpœna must be shown, and that such subpœna was issued by legal authority, as well as other items, from which it might easily be concluded that the pendency of a suit would be a prerequisite to prosecution, even though the statute may not have directly so provided. The nisi prius decision in People v. Berkowitz, supra, is not convincing. The case was prosecuted under section 2440 of the Penal Law of New York, the language of which is similar to, though not identical with, that of secton 137 of our Code. The opinion assigns no substantial reason for its conclusion that there must be in fact a trial, proceeding, inquiry, or investigation pending in which the witness or person about to be called is to give testimony.

[2] It is argued that, since certain other sections in the same chapter in which section

137 is found expressly specify that the act denounced has to do with a trial, proceeding, inquiry, or investigation, it must be assumed that section 137 was intended to make the same provision. The conclusion from this situation would seem to be quite to the contrary. The leaving out of all reference to trial or other proceeding in section 137, considering its proximity to the sections mentioned, and the fact that they all have to do with the same general class of offenses, would appear to have been intentional. That fact is emphasized by the definite language employed in section 132 and other sections following, and the express omission in section 137 of any reference to or mention of the "trial, proceeding, inquiry or investigation."

[3-5] It is pointed out that the chapter in which section 137 is contained is entitled "falsifying evidence." This term is board enough to include any interference with the production of true evidence whether that interference be a part of the scheme or plan to obstruct justice designed and begun before litigation has been instituted or afterward. Respondent attempts to uphold the ruling of the trial court in sustaining the demurrer by asserting that the information is defective in all five counts, in that there is no allegation in any of them of an understanding or agreement that the testimony of witnesses would be influenced by the bribes given or offered. The first two counts conclude with the direct allegation of an "understanding and agreement that the testimony of the said * * * in said case should be thereby influenced." The third, fourth, and fifth counts are predicated on the provision contained in the last part of section 137 of the Penal Code, and in each count the pleader has merely charged an attempt to induce some person to give false or withhold true testimony. Obviously, here no allegation as to an understanding or agreement is necessary, since there would be no meeting of the minds of the parties involved, where, so far as the pleading shows, only one attempting party had violated the provision of the law involved.

[6] We think this information is sufficient as a pleading. Each count alleges a violation of section 137 of the Penal Code. As to whether or not the defendant did the acts charged or attempted to do them will be questions for the jury to determine. Also it will be the duty of a jury under proper instructions from the court to say whether the person whose evidence is alleged to have been illegally influenced was in fact "about to be called as a witness." This of necessity involves the further question, also for the jury's decision, as to whether the acts of the defendant averred to be unlawful were done in contemplation of the beginning of an action or other proceeding, where such influenced evidence was intended to be produced or from which it was designed to suppress its use. All of these are questions of fact, and, as such must be determined adversely to the defendant in order that he may be convicted. But the charges contained in the information are in our opinion sufficient in each of the five counts to state a public offense.

[7-9] Extensive argument on behalf of the respondent is devoted to criticism of the ruling denying his motion to set aside the information as amended, and in attempted support of the ruling sustaining the demurrer to each of the five counts. It is insisted that the people's pleading is not based upon, nor does it conform to, the evidence or commitment in the municipal court; that there was no evidence taken at the preliminary examination tending to show the offense charged in the information; and that he was not legally committed. Neither a copy of the commitment, nor any evidence adduced at the preliminary examination, was transmitted to us in this proceeding, and, being confined to the record as presented, we must presume that the ruling of the court in denying the motion was proper. It may be added that no appeal was taken from the order mentioned, and the correctness of that decision is not before us. We are not advised by the transcript as to the offense for which the respondent was apprehended, the offense which the evidence tended to show, nor that with which he was charged in the commitment, yet various authorities are cited, and there is much discussion, from which we assume that it is contended that there was a fatal variance between the commitment and the information. Section 1004 of the Penal Code prescribes five grounds of demurrer: (1) That the court is without jurisdiction; (2) that the information does not substantially conform to the requirements of the Code; (3) that more than one offense is charged, except as provided in section 954; (4) that the facts stated do not constitute a public offense; and (5) that the allegations thereof constitute, if true, a legal justification of the offense charged, or other legal bar to the prosecution. In none of these subdivisons of said section is the sufficiency of the evidence or substances of the commitment, made of consequence for the purposes of demurrer. Demurrers are limited to the grounds specified by section 1004 of the Penal Code. People v. Markham, 64 Cal. 157, 30 P. 620, 49 Am. Rep. 700; People v. Schmidt, 64 Cal. 260, 30 P. 814; People v. Tibbitts, 71 Cal. App. 709, 236 P. 217.

For the reasons herein expressed, the judgment is reversed, and the trial court is directed to overrule the demurrer.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

99 Cal. App. 140

RAY THOMAS, Inc., v. COWAN.

(Civ. 3785.)

District Court of Appeal, Third District, California. May 24, 1929.

1. Contracts 🔑303(4)—Performance of contract, when prevented by acts of opposite party, is excused.

Party to contract cannot take advantage of his own act or omission to escape liability, and performance of contract is excused when prevented by acts of opposite party.

2. Vendor and purchaser 🔑18(3)—Vendor preventing service of notice of acceptance of option to purchase within time limited, and thereafter approving assignment and specifying manner of payment on receiving notice of acceptance by assignee, could not object that option was not exercised in time.

Where vendor by her own act prevented service upon her of written notice of acceptance of option to purchase within time limited, and on receipt of notice of acceptance by assignee of option on day after time expired approved assignment and signed addenda thereto, specifying manner of payment of installments, vendor could not, in suit by assignee of option for specific performance, defeat plaintiff's recovery on ground that option to purchase was not exercised within time.

3. Specific performance 🔑97(1)—Vendee need not tender performance before suit for specific performance, where vendor repudiates contract.

Where vendor repudiates term of contract and indicates that he will be no longer bound thereby, further tender of performance by vendee before suit for specific performance is unnecessary.

4. Specific performance 🔑114(4)—Vendee suing for specific performance after vendor's repudiation need only allege that he is ready, willing, and able to perform.

Where vendor has absolutely repudiated agreement to sell, it is sufficient for the vendee to set forth in complaint for specific performance that he is ready, willing, and able to perform.

5. Vendor and purchaser 🔑187—Vendor repudiating contract solely because her signature was obtained by fraud waived objection that amount of purchaser's tender was insufficient (Code Civ. Proc. § 2076; Civ. Code, § 2051).

Where vendor notified escrow holder and purchaser of repudiation of contract for sale on sole ground that her signature had been obtained by fraud, objection to sufficiency of purchaser's tender was waived under Code Civ. Proc. § 2076, and Civ. Code, § 2051, in purchaser's suit for specific performance.

6. Vendor and purchaser 🔑18(3)—Vendor, by handing deed to escrow holder, sufficiently ratified assignment of option to purchase.

Vendor giving option to purchase sufficiently ratified assignment thereof as notice of acceptance of option by handing deed executed in favor of assignee of option to escrow holder.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Suit by Ray Thomas, Inc., against Mary E. Cowan. Judgment for plaintiff, and defendant appeals. Affirmed.

Stewart & Stewart, of Los Angeles, for appellant.

Joseph Musgrove and F. O. McGirr, both of Los Angeles, for respondent.

PLUMMER, J. Plaintiff had judgment in an action for specific performance of a contract for the sale of real estate. From this judgment the defendant appeals.

The complaint in this action sets forth that the defendant is the owner in fee of the lands and premises described in this action, and was such on the 6th day of July, 1926; that on said date the defendant gave to one George W. Fassel an option to purchase the real estate described in the complaint; that thereafter, and on or about the 19th day of July, 1926, Fassel assigned his interest in said option to one Lem A. Brunson, who on or about the same date assigned his interest in said option to the plaintiff in this action; that on or about the same date the defendant accepted the assignment of the option herein referred to; that on or about the 20th day of July, 1926, the defendant gave certain instructions to the Title Guarantee & Trust Company, in relation to consummating the sale of the real estate involved in this action. The complaint further alleges that the plaintiff has complied with all the terms and conditions of the option agreements herein referred to. The answer of the defendant denies the allegations of the complaint, and for further defense sets up that she was induced to sign the instruments referred to herein by reason of fraudulent misrepresentations. As the question of fraud is not presented to us upon this appeal, no further reference will be made thereto.

The court found that the plaintiff was entitled to, and entered a decree for the specific performance of the instruments designated as Exhibits A and B.

Exhibit A is the option agreement entered into between the respondent Mary E. Cowan and George W. Fassel, the persons heretofore referred to, and is substantially as follows: That on the 6th day of July, 1926, the defendant gave to said Fassel the exclusive right and option, at any time before 12 o'clock p. m. on the 18th day of July, to purchase the real property involved in this action for the sum of $36,000, subject to conditions (which are not involved in this action and need not to be set forth). The option ran in favor of the optionee, his heirs, executors, administrators, and assigns. By its terms it provided that the option could be exercised only by written instrument signed by the optionee, his heirs, executors, administrators, or assigns, and delivered to the optionor personally or deposited in the mail by registered letter, postage prepaid, addressed to the optionor at her address in the city of Los Angeles. The purchase price was fixed at $36,000; $12,000 payable upon demand in escrow, the remaining $24,000 payable on or before five years after date of escrow, with interest at 7 per cent. per annum, payable semiannually. The 18th day of July, 1926, falling on Sunday, the life of the option, by reason of the provisions of the Civil Code, ran until 12 o'clock p. m., July 19th. On the 19th day of July, George W. Fassel assigned and transferred all his interest in the option referred to and right to purchase the real estate involved in this action to Lem A. Brunson. This assignment is in the words and figures following, to wit:

"Exhibit B.

"July 19, 1926.

"Mr. Lem A. Brunson, 945 Wall Street, Los Angeles, Calif. My dear Mr. Brunson: In accordance with our conversation of this date, please be advised that I hereby agree to and do hereby transfer, assign, set over and convey to you those certain exclusive options executed and delivered to me by Miss Mary E. Cowan, covering certain real property owned by said Mary E. Cowan, situated at 824 West 10th Street, Los Angeles, California, upon the following terms and conditions, to-wit: First: That you agree to pay said Miss Mary E. Cowan, upon acceptance and exercise of said option, the sum of $36,000, $5,000 of which is to be paid into escrow within three (3) days after notification by the Title Company or Mary E. Cowan, of the opening of escrow by said Mary E. Cowan and $7,000 and a note and mortgage on standard form in the sum of $24,000 dated and bearing interest of 7% from the date of close of escrow within three (3) days after notification to you by the Title Company of its readiness to record the Deed of Conveyance. Second: And upon your payment to me of the further sum of $2,000 upon the close of said escrow. It is understood and agreed that your acceptance of this proposition is to supercede a former option dated July 15, 1926, by me to you upon said property.

"Very truly yours, Geo. W. Fassel.

"Approved and Accepted
"Lem A. Brunson."

Thereupon, said Lem A. Brunson signed the following instrument, directed to the respondent, to wit:

"July 19, 1926.

"Miss Mary E. Cowan, 824 West 10th Street, Los Angeles, Calif. Dear Madam: This is to advise you that Mr. George W. Fassel has this date sold, assigned and transferred to me those certain options given by you to him, covering the purchase of your property situated at 824 West 10th Street, Los Angeles, California, at a price of $36,000 net to you, payable upon the following terms and conditions, to wit: $5,000 to be paid to you upon opening of escrow for the sale of said property, which you agreed to do within three (3) days from the date hereof, and a further sum of $7,000 and a note and mortgage in the sum of $24,000 on the standard form, dated as of the close of escrow and bearing 7% (LAB) interest from said date, payable semiannually, which sum is to be paid on or before five (5) years. This is to further notify you that I do hereby accept and exercise said offer and do hereby tender to you on account of the purchase price of said property as hereinbefore set forth, the sum of $500.00.

"Very truly yours, Lem A. Brunson.

"Above assignment, terms, conditions and the receipt of $500.00 on the purchase price is accepted and approved this 19th day of July, 1926. Terms of mortgage to be $8,000.00 in 2 yrs. $8,000.00 in 4 yrs. & $8,000.00 in 5 yrs. at 7% on all deferred payments.

"Mary E. Cowan.

"Witness to signature of Mary E. Cowan.
"Geo. W. Fassel."

The record shows an assignment by Brunson to the plaintiff in this action. While the approval of the assignment by Fassel to Brunson appears to have been approved by the respondent on the 19th day of July, 1926, it was actually approved by her on the 20th of July, 1926.

By an instrument bearing date of July 20, 1926, the appellant gave certain instructions to the Title Guarantee & Trust Company escrow holder relative to the acts to be performed in the consummation of the sale of the property referred to by the plaintiff in this action, and also set forth the terms of sale. These instructions were to the effect that a deed executed by her to the respondent for the property involved was authorized to be delivered to the plaintiff within 20 days on payment to the Title Company of the sum of $11,500, on account of the purchase price of the property mentioned, and a mortgage for $24,000 securing three notes of $8,000 each in two, four, and five years, with interest at 7 per cent. per annum, payable semiannually. The instructions also provided that $5,000 of the defendant's demand should be placed in escrow on or before Friday, July 23, 1926. The record shows that on the 21st day of July, 1926, the plaintiff, or, rather, that one Musgrove, an attorney for plaintiff, deposited with the Title Guarantee & Trust Company the sum of $4,500 for the benefit of the plaintiff. The transcript contains the following in relation to the $4,500: "It was also stipulated that $4,500.00 was paid into escrow and is still in said escrow."

On the 23d day of July, 1926, the appellant wrote a letter to the Title Guarantee & Trust Company and the parties involved herein, notifying them that she repudiated her agreements of sale on the ground that her signature thereto had been obtained by fraud. No objection was made to the form of the tender, nor was any objection made as to the amount thereof.

Upon this appeal it is contended that the finding of the court, that the plaintiff had complied with all the terms and conditions to be performed by it specified in the writings to which we have referred, are not supported by the testimony in this, that the evidence shows the option to purchase was not accepted and ratified on the 19th day of July, 1926, but that the ratification thereof took place on the 20th day of July, 1926, and was therefore one day too late. And, further, that the payment of $4,500 in escrow was not in accordance with the terms of the instrument in that the escrow instructions delivered to the Title Guarantee & Trust Company called for the payment of the sum of $5,000, and also that it was uncertain as to whether the $4,500 heretofore mentioned was deposited in such a manner that the appellant could lay claim thereto in the event the plaintiff failed to comply with the terms and conditions of the instruments herein referred to. It may be observed that none of the instructions to which we have referred, made time the essence thereof, save and except that the options, until accepted, gave the optionee only so long a time within which to exercise his option to purchase.

[1, 2] As to the first objection that the option to purchase was not exercised within the time limit, it is sufficient to say that the record shows beyond controversy that the act of the appellant prevented the service upon her of written notice of acceptance of the option within the time limit, and brings this case clearly within the rule set forth in 13 C. J., p. 647, § 721, which is: "A party to a contract cannot take advantage of his own act or omission, to escape liability thereon. * * * Under this rule performance of a contract is excused when it is prevented by the acts of the opposite party, or is rendered impossible by him." Furthermore, the record shows that on the 20th day of July, 1926, the appellant received notice of the acceptance of the option and assignment, and thereupon approved the assignment, and signified the same by signing an addenda to the assignment specifying that the $24,000 mentioned in the acceptance of the option and assignment thereof should be paid in two, four, and five years.

[3-6] The second objection urged by the appellant is as to the amount of the tender. As shown by the writing dated July 19, 1926, which bears the approval of the respondent, it is specified that $5,000 was to be paid to the appellant upon the opening of the escrow of the sale of property involved in this action, and then that the further sum of $7,000 was to be paid, and then notes and mortgages were to be given for $24,000. It thus clearly appears that the cash to be paid was only the sum of $12,000. At the time of the approval of this writing, the appellant was tendered and accepted a check for the sum of $500. This left only the sum of $11,500 to be paid. The instructions contained in the paper signed by the appellant and handed to the Title Guarantee & Trust Company did direct that $5,000 should be paid on or before July 23, 1926. In this particular it differs from the two instruments which we have mentioned herein, or, rather the fact that $500 had already been paid on the $5,000 apparently was lost sight of. As we have stated, on the 23d day of July, 1926, the appellant repudiated her agreements, which repudiation was received by the parties interested on the 24th day of July, 1926. The law is well settled that, where a vendor repudiates the terms of a contract and indicates that he will be no longer bound thereby, a further tender of performance before beginning suit by the vendee is unnecessary. In support of this we may refer to the long list of cases cited in a note appended to the case of Bateman v. Hopkins, as reported in Ann. Cas. 1913C, pp. 642–648, being a case also reported in 157 N. C. 470, 73 S. E. 133. To the same effect is the rule stated in 23 Cal. Jur. p. 499. See, also, Buckmaster v. Bertram, 186 Cal. 673, 200 P. 610. Where the vendor has absolutely repudiated his agreement to sell, it is sufficient, on the part of the vendee, to set forth in his complaint that he is ready, willing, and able to perform his part of the contract. Such appears to be the case at bar. The complaint contains the necessary allegations which was followed by the necessary proof introduced upon the trial. As to the sufficiency of the tender and offer of the payment of the first installment, we think the objections of the appellant are answered by section 2076 of the Code of Civil Procedure and section 1501 of the Civil Code. These sections provide that the form of tender must be objected to at the time, and likewise as to the amount; otherwise such objections are waived. Without reciting the sections referred to, we think they absolutely answer the objections of the appellant in the negative. While the record shows no acceptance of the assignment by Brunson to the plaintiff, it does show the assignment, and then shows that the respondent acted thereon and in pursuance thereof in handing the deed executed in favor of the plaintiff, to the Title Guarantee & Trust Company, for the property involved, at the time of the delivery of instruments which sufficiently show ratification. The record shows that appellant makes no objection in this particular.

We conclude that the trial court was correct in holding that Exhibits A and B constituted a contract of sale and properly directed specific performance.

The judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

99 Cal. App. 172

QUAGELLI v. QUAGELLI. (Civ. 6663.)

District Court of Appeal, First District, Division 2. California. May 28, 1929.

1. Divorce ⚷130—Allegations of complaint, supported by uncontradicted evidence, held sufficient to entitle wife to divorce for cruelty.

Allegations of complaint, supported by direct, positive, and uncontradicted evidence of competent witnesses, that defendant continually abused and cursed plaintiff and their children, hurled dishes and food at them, and locked himself in room for two or three days at time in state of extreme intoxication, screaming late into night, reviling plaintiff and his children and threatening plaintiff with bodily harm, that it was twice necessary to summon police to subdue him, and that his conduct was so boisterous and abusive as to be common knowledge among neighbors, causing plaintiff grievous mental suffering, *held* sufficient to entitle her to divorce decree on ground of cruelty.

2. Husband and wife ⚷299(1)—Decree for wife in suit for separate maintenance on ground of cruelty held conclusive evidence thereof in divorce suit.

Decree for plaintiff in wife's suit for separate maintenance on ground of extreme cruelty *held* conclusive evidence thereof in her subsequent suit for divorce, where not appealed from, though appeal was taken from order modifying decree as to property award.

3. Divorce ⚷154—Divorce cannot be arbitrarily or capriciously denied plaintiff, whose evidence establishes truth of allegations in complaint.

When plaintiff's evidence, adequately corroborated, establishes truth of allegations of complaint for divorce, such relief, specified by statutes, cannot be arbitrarily or capriciously denied her.

4. Divorce ⚷252—Wife establishing extreme cruelty, alleged in complaint, is entitled to divorce on such ground, and hence to over half of community property (Civ. Code, §§ 146, 148).

Wife establishing extreme cruelty, alleged in complaint for divorce, by final decree for separate maintenance on such ground, was entitled to divorce decree on such ground and hence to award of more than half of community property under Civ. Code, §§ 146, 148; amount being for trial court to determine in first instance from circumstances of case, subject to revision on appeal.

5. Husband and wife ⚷262(1)—Realty taken by written conveyance in name of wife only is presumed her separate property.

When real property is taken by written conveyance in name of wife alone, it is presumed to be her separate property.

6. Divorce ⚷286—Allegation of answer in separate maintenance suit that there was other community property in wife's name being sufficient to raise issue whether unmentioned parcel was community property, court must presume on appeal from divorce decree that issue was tried and separate maintenance decree sustained by evidence.

Allegation of answer in wife's suit for separate maintenance, record of which was admitted in her subsequent divorce suit, that there was other community property standing in her name than that mentioned in complaint, being sufficient to raise issue whether parcel not mentioned therein was community property, as adjudged in decree, Court of Appeal must presume in support of decree, where parties waived findings, that they tried such issue and that decree was sustained by competent evidence.

7. Divorce ⚷249(6)—Court cannot assign one-half undivided interest in homestead to party at fault in divorce suit (Civ. Code, § 146, subd. 3, and § 148).

Civ. Code, § 146, subd. 3, does not authorize court to assign one-half undivided interest in homestead to party at fault in divorce suit, but requires that court either assign it to innocent party absolutely or for limited period, divide it between parties, or order it sold and proceeds divided in proper proportions under that section and section 148.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Suit by Caterina Quagelli against Enrico Quagelli for a divorce. From a decree granting plaintiff a divorce and ordering an equal division of property, plaintiff appeals. Reversed.

Kirkbride & Gordon, of San Mateo, for appellant.

Hugh K. McKevitt, and Halloway Jones, both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for a divorce upon three grounds—cruelty, desertion, and habitual intemperance. Defendant answered and filed a cross-complaint asking for a divorce upon the ground of plaintiff's cruelty. The trial court found adversely to plaintiff in regard to her allegations of cruelty and intemperance, but granted her a decree of divorce upon the ground of desertion. It also found against defendant in regard to his allegation of cruelty on the part of plaintiff. All the property standing in the names of either party was found to be community and was ordered to be equally divided between the parties. The plaintiff has appealed from the decree on a bill of exceptions.

The attack upon the decree is based on two main grounds—that the undisputed evidence demanded a finding and decree favorable to plaintiff on the grounds of cruelty and habitual intemperance and a consequent division of the community property more favorable to the plaintiff under the express provisions of section 146, Civil Code; and that the undisputed evidence demanded a finding that two of the parcels of real property were the separate property of the plaintiff.

[1] The complaint contains a lengthy specification of acts of cruelty running from the year 1913 down to the year 1925. It is alleged that in 1913 the defendant became addicted to the excessive use of intoxicating liquor which incapacitated him from transacting any business, and which caused him to assume a hostile attitude towards plaintiff and their children; that he continually abused and cursed the plaintiff and their children, calling his wife and daughters prostitutes and his sons bastards; that he hurled dishes and food at the plaintiff and threw furniture about the home; that he refused to eat his meals with the family, but would lock himself in his room, where he would remain for two and three days at a time in a state of extreme intoxication; that on these occasions he would scream late into the night, reviling the plaintiff and his children and threatening the plaintiff with bodily harm; that on two occasions it became necessary to summon police officers to subdue the defendant; and that his conduct was so boisterous and abusive that it was of common knowledge among the neighbors, all of which caused the plaintiff grievous mental suffering. It is unnecessary to recite the many other allegations of cruelty; what we have stated is more than sufficient to entitle plaintiff to a decree on that ground. All the acts mentioned were proved by direct and positive evidence and were fully corroborated by competent witnesses. No evidence was offered by the defendant to rebut a single charge made, except his bare statement that the denials in his answer were true. The finding that it was not true that defendant at any time treated plaintiff in a cruel and inhuman manner or inflicted upon her mental suffering or any suffering at all is directly contrary to all the competent evidence in the record.

[2] In addition to this the plaintiff alleged that on the 27th day of February, 1925, she commenced an action against the defendant to obtain a decree of separate maintenance, and that on the 3d day of September, 1925, a decree was entered in said action in her favor. She further alleged that said decree had become final. The court made a finding in favor of the plaintiff on all of the aforesaid allegations except the last, and in that behalf it found "that said order of separate maintenance was made subject to change or modification." The record in said action was introduced in evidence, and it is a part of the record in the instant case. Turning to the record in the maintenance case, it will be noted that plaintiff pleaded facts showing that her cause of action for divorce was extreme cruelty. No other cause of action was pleaded or attempted to be pleaded. Findings were waived. The trial court entered a decree in favor of the plaintiff. That decree necessarily rested on an implied finding that the plaintiff had sustained her allegations of extreme cruelty. Hence that decree was conclusive evidence in the instant case to prove the charge of extreme cruelty. 15 Cal. Jur. 136. Unless the defendant disproved the judgment in the maintenance action, the issue on extreme cruelty must necessarily have been found for the plaintiff. He did not attempt to disprove the judgment, therefore the trial court was bound to have found the issue in accordance with the decree in the maintenance action. It is argued that that decree is not res adjudicata of the grounds for divorce because it is not final. The controversy arises no doubt because of misapprehension of the condition of the record. No appeal was taken from the decree in the maintenance action, and the judgment therein had become a final judgment. An order had been made modifying that final judgment as to the property award and an appeal has been taken from that order. However, this subsequent modification of the decree as to property rights was based upon the prior finding of the existence of the grounds for divorce and was a reaffirmance of that finding rather than a modification of it.

[3, 4] If the trial court had made its findings in accord with the evidence, the plaintiff would have been entitled to a judgment on the ground of extreme cruelty. Lewis v. Lewis, 167 Cal. 732, 733, 141 P. 367 [52 L. R. A. (N. S.) 675]; Harman v. Harman, 198 Cal. 695, 698, 247 P. 194. In the Lewis Case it was said: "The court is not authorized to deny a divorce where the evidence of the plaintiff, adequately corroborated, establishes the truth of the allegations of the complaint." When a case is thus made out, the plaintiff is entitled to the relief which the statutes specify, and such relief cannot be arbitrarily or capriciously denied one. The plaintiff here, having made her case of extreme cruelty, was entitled to a decree on that ground, and this would, of course, entitle her to an award of more than one-half of the community property. On this question the cases are all in accord. Eslinger v. Eslinger, 47 Cal. 62, 64; Brown v. Brown, 60 Cal. 579, 580; Thomsen v. Thomsen, 31 Cal. App. 185, 188, 159 P. 1054; Nave v. Nave, 35 Cal. App. 27, 169 P. 253. Some of the cases hold that under the provisions of section 146 of the Civil Code the court should award three-quarters of the community property to the nonoffending spouse, and in some cases the appellate court, acting under the express provisions of sec-

tion 148 of the Civil Code, has reversed the judgment with specific directions as to how the property should be divided. But in all cases the uniform rule has been that when the decree is on the ground of extreme cruelty the award to the unoffending spouse must be substantially greater than that to the one who is at fault. What the difference should be depends upon the circumstances of each case, and that is a matter to be determined by the trial court in the first instance "subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court." Section 148, Civ. Code.

[5] It is apparent that both parties are satisfied that a divorce should be had, but they are unable to agree upon a proper division of their property interests. They have been in court on numerous occasions in the endeavor to settle these differences, and it is to be regretted that further proceedings are necessary for that purpose. However, in the determination of property rights there are certain legal principles which must be followed, and, if we do not follow those principles, we fail in our function in the administration of the law. One principle which seems to be well settled, and which is applicable here, is that when real property is taken by written conveyance in the name of the wife alone it is presumed to be her separate property. Here the two parcels designated in the findings as parcels five and six were shown by the only evidence offered on the subject to be the separate property of the appellant. As to parcel No. 5 (lot No. 15 in block No. 2, as per map of DeBoom tract, city and county of San Francisco), the finding that this was the community property of the parties is contrary to the evidence and must be set aside.

[6] In the suit for maintenance heretofore brought by this same plaintiff a decree was entered wherein it was adjudged that parcel No. 6 was community property. The record in that case was admitted here for the purpose of showing that this decree was beyond the issues as to this parcel because it was not included in the pleadings in that case. From that record it appears that the defendant in his answer pleaded that, in addition to the community property mentioned in the complaint, "there is other property in San Francisco * * * which is community property, that the same stands in the name of plaintiff." This would seem sufficient to raise the issue, and, as the parties waived findings in that case, we must presume, in support of the judgment, that the parties tried the issue and that the decree was sustained by competent evidence.

Appellant attacks the finding that the Burlingame property designated in the findings as lot No. 8, block No. 1, in the city of Burlingame was not subject to the declaration of homestead by appellant because she had previously declared a homestead on another parcel in San Francisco, which homestead had not been abandoned. There was no evidence of any character or description relating to the alleged declaration of homestead in San Francisco. The only evidence in the record proves without dispute the declaration of homestead upon the Burlingame property, and the plaintiff was entitled to a finding that this property was covered by a valid and existing homestead under her declaration.

[7] Under the provisions of subdivision 3 of section 146, Civil Code, the trial court is authorized to assign the homestead to the innocent party either absolutely or for a limited period, *or* it may be *divided*, or be sold and *the proceeds divided*. The section does not authorize the court to assign a one-half undivided interest in the homestead to the party at fault, as has been done here. In determining the proper division of the community property the trial court will also determine the course to be pursued as to this homestead property—by either assigning it to the appellant absolutely, or for a limited period, or by dividing it between the parties, or by ordering it sold and the proceeds thereof divided—in either case awarding the appellant such proportion thereof as she is entitled to receive under the views hereinbefore expressed.

Judgment reversed.

We concur: **KOFORD, P. J.; STURTEVANT, J.**

99 Cal. App. 130

HUNSBERGER v. HUNSBERGER.
(Civ. 6826.)

District Court of Appeal, First District, Division 2, California. May 24, 1929.

1. **Divorce 🔑133(1)—Husband held properly denied divorce on ground of desertion.**

Evidence *held* to justify denial of divorce to husband on ground of desertion.

2. **Divorce 🔑130—Divorce to husband on ground of extreme cruelty held properly denied.**

Evidence *held* not to establish husband's right to divorce on ground of extreme cruelty.

3. **Divorce 🔑286—Absent contrary showing, court must assume, in support of judgment awarding wife counsel fees, that allowance was made only after motion was duly made and presented.**

Where judgment of divorce awarded wife counsel fees, there being no showing in record to contrary, appellate court, in support of judgment, must assume that in due time wife, on proper notice, duly made motion to be allowed counsel fees, that motion was duly presented, that ruling thereon was held in abeyance to abide result of trial, and that item contained in judgment was ruling of court thereon.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action for divorce by Harvey S. Hunsberger against Adeline H. Hunsberger. Judgment for defendant, and plaintiff appeals. Affirmed.

J. S. Hutchinson and Forrest H. Bailey, both of San Francisco, for appellant.

Christopher M. Jenks, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action to obtain a divorce from the defendant. He pleaded desertion and willful neglect. The defendant filed an answer denying both charges. A trial was had before the court sitting without a jury. The trial court made findings of fact in favor of the defendant, and the plaintiff has appealed under section 953a of the Code of Civil Procedure.

[1] The plaintiff contends that the trial court should have awarded him a decree on the ground of desertion, and claims that the evidence was full and complete. We think he is mistaken, for the following reasons: In one place, answering a leading question of his attorney, he stated that his wife deserted him. Of course, that was but his legal conclusion. In another place, he stated that on the 29th day of July, 1924, his wife left the family apartment. In that connection the defendant testified that at the time she left she was in a very nervous condition by reason of overwork, and that she had been doing too much work. What with services rendered as a trained nurse, what with her duties as housekeeper, and what with the effort she was making in repainting some furniture which her mother had loaned to her, the defendant had greatly broken down her health. At the time she left the family home she was under the care of a physician. For several months she returned from time to time and at various times the parties met, either at their own home or at the mother's home, or other places. There is evidence that a year and a half after the defendant left the home that she then stated she did not care to return. That statement was apparently made a month or two months after this action was filed. If the plaintiff is relying on the date of that refusal as the date of desertion, then the desertion had not continued one year prior to the commencement of the action and therefore will not support a decree based on desertion. Pinkard v. Pinkard, 14 Tex. 356, 65 Am. Dec. 129. There is evidence that the parties were living separate and apart for a few months during the year 1923; however, that evidence is entirely without the issues made by the pleadings. On July 29, 1924, as the defendant left the house, she stated to the landlord that thereafter he should look to the husband for the rent, as she was going away. Assuming that the remark was favorable to the plaintiff's case, the most that can be said is that it but created a slight conflict, and that the trial court was warranted in reaching the conclusion that the conflict should be resolved in favor of the defendant. In this connection it should be noted that, except as to the item just adverted to, there is not a particle of evidence of corroboration of the plaintiff on this particular count.

[2] The plaintiff contends also that he was entitled to a decree on the ground of extreme cruelty. He makes this contention on the following facts: In 1923, when the parties were separated, they met on the street, and the wife did not speak to him. He does not claim that he spoke to her. Later they lived together for some months. During their married life the plaintiff was engaged in practicing his profession as a physician and surgeon. His wife during the same period was actively engaged in practicing her profession as a trained nurse. They accumulated a little property. A part of that property consisted of some bonds. The amount is not stated in the evidence. The custody of those bonds was intrusted to the defendant. On a certain occasion the plaintiff asked his wife to deliver those bonds to him that he might borrow some rent money. She declined and he says she told him to go pawn something. If there was any real cruelty in the act, the sub-

ject was not sufficiently developed in the trial court to show the fact. While living in a certain apartment, an arrangement was made by which these parties agreed to pay, and did pay, a part of the cost of a telephone which was located in the landlady's apartment, and to which all should have access. At one time, when Mrs. Hunsberger wanted to use the phone, the landlady had locked the door. The plaintiff testified that thereupon Mrs. Hunsberger broke some panes of glass in the door, and that a quarrel ensued between her and the landlady. On another occasion the plaintiff testified that the defendant said to him, "You are no good, you are not a man." He further testified that on a certain occasion the spouses were living in the same house with the plaintiff's mother and were using the same kitchen. On one of the bills for groceries some items were entered which were groceries bought for the mother. However, there is evidence that these parties ate some of the groceries. There is not a particle of corroboration of any of the evidence so given by the plaintiff. Even though there were, it is patent that the trial court was exercising a sound discretion in refusing to base a decree of divorce on any one or all of the acts alleged. There is not a particle of evidence in the record to show that the defendant inflicted any bodily injury on the plaintiff nor that any one or all of her acts produced any grievous mental suffering on the part of the plaintiff. For all of these reasons the trial court did not err in holding that the plaintiff had not proved a cause of action as for extreme cruelty. Barnes v. Barnes, 95 Cal. 171, 176, 30 P. 298, 16 L. R. A. 660.

[3] In its judgment the trial court awarded the defendant $50 as counsel fees. As the record does not show to the contrary, in support of the judgment we must assume that in due time the defendant, on proper notice, duly made a motion to be allowed counsel fees; that the motion was duly presented; that a ruling thereon was held in abeyance to abide the result of the trial; and that the item contained in the judgment is the ruling of the court thereon.

In paragraph 4 of his second cause of action the plaintiff alleged "(a) that on the 29th day of July, 1924, in the said city and county of San Francisco, plaintiff and defendant separated, by reason of defendant's extreme cruelty, (b) that the time intervening between the marriage of plaintiff and defendant and the date of their separation on said 29th day of July, 1924, is one year, eleven months and twenty-three days." (Parentheses ours.) He claims the court erred because it made no finding thereon. The first part of the allegation, which we have marked "a," seems to be an attempt to plead the theory stated in Civil Code, § 98. If so, there was no evidence thereon. On the other hand, if it was an attempt to plead matters of inducement under the theory stated in Civil Code, § 94, then it was sufficiently found on. The specific acts of cruelty were pleaded in paragraph 5, and in finding 6 the court found those facts against the plaintiff. The latter part of the paragraph quoted was an allegation to comply with subdivision 4 of section 426a of the Code of Civil Procedure. That allegation was found to be true in finding No. 4.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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99 Cal. App. 153

JOHNSON v. COYNE et al. (Civ. 3780.)

District Court of Appeal, Third District, California. May 25, 1929.

1. Appeal and error 🔑1010(1)—Evidence held not insufficient as matter of law to justify finding that defendant's promise to pay for labor and material was original promise.

In action to recover amount alleged due for labor and material furnished, evidence *held* not insufficient as matter of law to sustain finding of trial court that defendant's promise to pay for such labor and material was an original one rather than mere promise to answer for default of another.

2. Contracts 🔑54(1)—Defendant promising after partial performance of work to pay therefor under terms of original agreement is liable for entire cost of work.

Where defendant, after plaintiff had partially performed work of decorating interior of house, promised to pay therefor under terms of original agreement for work performed and to be performed, defendant is bound by such promises for entire cost of work performed.

3. Appeal and error 🔑1048(6)—Cross-examination of defendant whether he had guaranteed payment of work performed by others, to which negative answer was given, held not prejudicial.

In action tried by court without jury to recover for labor and material furnished, based on defendant's alleged promise to pay therefor, cross-examination of defendant as to whether he had guaranteed payment of work performed by others upon premises in question, to which he answered either that he had not or did not remember, was not prejudicial to defendant.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Pauline Johnson against William R. Coyne and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Julius V. Patrosso and C. C. Mishler, both of Los Angeles, for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondent.

FINCH, P. J. The plaintiff, as assignee of Nelson Bros., brought this action to recover an amount alleged to be due for labor performed and materials furnished in the painting and decorating of the interior of a dwelling house and to foreclose a lien for the value of such labor and materials. The court found against the existence of the alleged lien, but entered judgment against the defendants Coyne and Weisman for the amount demanded in the complaint. The defendant Coyne has appealed from the judgment.

The appellant contends that, at most, the evidence merely shows that he made an oral promise "to answer for the debt or default" of Weisman, and that such promise is invalid because not in writing. It is conceded, of course, that the evidence must be viewed in the light most favorable to the respondent, and all contradictory evidence is omitted.

[1] Prior to May 8, 1923, Coyne and his wife were the owners of the property involved in this suit. On that day they conveyed it to S. R. and Elizabeth S. Ow, who in turn gave Coyne and his wife a mortgage on the property to secure a promissory note for $15,000, and on July 5, 1923, Ow and his wife executed a trust deed to secure another promissory note in favor of the Coynes for $7,500, payable November 8, 1923. Thereafter and prior to the employment of the Nelsons, Ow and his wife conveyed the property to Weisman, subject to the mortgage and the trust deed. After the completion of the work and before the commencement of this suit the property was sold under the trust deed, Coyne and his wife becoming the purchasers, their bid being the only one made at the sale. The following evidence appears in the record, the quotations, except as otherwise stated, being taken from the testimony of R. A. Nelson, one of the Nelson Bros.:

"Mr. Coyne told us that he intended selling the house to a man named Mr. Weisman, and the condition of the house at the present time it couldn't be resold; so he was trying to arrange to have us redecorate it, and arrange a contract with Mr. Weisman for the redecorating of it, but yet Mr. Weisman didn't have any money, he was quite sure, and he wasn't quite sure Mr. Weisman would be able to pay for the contract; and if he didn't pay us, not to worry, that he, Mr. Coyne, would pay us. * * * He told us not to worry; that he would see the money got to us all right." On the following day the Nelsons met with Coyne and Weisman at the house in question. They were then informed for the first time that Weisman had purchased the property. "Mr. Coyne called me to one side and asked me about what my figure was. * * * I told him the price was $1,143, and he said: 'Well, I don't hardly think you will be able to get it out of Mr. Weisman, but if not I will pay you. * * * Figure about $200 on that price for me, in case he does pay you,' * * * but if Mr. Coyne was to pay it, he would pay $1,143." The Nelsons and Weisman thereupon agreed upon a price of $1,343 for the work, but no written contract was executed. "We were to receive $500 in 30 days, $643 in 60 days and $200 in 90 days. * * * After we had started to work, Mr. Coyne advised us to take our time on it, because he told us he didn't think Mr. Weisman was financially able to pay it, and to give him plenty of time to get it. And 30 days, when our first payment of $500 came due, we hunted up Mr. Weisman, and Mr. Weisman informed us that he was unable to pay us at that time; and we went to Mr. Coyne and told him that, and Mr. Coyne told us the best thing for us to do would be to knock off the job; and he said he knew Mr. Weisman couldn't get anybody to duplicate our work or finish the job; and Mr. Weisman also knew that; and if we knocked off the job we might bring Mr. Weisman to terms and persuade him to get the money." The Nelsons then quit work for "two weeks or more" and then returned at Coyne's suggestion. "He came to our house one evening and told us * * * he thought he had it arranged for Mr. Weisman to sell the house to a Mr. Eiseman; that Mr. Coyne would take care of the first initial payment due us, and we could enter into a contract for the balance of the work to be done, with Mr. Eiseman." About 40 per cent. of the work had been done at that time. Before commencing work under the original contract, "Mr. Coyne told us * * * not to do anything on the house without consulting him first, in regards to colors and one thing and another." Coyne "told us to go ahead and draw up a contract with Mr. Eiseman to finish the house, and try to get as much from him as possible, but for us not to worry, that the job really went on on the old agreement." The Nelsons then entered into a written agreement with Eiseman to complete the work for $750, and "Mr. Coyne told us before we did any finish decorating in the house * * * to consult him first, because he didn't want the house ruined again like it had been in the first place. * * * Q. Did you have any further conversation after that time with Mr. Coyne, respecting the work? A. He and Mr. Weisman came on the job one day and seemed very excited, and told us that the way things were shaping up he thought Mr. Eiseman would not be able to hold the house. * * * He told us that if Mr. Weisman got the house back from Mr. Eiseman, that we would start right in again, and Mr. Coyne and Mr. Weisman would pay us right up on the old contract. * * * Mr. Coyne * * * came to us one day and told us that we were not to let Mr. Eiseman in the house." The

Nelsons then quit work on the house. The work was "pretty well advanced" at that time. About "a week or a week and a half" later they resumed work at Coyne's request. "He told us to come back over and resume work on the job; that he had the house back, and we should come back and finish the job and he and Mr. Weisman would pay us." After the work was completed "Mr. Coyne said the work was entirely satisfactory, and he was sure it would be sold in a short time to somebody with some money, and whoever he sold it to he was going to sell it with the agreement that they were going to help him pay us for our decorating."

During the progress of the work Coyne visited the job "nearly every day," and, according to Nelson's testimony, he gave instructions that no changes be made in the decorations as planned without his approval and, from time to time, he directed the temporary discontinuance and the resumption of work. At the time the Nelsons agreed to do the work, Coyne told them that "Weisman didn't have any money * * * and he wasn't quite sure Mr. Weisman would be able to pay for the contract." It is a reasonable inference from the evidence that Coyne then believed that Weisman was not financially able to pay for the property and that Coyne was anxious to have the house redecorated because in its then condition "it couldn't be resold." He knew that the promissory note for $7,500, secured by the trust deed, was long overdue and that, since Weisman had no money, it would be necessary to effect a sale of the property. He knew that the redecorating would add greatly to the market value of the house and that if he became the purchaser at a sale of the property under the trust deed he would receive the full value of the work to be done. The Nelsons were employed on March 18, 1924. Nelson testified that the work was completed about July 22, 1924. The trustee's deed to the Coynes recites that on July 12, 1924, the Coynes recorded notice of default in payment of the promissory note and their election to cause the property to be sold. From these facts it appears that Coyne was taking steps to cause the sale of the property before the work was finished. It cannot be held, as a matter of law, that the evidence is insufficient to warrant the finding of the trial court to the effect that Coyne's promise was an original one rather than a mere promise to answer for the default of Weisman. Under a similar state of facts, in Davis v. Patrick, 141 U. S. 479, 12 S. Ct. 58, 35 L. Ed. 826, the court said:

"Were it not for the Statute of Frauds there would be no question, for obviously there were both promise and consideration. Defendant relies upon that provision of the Statute of Frauds which forbids the maintenance of an action 'to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing,' etc. The purpose of this provision was not to effectuate, but to prevent, wrong. It does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another. * * * Whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise. * * * There is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. The case before us is in the latter category."

When the work was nearing completion the defendant Coyne told the Nelsons that "if Mr. Weisman got the house back from Mr. Eiseman, that we would start right in again, and Mr. Coyne and Mr. Weisman would pay us right up on the old contract." At a later time Coyne requested the Nelsons to resume work, saying that "he had the house back * * * and he and Mr. Weisman would pay us." In Ogden v. United Bank & Trust Co. (Cal. Sup.) 275 P. 430, the defendant bank was held bound by a promise made under similar circumstances, after the work involved in that action had been partially performed.

[2] Appellant contends that "the judgment is excessive, as it appears without conflict from the testimony on behalf of the respondent that the appellant was to be liable only for the sum of $500 in the event Nelson Brothers made a contract with J. J. Eiseman." The evidence referred to in the last paragraph shows that at and subsequent to the time that Eiseman gave up the property, Coyne promised to pay the Nelsons under the terms of the original agreement for the work performed and to be performed. Under the Ogden Case, he is bound by such promises.

[3] Appellant complains that "the trial court, over the objections of the appellant, permitted the introduction of evidence to the effect that the appellant had guaranteed the payment of work performed by others

upon the premises in question." The part of the record to which appellant calls attention, however, does not support his statement. He was asked on cross-examination if he had "guaranteed the payment of some of the bills on this job by a written guarantee." Without objection he replied that he had not. Later his objections to similar questions were overruled, and in each instance his answer was either that he had not guaranteed payment or that he did not remember. Finally he gave an answer which was not responsive to the question asked him, to the effect that he had paid some Japanese for washing windows and some "working men." Bearing in mind that the case was tried before the court without a jury, the appellant could not have been prejudiced by the cross-examination.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

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99 Cal. App. 45

RINKENBERGER v. RINKENBERGER.★
(Civ. 3778.)

District Court of Appeal, Third District, California. May 17, 1929.

Rehearing Denied June 14, 1929. Hearing Denied by Supreme Court July 15, 1929.

1. Appeal and error ⚿1071(6)—Judgment will not be reversed for want of finding upon an issue concerning which no evidence was introduced.

Judgment will not be reversed for want of finding upon an issue where no evidence has been introduced in relation to such issue.

2. Divorce ⚿331—Decree for future alimony is as to installments past-due and unpaid entitled to full faith and credit, provided decree was not modified prior to maturity of installments (Const. U. S. art. 4, § 1).

A decree for future payment of alimony is as to installments past-due and unpaid within protection of full faith and credit clause of federal Constitution (Const. U. S. art. 4, § 1), provided that no modification of the decree was made prior to the maturity of such installments.

3. Divorce ⚿331—Washington interlocutory decree held entitled to full faith and credit as to past-due installments of alimony (Const. U. S. art. 4, § 1; Rem. & Bal. Code Wash., § 988, as amended by Laws Wash. 1921, p. 332, § 2).

Interlocutory decree of divorce providing for payment of alimony in installments, as authorized by Rem. & Bal. Code Wash., § 988, as amended by Laws Wash. 1921, p. 332, § 2, followed by final divorce decree, *held* entitled, under Const. U. S. art. 4, § 1, to full faith and credit as to overdue installments; the Washington statute giving the court no power to modify decree as to past-due installments.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Lily Rinkenberger against Fred W. Rinkenberger. Judgment for plaintiff, and defendant appeals. Affirmed.

Rupert B. Turnbull, of Los Angeles, for appellant.

Page, Nolan, Rohe & Freston, of Los Angeles, for respondent.

PLUMMER, J. This is an appeal from a judgment of the superior court of the county of Los Angeles finding that there is due the plaintiff the sum of $7,277, based upon a judgment of divorce entered in the superior court of King county, in the state of Washington, adjudging the plaintiff in this action entitled to a divorce from the defendant herein, and awarding the plaintiff alimony, payable in monthly installments, the overdue monthly installments amounting to the sum just herein stated. From this judgment the defendant appeals.

Upon this appeal the defendant sets forth two grounds alleged as sufficient cause for reversal: First, that the trial court failed to find upon certain affirmative defenses set up as counterclaims or offsets by the defendant; and, second, that the judgment of the superior court of King county, of the state of Washington, is not a final judgment to which full faith and credit can or should be given in pursuance of the Constitution of the United States.

[1] The counterclaims set up by the defendant are respectively in amounts of $500, $600, and $1,200, alleged as the value of certain personal property awarded to the defendant by the superior court of King county, and alleged to have been, at the time of the entry of judgment in said court, in the possession of the appellant in this action, and not delivered to the defendant in pursuance of the division of property between the plaintiff and defendant made by the superior court of King county. This cause is before us upon the judgment roll alone, and a careful reading of the record fails to disclose that there was a particle of evidence introduced by the defendant to sustain any one of his alleged counterclaims. The only semblance of support to defendant's claim is that the court reduced the amount of $8,650, found as the total amount of the accrued installments, to the sum of $7,277. This, however, is shown to have no foundation when the finding of the court in relation to these items is considered. Finding 4 of the trial court reads: "That since the 4th day of April, 1922, there has become due and owing from the above named defendant to the above named plaintiff, upon said interlocutory decree of divorce, the sum of $8,650.00; that no part of said sum has been paid, except the sum of $1,373.00," which, by following the ordinary rules of subtraction leaves the

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★Rehearing denied. Hearing denied by Supreme Court.

amount found due by the court the sum of $7,277. There being no testimony in the record, the conclusion is absolute, so far as an appellate court is concerned, that there was testimony introduced showing payment as found by the court, in the sum of $1,373. We do not need to review the authorities cited by the appellant that the failure of the court to find upon an essential issue or a material issue entitles an appellant to a reversal, for the law is equally clear and well settled in this state that a judgment will not be reversed for want of finding upon an issue where no evidence has been introduced in relation to such issue, and as was said in the case of Himmelman v. Henry, 84 Cal. 104, 23 P. 1098, quoting from 3 Cal. Unrep. 92, 21 P. 731: "In the case at bar, which is brought here upon the judgment roll alone, we will not presume, against the correctness of the judgment, that there was evidence upon a point with respect to which there is no finding." To the same effect are the following cases: Leviston v. Ryan, 75 Cal. 293, 17 P. 239; Winslow v. Gohransen, 88 Cal. 450, 26 P. 504, where the subject is considered at length. Other cases might be cited, but the rule we have stated has never been departed from.

Appellant cites Spect v. Spect, 88 Cal. 437, 26 P. 203, 13 L. R. A. 137, 22 Am. St. Rep. 214. The opinion, however, in that case, as shown on page 439, of said volume (26 P. 204) sets forth certain facts and circumstances which distinguishes that case from the case at bar and the others which we have cited as controlling here. In the Spect Case it appears that the record showed that the trial court gave as a reason for not making findings upon certain issues that such findings were immaterial, and therefore the Supreme Court presumed that evidence had been introduced in support of the issues set up in the pleadings.

There being absolutely nothing in the record to show that the defendant introduced any evidence whatever, or that the trial court had any facts or circumstances before it upon which it could base any finding as to the defendant's alleged counterclaims, it must be held that the appellant's first contention that the court did not find upon material issues is not well taken.

[2] The second alleged error of the trial court involves the question as to whether the provision for the payment of alimony in installments contained in an interlocutory decree of divorce, followed by a final decree of divorce, is a final judgment as to installments overdue, to which full faith and credit shall be given, etc., under the provisions of section 1 of article 4 of the Constitution of the United States.

The record shows that in this case an interlocutory decree of divorce was entered in the superior court of King county, state of Washington, followed by an absolute decree of divorce, and that the interlocutory decree of divorce, providing for the payment of alimony in installments, was never appealed from and has not been modified or changed in any particular. This action involves only overdue installments and the judgment does not purport to in any way bind the defendant for the payment of accruing installments. The action is really in the form of one to collect or obtain judgment for the amount hereinbefore set forth, based upon the accrued and overdue installments ordered paid by the defendant to the plaintiff in an interlocutory decree of divorce.

Section 988 of Remington & Ballinger's Annotated Codes and Statutes of Washington as amended by Laws Wash. 1921, p. 332, § 2, reads as follows: "Pending the action for the divorce, the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; at the conclusion of the trial the court must make and file findings of fact and conclusions of law. If it determines that no divorce shall be granted final judgment must thereupon be entered accordingly. If, however, the court determines that either party, or both, is entitled to a divorce an interlocutory order must be entered accordingly, declaring that the party in whose favor the court decides is entitled to a decree of divorce as hereinafter provided; which order shall also make all necessary provisions as to alimony, costs, care, custody, support and education of children and custody, management and division of property, which order as to the custody, management and division of property shall be final and conclusive upon the parties subject only to the right of appeal; but in no case shall such interlocutory order be considered or construed to have the effect of dissolving the marriage of the parties to the action, or of granting a divorce, until final judgment is entered: Provided, that the court shall, at all times, have the power to grant any and all restraining orders that may be necessary to protect the parties and secure justice. Appeals may be taken from such interlocutory order within 90 days after its entry."

The appellant's contention has to do with that portion of the section which we have just set out, with making necessary provisions as to alimony, costs, care, custody, support, and education of children, and the argument made that, as the section provides that the order of the court is final only as to the custody, management, and division of property, subject only to the right of appeal, that the payment of accrued or overdue installments of alimony are payable only subject to the discretion of the trial court, and therefore cannot in any sense constitute a final judgment. In other words, that, as the section expresses the idea of the Legislature that judgment as to the disposition of property shall be final, it follows as a necessary consequence that the decree of the court as to the payment of alimony was not intended to become final as to any installments whether accrued or to accrue. In support of this contention appellant cites the cases of Hodge v. Hodge, 125 Wash. 347, 215 P. 1044; Ruge v. Ruge, 97 Wash. 51, 165 P. 1063, L. R. A. 1917F, 721, and other cases in line therewith where the Supreme Court of Washington has held, prior to the amendment of section 988 of Remington & Ballinger's Annotated Codes, the allowance of alimony could not be subsequently modified, and argues therefrom that, as the Legislature, by the section as amended, intended, by making only that part of the decree of the court relating to a division of the property final, it intended that the allowance of alimony, payable in installments, whether accrued or to accrue, should never become final and constitute a basis for an action in another state under section 1 of article 4 of the Constitution of the United States. None of these cases, so far as we have been able to discover, have dealt with the question of overdue installments. This is illustrated by the syllabus in the case of Hodge v. Hodge, supra, which is similar to all the other cases cited, to wit: "Where a decree of divorce is absolute and there are minor children and permanent alimony is awarded, the court may, even in the absence of a reservation to subsequently make further orders, modify the decree as respects alimony to meet altered conditions." This is only in line with section 139 of the Civil Code of this state, which provides that, where alimony or support has been provided for in an interlocutory decree of divorce, that the court may "from time to time, modify its orders in these respects."

Appellant further cites and relies upon the case of Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061, and quotes from that case the following: "Where, by the law of the State in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due;" the rule of full faith and credit to the judgment of sister states does not apply. However, the section of the Washington code with which we are dealing contains no such provision, nor is there any implication contained within the language of the section which would warrant the conclusion drawn by the appellant. The power conferred upon the court by the section as to alimony is no different in substance from the power conferred by the code sections in our own and other states which has been held to apply only to future installments. Thus, the very case which the appellant cites is an authority against his contention. The rule is there laid down as follows: "A decree for the future payment of alimony is, as to installments past due and unpaid, within the protection of the full faith and credit clause of the federal Constitution, provided that no modification of the decree was made prior to the maturity of such instalments." The Sistare Case had to do with the code provisions of the state of New York, similar in form and substance with our own and the Washington code, and the Supreme Court of the United States further said, in relation thereto, that "decrees of the New York courts for the future payment of alimony are not subject to annullment or modification by those courts as to overdue and unsatisfied instalments, so as to deprive such decrees of the protection, as to past-due and unpaid installments, of the full faith and credit clause of the federal Constitution." The Sistare Case is also reported in 28 L. R. A. (N. S.) 1068, where a long line of other cases are cited supporting the same rule.

In the case of Holton v. Holton, 153 Minn. 346, 190 N. W. 542, 41 A. L. R. 1415, we find the following: "So long as a judgment for alimony payable in instalments is absolute in its terms and remains unmodified, or at least until an application for modification has been made, it is final as to instalments which have accrued and is entitled to full faith and credit in the courts of a sister state in an action founded upon it." Beginning on page 1419 of 41 A. L. R., a list of authorities supporting this same rule is set forth, which is too long to be more than mentioned herein.

In Myers v. Myers, 62 Utah, 90, 218 P. 123, 30 A. L. R. 74, the Supreme Court of Utah reviews a large number of cases having to do with the questions here under consideration, including the case of Sistare v. Sistare, supra, and other cases cited by the United States Supreme Court, and then holds that "the court has no power to affect instalments of alimony which have actually accrued, under a statute providing that subsequent changes or new orders may be made in respect to the disposition of property as shall be [deemed] reasonable and proper." The same holding is had in the case of Bolton v. Bolton, 86 N. J. Law, 622, 92 A. 389, Ann. Cas. 1916E, 938. This case holds that alimony payable in installments confers a vested right as to the installments that had become actually due and payable. To the same effect is the case of Guess v. Smith, 100 Miss. 457, 56 So. 166, Ann. Cas. 1914A, 300. This case, as reported in Ann. Cas. supra, is followed by a note citing a long list of authorities supporting the rule heretofore stated. The same rule is supported by the few cases in California where the subject has been considered, to wit: In Soule v. Soule, 4 Cal. App. 97, 87 P. 205, the subject is considered on pages 105–107 of that volume (87 P. 208, 209); also, Cummings v. Cummings (Cal. App.) 275 P. 245, where it is said: "A judgment for alimony is not subject to modification as to sums already accrued and past-due."

[3] The respondent makes the point that the appellant has failed to prove the law of Washington, other than the mere introduction of the section of the code referred to. The objection of the respondent appears to be well taken, as this action was tried prior to the amendment to section 1875, Code of Civil Procedure, in 1927 (St. 1927, p. 110), but we are nevertheless satisfied that the section of the Washington code having to do with the allowance of alimony and future changes in the amount of the allowance bears only the construction which has been given to like statutes and code provisions in other states, and that, as to overdue installments of alimony contained in a decree granting a divorce in the state of Washington, the full faith and credit clause of the Constitution applies, and constituted a basis for the action instituted by the plaintiff against the defendant in this cause.

The judgment of the trial court is therefore affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

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98 Cal. App. 787

ANDERSON v. VAN CAMP SEA FOOD CO., Inc. (Civ. 3763.)★

District Court of Appeal, Third District, California. May 15, 1929.

Rehearing Denied June 14, 1929. Hearing Denied by Supreme Court July 11, 1929.

1. Shipping 🔑27—In action to recover purchase money wrongfully retained after breach of contract to sell boat, evidence supported judgment for plaintiff for $2,813.53.

In action to recover purchase money wrongfully retained by seller after breach of contract to sell fishing boat, evidence *held* sufficient to support judgment for plaintiff for sum of $2,813.53, together with interest.

2. Appeal and error 🔑1033(9)—Defendants cannot complain that trial court allowed plaintiff less than record authorized.

Defendants, in action to recover purchase money retained after breach of contract to sell fishing boat, may not complain if trial court allowed plaintiff less than record showed he was entitled to.

3. Shipping 🔑27—If buyer was in default in paying first installment on boat, seller waived delay by subsequently crediting sum without objection.

If buyer, suing to recover purchase money wrongfully retained by seller after breach of contract to sell boat, was in default for failure to pay first installment within time prescribed, seller waived delay by subsequently crediting proceeds of sale of buyer's automobile without objection and by conduct indicating that strict compliance with respect to making such payment was not insisted upon.

4. Shipping 🔑27—Seller's reselling boat without notice to buyer who paid part of purchase price and without compensating buyer amounted to rescission of contract.

Where seller, in spite of substantial payments made by buyer, without notice and without compensating buyer sold and conveyed boat to another purchaser, such conduct amounted to rescission and abandonment of contract on part of seller and authorized instituting suit in assumpsit against seller for money paid by buyer.

5. Sales 🔑392—Where seller has resold property, demand for performance is unnecessary as prerequisite to action to recover purchase money paid.

Where seller has resold and conveyed property to another person and is therefore unable to transfer title to original buyer, demand for performance is unnecessary as prerequisite to maintenance of action to recover purchase money which has been paid.

6. Shipping 🔑27—Seller's resale of boat and consequent inability to deliver it to buyer created failure of consideration, making formal rescission by buyer unnecessary.

Resale of boat by seller and consequent inability to deliver it to buyer pursuant to contract created failure of consideration, making formal rescission on part of buyer unnecessary.

7. Contracts 🔑212(2)—Where no limitation of time was designated for fulfillment of contract, law implied reasonable time for performance.

Where no limitation of time was designated for fulfillment of contract, law implied that reasonable time was intended to be allowed for performance.

8. Master and servant 🔑20—Employment contract between buyer and seller, whereby seller agreed to credit boat account with portion of compensation for services, being silent regarding term, could be terminated only upon notice (Civ. Code, § 1999).

Contract of employment between buyer and seller of boat, whereby seller agreed to credit boat account with portion of compensation for services, being silent as to term of employment, could be terminated only upon notice, under Civ. Code, § 1999.

9. Corporations 🔑579(1)—Newly organized corporation having taken over property of original company, including boat sold, assumed liability for breach of sales contract.

New corporation organized for convenience of business assumed liability for breach of sales contract, where it took over business and property of original company, including boat which original company had contracted to sell.

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Dave C. Anderson against the Van Camp Sea Food Company, Inc., and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Loucks & Phister, of San Pedro, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

THOMPSON, J. This is an appeal from a judgment in favor of plaintiff in a suit in assumpsit to recover purchase money wrongfully retained by the vendor after a breach of contract to sell and convey a fishing boat.

The appellants operated a fish canning and packing establishment at San Pedro, Cal. March 4, 1918, the respondent executed and delivered his note and entered into a written contract, termed a "purchase lease," with the appellants, by the terms of which they agreed to sell and convey to the respondent a motorboat called "Freedom" for the sum of $8,500. This contract contained the following provision:

"The above note is given * * * for the consideration that the said lessor has agreed * * * that upon the payment of said note, * * * at maturity * * * they will sell and transfer to the undersigned * * * the boat 'Freedom.' * * * The legal title thereof is (to remain) in said lessor * * * until they shall make the aforesaid sale and transfer. * * * This note is payable in installments of one thousand dollars on or before June 15, 1918—Balance to be (paid from) the boat's share of all earning."

This contract contained no forfeiture clause. Contemporaneously with the execution of this contract and note another agreement was entered into between the same parties, by the terms of which the plaintiff was employed for the seasons of 1918, 1919, and 1920, to use said boat and actively engage in fishing exclusively for the appellants, promptly cleaning and delivering to the cannery at San Pedro, all fish caught, on consideration of which the appellants promised to pay the market price for all albacore, tuna, skipjack, and other fish. The boat was to be registered in the name of the vendor and remain its property until fully paid for. The contract of employment, however, provided in part that:

"Whereas second party (the respondent) is the owner or the operator of a boat * * * named 'Freedom,' and * * * second party is indebted to first party at this date in the sum of $8,500.00, it is agreed that from time to time at the option of the first party, this contract may be extended until any and all such indebtedness * * * is paid in full. * * * It is herewith agreed by both parties that this contract (for fishing) shall cover the seasons of 1918, 1919 and 1920. * * * Second party herewith agrees to haul fish at any time for the first party at the rate of $50 per day. Second party to pay all expenses."

[1, 2] Subsequently a similar written contract for fishing in the Mexican waters of Lower California for the season of 1919 was executed. These fishing expeditions were not profitable. Later oral agreements were made, by the terms of which the respondent consented to use the boat "Freedom" and render personal services in hauling fish and supplies for appellants in consideration of agreed cash wages and an additional credit to be allowed on his note for the purchase of the boat. Pursuant to these oral agreements, respondent testified that in the season of 1920, he worked ninety days, for which he was paid $10 per day as wages, with a promise to credit him with $15 per day additional on the purchase price of the boat, for which latter sum appellants failed to give him credit. He testified:

"In the latter part of June he (Gilbert Van Camp) told me I could get a contract to haul fish (for appellants). He said I would be paid $25.00 a day for the boat and that they would pay all expenses. The company would pay me $10.00 per day in cash for my time and $15.00 a day, as then agreed on, was to be applied as the boat's share. I worked ninety days and was paid $10.00 a day which was deducted from the $25.00 a day, leaving $15.00 per day as the boat's share to be applied against the indebtedness owed by me on the boat."

In 1921 the respondent had no specific employment with the appellants. But in 1922 he was again hired for a term of ninety days, agreeing to use the boat and haul fish and supplies under a similar contract for $25 per day, except that from this sum he was to receive only $150 per month, the balance, to wit, $1,800 was to be credited on the boat account. Mr. Gilbert Van Camp substantially corroborated this oral contract of employment. He said:

"My recollection is that when he (the respondent) tendered, we were to credit his account $15.00 or $20.00 a day for the boat, and in addition we were to pay for gas, oil, and food actually used while tendering. During the season of 1920 Mr. Anderson tendered for the Van Camp Sea Food Company, that is, hauled fish and supplies. * * * During that time we paid him a salary for himself and agreed to credit his account * * * (on) the boat with so much per day for the use of the boat."

There may be some conflict in the evidence regarding the time the respondent was employed under the last-mentioned contract. But the attention of the court is not called to any evidence indicating that these two items of $15 per day for ninety days' service each season for two years, aggregating the sum of $3,150, were ever credited to his boat account or otherwise paid. There are other items for which the respondent claimed he had not been paid. These other items, however, need not be considered. The appellants may not complain if the trial court allowed the respondent less than the aggregate amount which might find support by the record. He was given judgment for the sum of $2,813.53, together with interest. At least this sum does find support in the evidence, although the testimony is conflicting.

The chief discrepancy between the accounts of the appellants and the respondent in the various transactions involved in this suit is the omission to credit the boat account with the agreed sums above mentioned for hauling supplies and the fact that numerous items were charged to the respondent on account of nets and equipment for the boat, which under the terms of the note and contract were to be supplied by the vendor in consideration for the original purchase price of $8,500. The note and contract clearly imposed upon the appellants the obligation of equipping the boat with machinery, nets, and apparatus. The agreement read:

"The * * * lessor has agreed and * * * they will sell and transfer to the undersigned, at the price of said principal and interest the boat 'Freedom' * * * *together with all nets and equipment.*"

[3] The appellants assert that the respondent is barred from maintaining this action for the reason that he was in default for failure to pay the first installment of $1,000 as provided by the note within the time prescribed.

The record, however, contains evidence in support of the implied finding that the respondent was not guilty of a breach in this regard. The respondent testified that he turned over his automobile, which was sold for $600, and the proceeds, less the sum of $135 expended as costs of sale, were paid to appellants and credited on the boat account in 1918. He also testified that he paid in behalf of appellants the further sum of $800 or $900 for fishing nets and equipment for the boat, at the time it was first launched, which sum should also have been credited to the boat account. These two payments exceeded the amount of the first cash installment required. If these payments were not promptly made within the time prescribed, the delay was waived by subsequently crediting the proceeds of the sale of the automobile without objection and by conduct indicating that strict compliance with respect to the time of making this payment was not insisted upon.

[4] In spite of these substantial payments made by the respondent, the appellants, without notice and without compensating the respondent, sold and conveyed the boat to another purchaser in 1924. This conduct amounted to a rescission and abandonment of the contract on the part of the appellants, and authorized the instituting of this suit in assumpsit against the vendor for the money paid by respondent and retained on account of of purchase price of the boat. 17 Cal. Jur. 614, §§ 10, 11, 13. In Bankston v. Hill, 37 A. L. R., note, p. 102, it is said: "Where the contract of conditional sale contains no forfeiture clause, express or implied, the only provision in this regard being a reservation of the title until payment of the purchase price, if the seller, upon default of the buyer, enforces this latter clause by retaking the property and disposing of it to his own use, he renders himself liable to account to the buyer for the money paid by the latter on the purchase price."

The principle announced in San Diego Const. Co. v. Mannix, 175 Cal. 548, 553, 166 P. 325, 327, is applicable to the present case, as follows: "Where performance of a contract to convey is due and the vendor refuses to perform it or fails to perform on being duly requested to do so, * * * the vendee may, if he chooses, treat such breach as an abandonment and termination of the contract and may then abandon it himself, and, 'the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise.' (Glock v. Howard, 123 Cal. 10 [55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17]; Alderson v. Houston, 154 Cal. 12 [96 P. 884]; 3 Elliott on Contracts, sec. 2095; 1 Sugden on Vendors, p. 357.)"

[5, 6] Where the vendor has resold and conveyed the property to another person, and is therefore unable to transfer title to the original vendee, demand for performance is unnecessary as a prerequisite to the maintenance of an action to recover the purchase money which has been paid. The resale of the boat by the vendor and consequent inability to deliver it to respondent pursuant to the contract, created a failure of consideration. Russ L. & M. Co. v. Muscupiabe Land & Water Co., 120 Cal. 521, 52 P. 995, 65 Am. St. Rep. 186. Where the consideration has wholly failed, formal rescission on the part of the vendee is unnecessary. Richter v. Union L. & S. Co., 129 Cal. 367, 373, 62 P. 39.

[7, 8] Except for the payment of the first installment of $1,000, there was no limitation of time designated for the fulfillment of the contract. When the time for the completion of a contract is omitted, the law implies that a reasonable time is intended to be allowed for the performance. 6 R. C. L. 896, § 283; 6 Cal. Jur. 218, § 143. In determining what period constitutes a reasonable time, when the contract is silent in that regard, the situation of the parties and the nature of the

transaction which is involved must be considered. 6 R. C. L. 896, § 283. In the present case the contract of employment provided that: "At the option of the first party, this contract may be extended until any and all such indebtedness * * * is paid in full." From the fact that the appellants orally renewed their contract employing the respondent to haul fish for its benefit as late as 1922, specifically agreeing to credit the boat account with a portion of the compensation therefor, it is evident that the agreement to purchase the boat was still considered to have been in force and that it had not been abandoned or breached. Since the contract was silent as to the term for the employment of the respondent, either to fish or haul supplies for the appellants, it could be terminated only upon notice. Section 1999 of the Civil Code provides: "An employment, having no specified term, may be terminated at the will of either party, *on notice to the other.*"

No notice terminating this employment was ever given to the respondent. The validity of the contract was recognized by appellants as late as the season of 1922, by orally employing the respondent to haul supplies and by agreeing to credit a portion of his earnings to the boat account.

[9] The appellants contend that the court erroneously rendered judgment against the Van Camp Sea Food Company, Inc., for the reason that there was no privity of contract between it and the respondent. It is true that the contract which forms the basis of the obligation resulting in the judgment was in fact executed by the predecessor of the "Inc." Company only, and that no credit was given respondent on this contract after the incorporation was accomplished, in July, 1923. When this change in the organization occurred, however, the new corporation purchased and took over all the business and properties of the original company, including the boat which is involved in this suit; the president, if not the entire organization, remained the same. The record indicates that the transformation of the original company into the corporation was a mere change of form for the convenience of business and that the blood, bone and sinew of the organization remained the same. As the court says in Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 P. 765, 29 Am. St. Rep. 149.

"'Equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts.' * * * 'A mere change of name cannot avoid obligations. The new corporation took all the property of the old, went forward with its business, * * * was, in short, the old corporation, and now seeks to escape the obligations of the old. * * * The old corporation and its property were liable to the demands of the plaintiff. The new corporation must respond to the extent of the property acquired.'"

Having taken over the business and the property of the original company, including the boat in question, which it subsequently sold, we are of the opinion that the corporation also assumed liability for the breach of this contract. In 4 Cook on Corporations (6th Ed.) 3295, § 897, it is said: "This new consolidated corporation usually succeeds to all the obligations of the old companies."

Likewise, in 7 Ruling Case Law, 184, § 157, it is said: "The consolidated corporation is answerable for the performance of executory contracts entered into by the consolidated corporations, and by which they were bound at the time of the consolidation, such as a contract to convey land."

The same principle applies when one company is merged into a corporation which takes title and possession of all the property and the business of the former organization. Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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99 Cal. App. 32

PEOPLE v. HARBAND. (Cr. 1795.)

District Court of Appeal, Second District, Division 2. California. May 17, 1929.

1. Criminal law 🔑1166½(1)—Error of trial court, on motion for new trial, in reading order appointing guardian for complaining witness which was not in evidence held not prejudicial.

Where testimony was admitted without objection in prosecution for grand theft to effect that complaining witness was mentally and physically weak and guardian had been appointed, action of trial court on motion for new trial in reading order appointing guardian which had not been introduced in evidence was not prejudicial error; such evidence being merely cumulative.

2. Criminal law 🔑1144(18)—Appellate court will presume trial court granted new trial on ground specified and correctly applied law in testing sufficiency of evidence.

On appeal by the state from an order granting a new trial after conviction, appellate court will presume that trial court granted new trial on ground set forth in order and correctly applied law in testing sufficiency of evidence.

3. Criminal law 🔑935(1)—On motion for new trial for insufficiency of evidence, court must consider witness' manner of testifying contradictory statements and uncontradicted testimony to determine credibility.

Where there was testimony showing that complaining witness was physically and mentally weak, court, in considering such testimony on motion for new trial for insufficiency of evidence to sustain conviction, must take into consideration manner in which witness testified contradictory statements and facts testified to without contradiction or objection regarding condition of witness for purpose of determining degree of credibility to be attached to his testimony.

4. Criminal law 🔑935(1)—Court, on motion for new trial, may consider circumstances surrounding testimony of witness, though no objection was made to competency.

Where there was testimony to the effect that complaining witness in prosecution for grand theft was mentally and physically weak, fact that no objection was made to the competency of witness, or that defendant did not request privilege of examining witness upon his voir dire, did not preclude jury in first instance and trial judge on motion for new trial from considering testimony in the light of surrounding circumstances.

5. Criminal law 🔑935(1)—On motion for new trial, court need not give full faith and credit to verdict of jury supported by direct evidence.

Trial court in passing upon motion for new trial is not bound to give full faith and credit to verdict of jury which is supported by direct evidence.

6. Criminal law 🔑911—Trial court has wide discretion in passing on motion for new trial.

Trial court having heard the testimony and observed jurors and had opportunity of testing truth of defendant's testimony, by noticing his demeanor, has wide discretion in passing on motion for new trial after conviction.

7. Criminal law 🔑1144(18)—Appellate court will presume that trial court, in granting motion for new trial, acted with full appreciation of duties and obligations (Const. art. 6, § 4½).

Appellate court will presume that conclusion reached by trial court in granting a new trial was not governed by any idle or mere technical reasons, but that trial court acted with full appreciation of duties and obligations, having in mind Const. art. 6, § 4½, providing that new trial shall not be granted in criminal case for erroneous admission of evidence unless miscarriage of justice resulted.

8. Criminal law 🔑1158(1)—Discretion of trial court in granting new trial, where court entertained reasonable doubt concerning defendant's guilt, was not reviewed.

Where it was apparent that trial judge entertained doubt concerning whether defendant was merely buying securities for himself and reselling when opportunity afforded, or whether he was actually engaged in the business of broker, discretion of trial court in granting a new trial after conviction for conducting brokerage business without a license was not reviewed.

Appeal from Superior Court, San Diego County; C. P. Vicini, Judge.

Harry I. Harband was convicted of grand theft and acting as a broker and conducting a brokerage business without a license. From an order granting a new trial, the people appeal. Affirmed.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Warner I. Praul, of Los Angeles, and Stephen Connell, Dist. Atty., and E. N. Clark, Deputy Dist. Atty., both of San Diego, for the People.

Elwin L. Eckert of San Diego, for respondent.

IRA F. THOMPSON, J. The grand jury of San Diego county returned an indictment against the defendant charging him in count 1 with grand theft, in count 2 with a violation of the Corporate Securities Act (St. 1917, p. 673) for having sold securities without a license, and in count 3 with violation of the same statute in acting as a broker and conducting a brokerage business without a license. At the close of the testimony offered by the prosecution the second count of the indictment was dismissed. Verdicts of guilty were returned by the jury upon the other two counts. The defendant made a motion for a new trial, which was granted "on the ground of the insufficiency of the evidence." The people prosecute this appeal from the order granting the new trial.

The complaining witness as to count 1 was Carl Fuhrken. It is to be noted that the district attorney, as well as counsel for the defense, elicited the larger share of the testimony of this witness by asking leading questions. It is also observed that this witness, who gave the most damaging testimony against the respondent, contradicted himself on several occasions. During the examination of his divorced wife, a graduate nurse, it developed that she had been appointed guardian of his estate and person. She also testified that Mr. Fuhrken was mentally and physically sick; that this sickness had been coming on for two or three years; that she signed the petition to have herself appointed guardian. Without giving full credence to the testimony of the complaining witness it must be conceded that the testimony respecting count 1 makes it doubtful whether the respondent is guilty. This assertion is made after a review of the record and having in mind that the testimony as it appears on the printed page may be sufficient to support the verdict.

[1] Under these circumstances, when the motion for a new trial came before the trial judge, he said that he wanted to see, and he secured and read, the order adjudging Carl Fuhrken to be incompetent. This order had not theretofore been introduced, and appellant complains of this action of the court, saying that it abused its discretion in receiving evidence outside the record. There might be

merit in this contention of the appellant had not Mrs. Fuhrken testified without objection and without contradiction to her appointment as guardian, and to the fact that the witness was mentally and physically sick. She having testified, however, to those facts, the order was merely cumulative evidence thereof, and, while it may have been erroneous for the trial judge to have inspected the order, the error certainly cannot be said to have been prejudicial or harmful.

[2-7] Appellant also urges that the trial court erred in granting a new trial on the ground that the witness Carl Fuhrken was incompetent to testify. It is true that the court indicated during a discussion with counsel that the testimony of an incompetent was not the character of evidence upon which to send a man to the penitentiary, but he afterwards said: "The court is in a position that it cannot sit here and ignore the question at issue as to the insufficiency of the evidence and so overlook the fact that it is the court's duty to see what the evidence is and that it cannot send a man to the penitentiary on evidence that is not sufficient." But even though this statement were not a part of the record, we should be compelled to assume that the court granted the new trial upon the ground set forth in the order, to wit: "The insufficiency of the evidence," and that he correctly applied the law in testing its sufficiency. Undoubtedly he had the authority, and it was his duty upon this motion to take into consideration the manner in which the witness testified, the contradictory statements and the facts testified to by Mrs. Fuhrken without contradiction or objection that the witness was mentally sick and that she had been appointed his guardian, for the purpose of determining the degree of credibility to be attached to his statements. Counsel for appellant say that no objection was made by the defendant during the trial to the competency of the witness, and that respondent did not request the privilege of examining him upon his voir dire. No objection was in fact made, but this does not militate against the right of the jury in the first instance, and the trial judge upon the motion, to weigh his testimony in the light of all the surrounding circumstances. The record is barren of showing that the trial judge finally excluded the testimony of Fuhrken from consideration in weighing the evidence on the motion.

In so far as it is urged that respondent did not request the right to examine the witness to test the degree of his competency and credibility, it must be borne in mind that the entire examinaton constituted such a mental inspection. What we have already said disposes of the contention of appellant that the court erred while ruling upon the motion by holding as a matter of law that grand theft may not be committed where a promissory note is given in exchange for the article alleged to be stolen. We cannot say that the court so ruled. Furthermore, we do not interpret his remarks as so holding, but merely that where the note is given in good faith it is an ordinary business proposition. In view of the reliance by appellant upon the authority of People v. Hennessey, 201 Cal. 568, 258 P. 49, which, in effect, declares, if the verdict of the jury is supported by direct evidence, it must be given full faith and credit, we must direct attention to the fact that, while this rule of law applies to the consideration of the evidence by appellate tribunals, the trial judge in considering the testimony for the purpose of passing upon the motion for a new trial is not restricted to any such narrow limits.

The broad discretion with which the trial judge is clothed, and which we have already indicated, is well expressed in the case of People v. Canfield, 173 Cal. 309, 159 P. 1046, as follows: "The judge who presided at the trial of the cause who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. We cannot follow the mental processes of the judge. He may have been profoundly impressed with the influence upon the jury, to Canfield's injury, of the introduction of the evidence tending to prove another offense. Or he may have doubted the identification by the witnesses for the prosecution of Canfield as the man who passed as Rabild in the transactions leading to the sale of the note and mortgage. We can hardly manufacture in fancy a hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge. Surely there is no basis in the case before us for the substitution of the discretion of this court for that of the superior court. We must assume that the learned judge of the trial court acted with a full appreciation of his duties and obligations, with the cited section of the Constitution in mind, and that the conclusion which he reached was not governed by any idle nor any mere technical reasons."

[8] As respects the third count of the indictment, it is apparent that the trial judge entertained a doubt concerning whether the defendant was merely buying stock for himself and reselling when opportunity afforded, or whether he was actually engaged in the business of a stockbroker. We cannot say from the evidence that the trial judge could not properly entertain such a doubt, and it would serve no useful purpose for us to discuss further the only point urged by appellant to warrant a reversal of the order as to this count, to wit, that the evidence was sufficient to support the verdict of the jury.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

MONROE v. GROLIER SOCIETY OF LONDON. (Civ. 3770.)★

District Court of Appeal, Third District, California. May 25, 1929.

Rehearing Denied June 24, 1929. Hearing Granted by Supreme Court July 22, 1929.

1. Master and servant 🔑70(2)—General agent of book company having charge of sales and collections held not entitled to commissions on collections after termination of employment, notwithstanding collections represented sales during employment.

Under contract of employment whereby plaintiff was engaged as general agent for defendant, having management and control of sale of books and collection of purchase price, and was to be paid commission on all net collections after deduction of discounts, *held* that plaintiff was not entitled to commissions on payments made after termination of contract on sales made during term of contract.

2. Contracts 🔑147(3)—Intention of parties must be gathered from contract construed as whole.

A contract must be construed as a whole, and intention of parties collected from entire instrument, not from detached portions.

3. Master and servant 🔑50—Business and duties of employee may be considered in construing contract, where writing relates only to compensation (Civ. Code, § 1647).

Where writing relates only to compensation of employee, his business and duties, so far as necessary to determination, may be considered in arriving at true construction of contract of employment, in view of Civ. Code, § 1647.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by H. R. Monroe against the Grolier Society of London, a corporation. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Brown & Bissell and Leet W. Bissell, all of Los Angeles, Wm. R. Crawford, Jr., of New York City (J. Fearon Brown, of New York City, of counsel), for appellant.

Erwin P. Werner, of Los Angeles, for respondent.

PLUMMER, J. Plaintiff had judgment against the defendant in this action for the sum of $2,180.68 alleged to be due as commissions earned on a certain contract of employment hereinafter set forth. From this judgment the defendant appeals.

The plaintiff in his complaint asks for the sum of $3,099.78, against which the court allowed a counterclaim or offset in favor of the defendant in the sum of $919.10. The defendant, in its answer, set up a counterclaim against the plaintiff in the sum of $795. This counterclaim was allowed in the amount just stated, as an offset to plaintiff's demand.

The record shows that the defendant is a corporation engaged in the business of selling books; that during the time hereinafter mentioned the plaintiff was employed by the defendant as the general agent of the defendant, having the management and control of the sale of books and the collection of the purchase price thereof from the persons to whom books were sold. The method of conducting the business is not disclosed by the record, but there is sufficient to lead to the conclusion that books were sold upon the installment plan, and it was the duty of the plaintiff to supervise the sale and distribution of books and to look after the collection of the installments to be paid by purchasers to whom books were sold. In other words, the record shows that the plaintiff had at least two important duties to perform—first, to make sale of books; second, to attend to collection of the purchase price of the same. The extent of the agency is not disclosed by the record, further than that the evidence would indicate that the territory over which the plaintiff had supervision included the state of California and part of the state of Oregon, as the documents in the record refer to Los Angeles, San Francisco, and Portland. The record shows that considerable correspondence was had prior to reducing the terms of the employment to writing, and that finally the parties came to an agreement which was and is embodied in the following instrument:

"The Book of Knowledge
The Children's Encyclopedia
The Grolier Society
2 West 45th Street
New York

"Telephone: 0200 Vanderbilt June 23, 1922.

"Mr. H. R. Monroe. Dear Sir: Confirming our conversation we agree to pay you four per cent. (4%) on all net collections (after the discount has been deducted) on all business which was booked prior to October 1, 1921.

"On all business booked subsequent to October 1, 1921, we will pay you a commission of two per cent. (2%) on all net collections after the discounts have been deducted, with the exception of orders where the total collections have not exceeded fifteen per cent. (15%) of the contract price. In other words, on a $65.00 account, accompanied by a $4.00 payment, no commission would be due you on such collection until after the third payment of $4.00 has been made. The commission is then due you on these three payments the

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★Hearing granted. 281 P. 604.

same as on subsequent payments—settlements to be as of October 1, 1922, and March 1, 1923.

"This agreement is retroactive to October 1, 1921, and terminates February 28, 1923.

"Yours very truly,
"The Grolier Society,
"A. E. Smith.

"Accepted by H. R. Monroe."

The record shows a stipulation to the effect that the plaintiff's employment was continued under the foregoing contract to and including the 30th day of September, 1923. The plaintiff, under this agreement, was employed as a resident manager of the San Francisco office which controls the western territory or what is known as the western territory.

[1-3] The subject of dispute in this action is the compensation to which the plaintiff is entitled on business booked subsequent to October 1, 1921. The trial court accepted the theory that the plaintiff was entitled to 2 per cent. on all net collections on business booked subsequent to October 1, 1921, irrespective of whether collections were or were not made during the period for which the plaintiff was employed; in other words, that the plaintiff was entitled to 2 per cent. of net collections, irrespective of whether collections were made by him or by some one else after his employment had terminated. The appellant contends that, as the plaintiff had the duty of making collections as well as the duty of making sales, his sales and collections during the period of his employment were concurrent duties, and that the plaintiff was and is entitled only to 2 per cent. on all net collections made by him on business booked subsequent to October 1, 1921, and prior to the 30th day of September, 1923, and in furtherance of this contention appellant calls attention to the fact that the first clause of the employment, to wit, that clause which specifies that the plaintiff should receive 4 per cent. on all net collections, less certain discounts, on all business which was booked prior to October 1, 1921, indicates and shows the intent of the parties in entering into the agreement that collections and commissions went together (that is, that the right to commissions was dependent upon collections); otherwise, the defendant, on old business, would be paying double commissions, to wit, 4 per cent. to the plaintiff and whatever per cent. had been agreed upon to the predecessor of the plaintiff. To understand the meaning of the terms used in the writing which we have set forth, it is necessary to bear in mind that the collections were just as important a branch of the business to be managed by the plaintiff as that of making sales. If the collections were not properly attended to, the sales would prove profitless. If sales were made to hazardous risks, or, in other words, to persons from whom collections could never be made, there would be no profit either to the defendant or to the plaintiff, and thus, the intention is enforced, by the very terms of the contract, that collections and commissions should go together, and that the contract, taken as a whole, means this, that "on all business booked subsequent to October 1, 1921, we will pay you a commission of 2 per cent. on all net collections made by you after the discounts have been deducted," etc., this, to insure efficient management on the part of the plaintiff. Any other construction would lead to this: That the plaintiff might devote his entire time and attention to the sales department of the undertaking, leaving the collections not attended to, and then, at the expiration of the term of his employment, retire and quietly await the collections made on the sales during his administration, and demand his 2 per cent. If it had been the duty of the plaintiff only to make sales, then this construction might be held permissible, but, in view of the fact that the plaintiff had a double duty to perform as manager of the company, we conclude that sales and collections were joint duties and obligations, and began and ended with the beginning and termination of the contract of employment. As said in 13 C. J. 625, § 486: "A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument, and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part, as well as the whole. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect." In construing the writing involved in this action, as we have said, it is necessary to look into the business to conduct which the plaintiff was being employed. The writing itself only relates to compensation. The business and the duties of the plaintiff, so far as necessary to a determination of this cause, are set forth in the record, and the plaintiff was required to attend to all the business as manager, and not to a part, and the intent of the instrument, as we have said, was to secure efficient management and encourage the plaintiff, not only in making sales, but in making collections. This is apparent from the correspondence set forth in the record.

A somewhat similar contract was involved in the case of Ortega v. Collins New Medical Institute, 127 App. Div. 293, 111 N. Y. S. 427, and it was there held that "one employed to carry on business correspondence in a foreign language under a contract giving him a certain sum per year and a special commission on all receipts in his department, settlements of his compensation to be made monthly, is not, after his discharge, entitled to commissions on moneys received on business procured by him during the employment." Likewise, in the case of Crum v. Murray (C. C. A.)

102 F. 92, where it was held that a contract for commissions for services read, "80 per cent. of the first month's dues collected, 5 per cent. of the succeeding months' dues collected, $7.50 per share flat for fully-paid stock," and "1 per cent. of all dues collected after the first" of the month, did not apply to, and did not give to the person employed any right to dues collected after the termination of the contract. While the contracts involved in those cases, as we have said, differ somewhat from their terms from the one under consideration, they are in substance the same in relation to the compensation to be paid for the services to be performed. Again, as provided by section 1647 of the Civil Code: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Thus, the matter to which the contract we have to consider relates to the performance of the duties which we have herein specified, and when read in the light of the duties to be performed, we conclude that there is no ambiguity in the instrument relating to the plaintiff's compensation, and that he was to be compensated for the duties performed by him, and not for the duties left unperformed; that is, his failure to make collections during the term of his employment. This is further evidenced, as we have hereinbefore said, by the fact that the plaintiff was employed to perform duties left unperformed by his predecessor, and paid a separate compensation therefor.

The record shows that the defendant's counterclaim for $769.10 was for overpayments made by the defendant to the plaintiff, on account of drafts drawn by the plaintiff in excess of the amount to which the plaintiff was entitled under the contract set forth herein, and that the court found said amount justly due the defendant, and that there were some other items considered by the court which increased the counterclaim allowed to the sum of $919.10. As to these items the record gives us no information, and, for the purposes of terminating this litigation without further trial, we will act upon the appellant's request and accept the figures set forth in the defendant's answer as a counterclaim, and direct judgment in its favor therefor.

It follows from what has been said that, the error of the trial court consisting only of a misconstruction of the contract, no further proceedings need be had.

It is hereby ordered that the judgment entered in this cause be, and the same is hereby, reversed and set aside, and the trial court is hereby directed to enter judgment in favor of the defendant for the amount of its counterclaim set forth in its answer, to wit, in the sum of $769.10, and costs.

We concur: FINCH, P. J.; THOMPSON, J.

STAPLES v. HAWTHORNE et al.★
(Civ. 6717.)

District Court of Appeal, First District, Division 1, California. May 27, 1929.

Rehearing Denied June 26, 1929. Hearing Granted by Supreme Court July 25, 1929.

1. Wills 🔑58(1)—Agreement to leave all property to child at death, made prior to enactment of statute, was not required to be in writing (Civ. Code, § 1624, subd. 7).

An agreement to transfer at death all property to child, in consideration of privilege of rearing child, was not required to be in writing, where made prior to enactment of Civ. Code, § 1624, subd. 7.

2. Specific performance 🔑86—Courts of equity will enforce agreement to leave property at death by treating heirs as trustees and compelling conveyance of property according to agreement.

Courts of equity will enforce agreement of persons rearing child of another to leave all property to child at their death by treating heirs of such persons as trustees for those claiming benefit of agreement and compelling conveyance of property according to its terms.

3. Specific performance 🔑121(7)—Contract to leave property to another at death sustained only on presentation of clear and convincing proof.

Contract of persons rearing child of another to leave all their property to child on their death is to be sustained only on presentation of clear and convincing proof.

4. Appeal and error 🔑1011(2)—Rule that trial court's finding on conflicting evidence will not be disturbed applies, where testimony is in form of deposition.

Rule that appellate court will not disturb finding of trial court on conflicting evidence will be applied, though testimony of witnesses was presented in form of depositions.

5. Specific performance 🔑121(7)—Finding of nonexistence of alleged agreement of persons rearing plaintiff to leave their property to plaintiff on their death held not contrary to evidence as matter of law.

Evidence establishing alleged agreement by persons who reared plaintiff to transfer property to plaintiff on their death *held* not so convincing as to warrant setting aside as matter of law finding that no such agreement was made.

6. Evidence 🔑471(6)—Statement in deposition that witness heard "agreement," and that it was definitely "agreed," held properly stricken as conclusions and opinion of witness.

Portions of depositions stating that witness was present and heard "agreement," and that it was then and there definitely "agreed," and question whether witness knew whether there was any agreement, were properly stricken out as amounting to conclusions and opinion of witness.

★Hearing granted, 283 P. 67.

7. Appeal and error ⇨1047(3)—Striking of baby picture and letter from deposition, offered to show affection of parents for plaintiff, if error, held harmless.

In suit for specific performance of alleged oral agreement by persons rearing plaintiff to leave all their property to plaintiff on their death, striking from deposition baby picture of plaintiff and letter written by plaintiff's mother to show affection which plaintiff's parents bore her, if error because grounds of motion to strike were not stated, was harmless, since it in no wise tended to prove terms of agreement.

8. Stipulations ⇨17(2)—Stipulation and consent of some defendants that judgment be entered as prayed is not binding on other defendants.

Stipulation and consent of some of defendants that judgment be entered for plaintiff as prayed was in no wise binding on the other defendants, but, at most, entitled plaintiff to stipulated judgment against such consenting defendants.

9. Appeal and error ⇨1071(5)—Findings being unnecessary to entry of consent judgment against some of defendants, findings as to assignment by such defendants were immaterial.

Since no findings are necessary to entry of judgment by consent and stipulation against some of defendants, findings as to assignment by such consenting defendants were immaterial.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Ethel M. Staples against Laura Hawthorne and others. Judgment for defendants, and plaintiff appeals. Modified and affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

C. W. Byrer, of Los Angeles, for respondents.

LUCAS, Justice pro tem. Plaintiff appeals from the judgment herein decreeing that she take nothing by reason of her action, wherein she sought specific performance of an oral agreement and the enforcement of a trust. The complaint as amended to conform with the proof alleges that in 1887 James Bower, the father of plaintiff, for and on behalf of plaintiff, who was then a little girl of about four years of age, made and entered into an agreement with one N. H. Hosmer and Clymena W. Hosmer, his wife, whereby, in consideration of the said James Bower agreeing to deliver plaintiff into the companionship, care, custody, and control of the said Hosmers, and to relinquish to them his parental rights over plaintiff, the said Hosmers agreed to take plaintiff into their home and family as a daughter, to love, cherish, support, maintain, and educate her, to treat her in all respects as their own child, and, upon their deaths, to leave, bequeath, and devise all of their property to plaintiff as their sole heir, legatee, and devisee.

The record shows that the said Hosmers did take plaintiff into their home, where she remained until she married, and that she was treated at all times by them as a natural child would be treated, but that, when the said N. H. Hosmer died in June, 1912, he left all of his property and estate to the said Clymena W. Hosmer. She in turn died in February, 1923, leaving an holographic will bearing date November 21, 1920, by the terms of which she gave plaintiff but $500 out of a $27,000 estate. To plaintiff's husband she bequeathed $500; to Alfred S. Copps $500; to Arthur M. Copps $200; and to defendants and respondents Laura E. Hawthorne, Lelia B. Morse, Angie Williamson, and Frank S. Morse the residue, share and share alike. Plaintiff was appointed administratrix of said estate with the will annexed, but sued herein in her individual capacity. She prayed judgment decreeing that she is the equitable owner of all of said decedent's property and estate, that the defendants named in the will as beneficiaries thereunder hold their respective interests as trustees, and that they be required to convey unto her their several interests in said property and estate.

The defendants Alfred S. Copps and Arthur M. Copps filed an answer and disclaimer, admitting the allegations of plaintiff's complaint to be true, and relinquishing their rights as legatees under the will of the said Clymena W. Hosmer.

The defendants Laura E. Hawthorne, Angie Williamson, Lelia B. Morse, and Frank S. Morse filed an answer placing in issue the material allegations of the complaint, setting up certain special defenses, and asking that plaintiff take nothing by her action.

The case was tried by the court without a jury, and in its decision the court found substantially that all of the allegations of plaintiff's complaint were true, except the allegation that the Hosmers agreed upon their deaths to leave, bequeath, and devise all of their property to plaintiff as their sole heir, legatee, and devisee. Judgment was therefore given for the defendants Hawthorne, Williamson, Lelia B. Morse, and Frank S. Morse.

As grounds of appeal from this judgment, plaintiff and appellant contends, (1) that there is no evidence to support the negative finding of the trial court that the Hosmers did not agree to leave plaintiff all of their property when they died; (2) that the said negative finding is in conflict with uncontradicted evidence to the contrary, and that, as a matter of law, the finding should be set aside as not supported by the evidence; (3) that certain rulings of the court on the admissibility of evidence are erroneous; and (4) that the findings and judgment should be set aside as being in violation of the disclaimers and consents of the defendants Alfred S. Copps and Arthur M. Copps.

[1-3] The agreement in question, if made at all, was made prior to the enactment of subdivision 7 of section 1624 of the Civil Code, and was therefore not required to be in writing. It is not disputed that courts of equity will enforce such an agreement by treating the heirs as trustees for those claiming the benefit thereof and compelling the conveyance of the property according to its terms. Owens v. McNally, 113 Cal. 444, at page 448, 45 P. 710, 33 L. R. A. 369; McCabe v. Healy, 138 Cal. 81, 70 P. 1008. Such contracts, however, are to be sustained only upon presentation of clear and convincing proof. Hayden's Estate, 1 Cal. App. 75, 81 P. 668, citing Owens v. McNally, supra; McCabe v. Healy, supra.

The justness of this rule is apparent in this case, in view of the fact that oral proof of words spoken many years before is relied upon to establish and enforce a solemn and binding contract for the transfer of real and personal property against the beneficiaries of one whose lips are forever sealed and who is charged with having deliberately violated such contract in the closing moments of her life. Careful scrutiny should be given by the trial court to the evidence adduced and by the court appealed to for a reversal of the trial court's judgment.

Plaintiff and appellant Ethel M. Staples and four other witnesses testified to statements made by either Mr. or Mrs. Hosmer tending to show their intent to leave all their property to appellant. This testimony, however, is just as consistent with the theory that such expressed intent was occasioned by a generous impulse on their part as it is with the theory that they had entered into an agreement so to dispose of their property. Giving it full weight, this testimony is at best but slightly corroborative of appellant's contention. The strength of appellant's case depends almost entirely upon the weight given the testimony of Edith L. Twycross and S. Lillie Twycross, sisters of appellant's mother, and upon that of Bradford W. Thurston, a grandnephew of appellant's father. The said Twycross sisters, aged, respectively, 58 and 80 years, were present when the conversation was had between the Hosmers and appellant's father at Cedar Grove, Me., in 1887, which conversation, it is claimed, constituted or resulted in the oral agreement here sought to be enforced. They testified, in substance, that appellant's father was willing for the Hosmers to take her, and that the Hosmers promised to give her a good home and a good education, and that they would leave all their property to her. The witness Thurston testified to a statement said to have been made by Mrs. Hosmer in 1915 that such conversation had taken place.

[4] The testimony of these three witnesses was presented to the trial court in the form of depositions. Had the three witnesses testified in person before the court, and thereby afforded the court an opportunity of observing their appearance and bearing, this court clearly would not be justified in disturbing the finding of the trial court.

"While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness's own statement of the transaction; or there may be circumstances in evidence in connection with the matter which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." Davis v. Judson, 159 Cal. at page 128, 113 P. 150.

Appellant urges strenuously, however, that such is not the rule where depositions are presented, and cites the case of Wilson v. Cross & Co., 33 Cal. 60, 69, as supporting authority. Mr. Justice McFarland, however, in the case of Reay v. Butler, 95 Cal. 206, 214, 30 P. 208, 209, in commenting upon the case of Wilson v. Cross & Co., supra, states what we believe to be the correct rule applicable hereto and the fundamental underlying reason for the rule:

"It has been held here in more than a hundred cases, commencing with Payne v. Jacobs, 1 Cal. 39, in the first published books of reports of this court, and ending with Dobinson v. McDonald, 92 Cal. 33 [27 P. 1098], in the last volume of such reports, that the finding of a jury or a court as to a fact decided upon the weight of evidence will not be reviewed by this court; and so the general rule is clearly established. It was said, however, in the opinion of the court in two or three cases, notably in Wilson v. Cross & Co., 33 Cal. 60, that the reason of the rule is, that the court below has the advantage of observing the appearance and bearing of the witnesses, and that such reason does not obtain when the witnesses do not appear personally in court. But is may be well argued that such is not the only reason of the rule; that it is founded in the essential distinction between the trial and the appellate court under our system, and grows out of considerations of jurisdiction; that it is the province of the trial court to decide questions of fact, and of the appellate court to decide questions of law; that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion. * * * In Bauder v. Tyrrel, 59 Cal. 99, the court says: 'The trial court decides as to the facts, the court of review (in this state) as to questions of law only.' The appellate court will, no doubt, look a little more closely into the evidence when it consists entirely of depositions or affidavits, or notes of former testimony; but it cannot be taken as settled that in such a case the rule as to conflicting evidence does not apply."

Denied the opportunity of personally observing certain of the witnesses, it was not only the right, but the duty of the trial court, in determining whether appellant had established her case by that clear and convincing proof required in cases of this kind, to carefully consider the inherent improbabilities as to the accuracy of the witnesses' own statements. This alone may so contradict the most positive testimony as to make applicable to the court's findings the conflicting evidence rule.

To make any binding contract, the promise of one party must be the moving consideration for the promise of the other. One agrees to do something for and in consideration of the agreement of the other to do something else. In point of time the promises are concurrent.

[5] Here it is claimed that one party, in consideration of the privilege of rearing a child as her own, and receiving its love, affection, and companionship, agreed at death to transfer by will all of her property to such child. For proof of the terms of the contract the greatest reliance is placed upon the memories of two women, aged respectively 58 and 80 years, as to what was said, by whom it was said, and the order in which it was said some 38 or 40 years ago. The memories of these women were shown by contradictory evidence to be defective in some details. This is not surprising. It is hardly conceivable that any one of the age of either could clearly remember with any degree of exactitude what was actually said so many years before. Yet, to make the alleged agreement to transfer effective and within the law, it must be established by clear and convincing testimony that a promise to transfer was made at or before the time appellant's father promised to relinquish appellant's care, custody, and control, and in consideration thereof. It may well be that during the conversation the Hosmers said something about leaving their property to appellant under some circumstances. This might reasonably be expected of a man and wife who professed love for a child of tender years and who had no direct heirs of their own.

But, considering the inherent probabilities of the case, the circumstances under which the contract was entered into, the age of the appellant at the time, her immediate needs of care, support, and education, the uncertainties of life, the inability to forecast what character appellant would develop or her needs at the time of the death of the Hosmers or the objects of the Hosmers' bounty at that time, and the various other conditions under which the contract was entered into, it is more inherently probable that the Hosmers simply agreed to treat the appellant in all respects as their own child than that they bound themselves irrevocably to leave her all their property, in any event.

To say that the testimony under consideration so distinctly and convincingly established an irrevocable agreement to transfer property that it was an error of law for the trial court to hold otherwise is a conclusion to which this court cannot subscribe.

So apt is the language of the opinion in the case of Turman v. Ellison, 37 Cal. App. at pages 209, 210, 174 P. 398, and so strongly in support of the position of this court, that we feel justified in quoting liberally from it:

"Actions to enforce oral agreements claimed to have been made with persons who are dead involve a dangerous assault upon property rights, and they are often supported by false testimony and they naturally and reasonably excite suspicion. And while they may be genuine and worthy of confirmation, they require the closest and most careful scrutiny to prevent injustice being done. (Wall's Appeal, 111 Pa. St. 460, 56 Am. Rep. 288, 5 A. 220.) They afford and carry opportunity for fraud against the estates of deceased persons and a great temptation to perjury on the part of disappointed or avaricious relatives. (Hinkle v. Sage, 67 Ohio St. 256, 65 N. E. 999.) Such considerations could not be laid out of view by the trial judge.

"He could not fail to observe, also, that the testimony of the plaintiffs was given nearly nine years after the transaction is said to have occurred. It is quite probable—even more than probable—that after the lapse of such a period the memory would be inaccurate as to the facts and conditions of the affair. It requires a good deal of courage and assurance for a witness to undertake under such circumstances to state definitely just what was said and done. If he does confidently make such attempt without ever having reduced the details to writing or having kept them vivid in his memory by frequent expression or recital of what took place, it is difficult to give full credit to his story. The distrust is naturally augmented by the circumstance that the testimony is not presented in any court until all the parties who could have any interest in contradicting it are dead. While we cannot say that under such circumstances it must necessarily be rejected as unworthy of belief, yet it must inevitably occur that the trial judge will regard it with serious misgivings. (Mattingly v. Pennie, 105 Cal. 514, 39 P. 200 [45 Am. St. Rep. 87].)

"In fact, it is proper to say that evidence given under such circumstances should not only be received with the greatest caution, but it has been declared to be evidence of the weakest and most unsatisfactory nature. (Austin v. Wilcoxson, 149 Cal. 24, 84 P. 417.)"

[6] As to the trial court's rulings on evidence to which exception is taken, we find no error sufficient to warrant us in disturbing its judgment. Parts of the deposition of Edith L. Twycross were properly stricken as amounting to conclusions of the witness—such, for example, as "I was present and heard the *agreement*," and "it was then and there definitely *agreed*." There was permitted to remain in evidence, however, a sufficiently full statement of what was said and done by the parties to enable the court to pass upon the question as to whether or not an agreement such as relied upon by appellant was in fact made. Furthermore, an objection was properly sustained to a compound question containing the language "Do you know whether or not there was any *agreement* between Clymena W. Hosmer and any one else regarding the terms, or conditions, under which plaintiff became an inmate in her home?" This clearly called for the opinion of the witness. The fact that the question also contained a request of the witness to state when and where and with whom such agreement was made, and who were present, and all that was said or done on that occasion, does not impair the correctness of the court's ruling.

[7] The striking from the deposition of a baby picture of appellant and a letter written by appellant's mother, offered for the purpose of showing the affection which appellant's parents bore her, if erroneous because the grounds of the motion to strike were not stated, was at most a harmless error, for proof of protestations of love and affection by appellant's parents in no wise tends to prove the terms of the agreement. Unless appellant's parents were unnatural parents, it is to be presumed they loved her.

[8, 9] Regarding the final contention of appellant, namely, that the findings and judgment should be set aside as being in violation of the disclaimer and consent of the defendants Alfred S. and Arthur M. Copps, we find each so-called disclaimer to be in the following language: "I freely relinquish my rights and interests as a legatee under the will of said Clymena W. Hosmer, and I do hereby freely consent and stipulate that judgment may be entered in said action as prayed for in said complaint."

That portion of the prayer of said complaint applicable to the legatees asks that plaintiff be adjudged the equitable owner of the property described in the complaint, and that the beneficiaries under the will hold as trustees for plaintiff the interests bequeathed to them and that they be required to convey such interests to plaintiff.

In its decision the court found that, by written assignments dated in May, 1925, and filed herein on August 6, 1925, the two Copps transferred their several legacies to plaintiff (appellant herein). Appellant complains that the question of the making of these assignments was not within the issues, and that there is no evidence to support such findings. Be that as it may, it is clear that the stipulation and consent of the Copps that judgment be entered as prayed for is in no wise binding upon the other defendants (respondents herein).

"Statements in the pleadings of one defendant are not admissible against his codefendants." 22 C. J. 336.

The most that can be said of the answers and stipulations of the Copps is that they are sufficient to entitle appellant to a stipulated judgment against them. Since no findings are necessary to the entry of such a judgment (14 Cal. Jur. 877), the findings in reference to the assignment by the Copps are immaterial.

The judgment appealed from is affirmed as between appellant and respondents herein. As against the defendants Alfred S. Copps and Arthur M. Copps, it is so modified that plaintiff and appellant Ethel M. Staples have judgment against them as prayed for.

We concur: TYLER, P. J.; KNIGHT, J.